

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.: [PPR/158/2016-DD/27/INF/2016/BOD/626/2022]

[PPR/158/2016-DD/29/INF/2016/BOD/634/2022]

[PPR/158/2016-DD/28/INF/2016/BOD/641/2022]

[PPR/158/2016-DD/30/INF/2016/BOD/642/2022]

CORAM: (Present in Person)

CA. Rajendra Kumar P, Presiding Officer

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

CA. Priti Savla, Member

In the matter of:

CA. (Dr.) Rahul Kumar Singh (M. No. 405120),

Varanasi in Re:

.... Respondent no. 1

CA. Pyare Krishna Agrawal (M. No. 078909),

Varanasi in Re:

.... Respondent no. 2

CA. Santosh Kumar Singh (M. No. 403514),

Varanasi in Re:

.... Respondent no. 3

CA. Ravi Holani (M. No. 073288),

Gwalior in Re:

.... Respondent no. 4

DATE OF FINAL HEARING

:

6th December 2023

PARTIES PRESENT: (In person)

Respondent No.1

:

CA. (Dr.) Rahul Kumar Singh

Respondent No.2

:

CA. Pyare Krishna Agrawal

Respondent No.3

:

CA. Santosh Kumar Singh

Respondent No.4

:

CA. Ravi Holani

Counsel for Respondent No. 1, 2 & 3

:

Adv. S.S. Sharma

Counsel for Respondent No. 4

:

Adv. Gokul Holani

R.S.S.

FINDINGS:

BRIEF BACKGROUND OF CASE:

1. In the 353rd meeting of Council, certain irregularities with respect to the completion of building project of Varanasi Branch of the CIRC of ICAI were deliberated on the Item no. 20 of the Forensic Audit Report of M/s G.D. Apte & Co., (hereinafter referred to as "Forensic Auditor") who were appointed as the Forensic Auditors in the said matter. The allegations against all the four Respondents namely Respondent No.1, Respondent No.2, Respondent No.3 and Respondent No.4 in brief are that they along with other Building Committee members of Varanasi Branch committed various irregularities including irregularities in the appointment of Architect, Contractor; payments made to Contractor; bill approval process; approval of second phase of construction; recommending and payment for escalation of contract price without obtaining the approval of concerned authority; manipulated cost of construction of building; non-adherence to Guidelines issued by the Institute for construction and maintenance work and thereby giving undue favors to the Contractor by causing loss to ICAI.

CHARGE ALLEGED:

2. Against the aforesaid background, it is alleged against the Respondent no.1, Respondent No.2, Respondent No.3 and Respondent No.4 as under:
 - 2.1 Irregularities in the appointment of Architect & related formalities
 - a) Selection of M/s Dev & Associates as Architect despite of non-submission of vital information and ignoring important criteria of Turnover, experience including liasoning experience.
 - b) The Architect was never insisted for execution of agreement incorporating the scope of work and terms & conditions relating to his appointment.
 - c) Selection of Architect done solely relying upon the expertise of one Mr. Pradhan, Engineer of RBA.
 - d) Presentations given by various firms of Architects and/or salient features thereof are not taken on record.
 - 2.2 Irregularities in the process of appointment of Contractor
 - a) Processing of tenders on the basis of inadequate information.
 - b) Continuing with the tendering process despite of non-availability of more than one eligible tenderer.
 - c) Obtaining of financial bids from three ineligible bidders who were rejected at pre-qualification stage and using such bids for rate analysis purposes.
 - d) *Issuance of work order dated 11th January 2012 without vital terms and conditions incorporated in the financial bid.*

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- e) Appointment of Contractor without obtaining approval of President of ICAI.
- 2.3 Irregularities in the payments made to contractor recommending and paying Rs 5.04 lakhs to contractor on account of service tax while the work order is silent on this point whether the same is inclusive in contract price or the ICAI has to bear the same.
- 2.4 Bill approval Process: Bill of Rs 13.39 lakhs submitted by the Contractor has been paid without issuing any work order.
- 2.5 Approval of Second phase of construction
- Tenders were not obtained for 2nd phase of construction to ensure that construction was done at competitive rates.
 - There is a significant increase in rates for 2nd phase as compared to 1st phase.
- 2.6 Payment of Escalation
- Payment regarding escalation in cost was not made as per the work order.
 - Increase in rates on account of escalation in material cost was not verified.
 - Approval of bills of Contractor at revised rates of Rs 6.21 lakhs merely on the basis of signature of the Architect even though ICAI Head office has not approved the same thereby causing financial loss to the ICAI.
- 2.7 Cost of construction of Building: Variations were there in bills as compared to actual construction resulting in estimated over billing of Rs 18.55 Lakhs.
- 2.8 Non-compliance of ICAI Guidelines- Significant Guidelines issued on 5th May 2006 (ICAI/HRD/(A)/Const./ Guidelines/) were not adhered to in respect of the construction of Building at Varanasi.

The Board noted that the Director (Discipline) in his Prima Facie Opinion opined the following with respect to the Respondent(s) holding them 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 of the said Act:

RESPONDENT	Prima Facie GUILTY (with respect to the charge specified at following paras above)	NOT GUILTY (with respect to the charge specified at following paras above)
Respondent No.1	Paras 2.1, 2.2, 2.3, 2.4, 2.5, 2.6 & 2.8	Para 2.7
Respondent No.2	Paras 2.1, 2.2 & 2.8	Paras 2.3, 2.4, 2.5, 2.6 & 2.7
Respondent No.3	Paras 2.1, 2.2, 2.3, 2.4, 2.5,	Para 2.7

	2.6 & 2.8	
Respondent No.4	Paras 2.1, 2.2, 2.3, 2.4, 2.5, 2.6 & 2.8	Para 2.7

The Board noted that while considering the Prima Facie Opinion of the Director(Discipline),the said view had been accepted by the Board. Accordingly, the conduct of the Respondent(s) was examined by the Board.

BRIEF OF PROCEEDINGS HELD:

3.1 With respect to Respondent No. 1,2 and 3:

S.No.	Date of Hearing(s)	Status of Hearing(s)
1.	21 st July, 2023	The Board directed the Respondent(s) to provide following information: 1. A note/ matrix clearly specifying Charges alleged against the Respondent(s), the Opinion of the Director(Discipline) on the same and the defence of the Respondent(s) on each charge alleged against him. 2. The relevant portion of the Forensic Audit report on the basis of which the Council of the Institute decided that there is a case against the Respondent(s). 3. Whether any financial loss/ irregularity was established in the matter. If so, the quantification thereof.
2.	30 th November 2023	The Board directed the Respondent(s) to provide the following information: 1. Create a list of the bills summarizing what the architect has mentioned on the said bills. 2. Compile a complete record of payment released by the Head quarter after recommendation of Building Committee.
3.	6 th December, 2023	Heard and concluded.

3.2 With respect to Respondent No.4:

S.No.	Date of Hearing	Status of Hearing(s)
1.	21 st July, 2023	Adjourned at the request of the Respondent.
2.	30 th November 2023	Adjourned at the request of the Respondent.
3.	6 th December, 2023	Heard and concluded.

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BRIEF SUBMISSIONS OF THE RESPONDENT(s): -

RESPONDENT No.1:

4. The Respondent in his written submissions inter-alia stated as under: -

- 4.1 This complaint is the offshoot of the very old dispute amongst some members of Varanasi branch of ICAI. The respondent has nothing to do with this information.
- 4.2 The comments made by Director (Discipline) in the PFO relating to manipulation, fiduciary capacity and personal interest are unwarranted and unexpected for without any material on record.
- 4.3 The Respondent became the treasurer of the Varanasi Branch on 17th March 2012, when selected treasurer CA. Pyare Krishna Agrawal gave resignation due to his personal reason and other members refused to take the post. For smooth functioning of branch, post of Treasurer was accepted. First bill of contractor dated 17th February 2012 was signed by then Chairman and Treasurer i.e. the Respondent. The Respondent No.2 & Respondent No.3 followed the same methodology adopted by them to sign the other running bills of contractor, which was certified by appointed Architect by HO.
- 4.4 In the running bill method, there may not be any excess or short payment unless the final bill is settled. Now, approximately more than 10 years have lapsed, whether final bill is made? If not then why not? Who is responsible?
- 4.5 From 10th May 2013, the date of illegal removal of the Respondent, by then other three members of managing committee, the Respondent had no access to mails and records.
- 4.6 In an individual capacity, the Respondent was not able to take any decision regarding building i.e. appointments, payments, approvals.
- 4.7 There was a very old dispute regarding the building advance of Rs. 5,25,000/- to CA. Shishir Bajpai by ICAI in around 1995. The sum of Rs.11,00,000/- was recovered by the branch and deposited with ICAI in 2010-11.
- 4.8 Thereafter, on the instruction of ICAI suitable land was searched for building. Varanasi Vikas Pradhikaran (VDA) refused to give any land to ICAI. Thereafter, he approached the District Magistrate of Varanasi, who happened to be a Chartered Accountant. On the basis of his insistence, VDA again gave a piece of land which was a pond at that time and nearby locality was not good, but connectivity was good and was near Income Tax Office. ICAI allowed to buy that land. Accordingly, land was bought from VDA for branch Building. In that process, working members of managing committee interacted many times with the District Magistrate and VDA and it was massive effort of the members of committee that we got land in spite of clearcut refusal by VDA. Registration of land was done on 28th March 2011, but the possession of the land was received on 2nd September 2011, this is being evident, as written at first para of draft minutes of 353rd council provided. Six months' time lapsed in taking possession because the surrounding area was captured by

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Jhuggis. We got the possession of land being a pond, after clearing the jhuggis with the help of administration.

- 4.9 The ICAI formed a building committee and nominated a Central Council Member as a chairman of the building committee. As per instruction and in consultation with ICAI and RBA all work was done. Some orders were written, and some were oral by the Chairman of building Committee including Vice President of ICAI.
- 4.10 Since respondent was the Secretary of the Branch, Respondent was also made the secretary of building committee. Since, writing of minutes of the meetings is done by the secretary of the branch; Respondent also have been said to write the minutes of the building committee. Accordingly, Respondent wrote the minutes of building committee.

RESPONDENT No. 3

5. The Respondent in his written submissions, inter-alia. stated as under: -

- 5.1 This complaint is the offshoot of the very old dispute amongst some office bearers of Varanasi branch of ICAI.
- 5.2 The comments made by Director (Discipline) in the PFO relating to manipulation, fiduciary capacity and personal interest are unwarranted and unexpected for without any material on record.
- 5.3 There was a very old dispute regarding building advance to Rs. 525000/- CA Shishir Bajpai by ICAI in around 1995, who was facing the Disciplinary Proceeding on that account. The sum of Rs.11,00,000/- recovered by the branch and deposited with ICAI in 2010-11. The Respondent, being Secretary of the Branch done all the correspondence and did the recovery of this amount for which no appreciation has been given by the Director (Discipline).
- 5.4 Thereafter, on the instruction of ICAI suitable land was searched for building. Varanasi Vikas Pradhikaran (VDA) refused to give any land to ICAI. Thereafter, he approached the District Magistrate of Varanasi, who happened to be a Chartered Accountant. On the basis of his insistence, VDA again gave a piece of land which was a pond at that time and nearby locality was not good, but connectivity was good and was near Income Tax Office. ICAI allowed to buy that land. Accordingly, land was bought from VDA for branch Building. In that process, working members of managing committee interacted many times with the District Magistrate and VDA and it was massive effort of the members of committee that we got land in spite of clearcut refusal by VDA. Registration of land was done on 28th March 2011, but the possession of the land was received on 2nd September 2011, this is being evident, as written at first para of draft minutes of 353rd council provided. Six months' time lapsed in taking possession because the surrounding area was captured by Jhuggis. We got the possession of land being a pond, after clearing the jhuggis with the help of administration.

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- 5.5 The ICAI formed a building committee and nominated a Central Council Member as a chairman of the building committee. As per instruction and in consultation with ICAI and RBA all work was done. Some orders were written, and some were oral by the Chairman of building Committee including Vice President of ICAI.
- 5.6 Since, Respondent was the Treasurer & Chairman of the Branch in the period under consideration, he was also made the Member of building committee through email from Assistant Engineer RBA (B. Pradhan).

RESPONDENT No.4

6. The Respondent in his written submissions, inter-alia. stated as under: -

- 6.1 The Prima-facie Opinion has conveniently ignored relevant portions of the forensic auditor's report. For instance, the Forensic Auditor's Report referred to the competent authorities like the then President of ICAI, the then Vice-President of ICAI, Finance Committee and RBA etc. However, the Prima Facie Opinion has conveniently ignored the guidance of the aforesaid authorities in the critical decisions like the approval of the appointment of Architect and the appointment of Contractor, were approved by RBA, Secretary, Vice President, President of ICAI and Finance Committee which has also been reported by the Forensic Auditor and is available on record.
- 6.2 Pertinently, the Forensic Auditor's report is also incomplete due to the unavailability of required material on record though the same should had been obtained from the RBA and head office of ICAI also from the existing sitting chairman of the building Committee who was also sitting Council's member at that time. Notably, the forensic auditor was appointed without determining its scope. In its report, despite the limited material made available for audit, the Auditor had not disclaimed and qualified his report to that extent but has concluded his own observation based on assumption, presumption and his own self-made suspicion under the strict control of the persons who created such issues in public at large. While the forensic auditor was expected to apply its own mind after getting all the required information and records, it has not been done by him.
- 6.3 Since, the audit report given by the Forensic Auditor was basically disclaimed due to not having the information as claimed by him in the audit report but not tried to obtain evidence, information, documents and record of the Head Office i.e., RBA Section, President and Vice president's office. Moreover, the forensic auditor himself states that the examination was based on email id varanasi@icai.in which was not in existence and operation at that time. The Auditor had also reported that they had verified certain document as enlisted in enclosure No. 7 of their report and also verified the Emails for e.g email-ID varanasi@icai.in although, the earlier Email-ID varanasi@icai.org had not been considered while drawing conclusions.
- 6.4 However, during the examination, the Forensic Auditor had also examined the procedural aspect followed by the branch committee while comparing the same with the guidelines on construction work issued by ICAI HO which was not made available to the building

committee even after several requests made by the committee to RBA which in turn did not supply the same mentioning that no such guideline have been issued by ICAI HO pertaining to branches. RBA being the specific division of ICAI for infrastructure development hence the building committee had to totally relied and dependent upon RBA. Although the communication regarding request and approvals were also informed parallelly to the office of the President of ICAI. In the absence of the above guidelines specifically with reference to the procedural aspects the general practice as instructed by the RBA being immediate and concerned division were followed which were further approved by the action of the then Vice President, the then President of ICAI. [In this regard, also see RBA's email dated 28.12.2015] Hence the procedure adopted by the building committee was an accordance with general practice together with the approval of then the then Vice President, the Secretary, the then president, RBA.

6.5 The appointment of architect was made in meeting of building committee in the presence of Mr. B Pradhan Representing RBA, an immediate expert and representative of the President of ICAI.

6.6 As per the facts on record, the contractor was selected on 19.10.2011. However, the work order was issued on 11.01.2012 which was duly approved by RBA on 08.12.2011. The responsibility has been unlawfully fostered on the Building Committee.

6.7 As the recommendation and payment of Service Tax was made after approval of the Competent Authority, the allegation is false, unjust and liable to be rejected.

6.8 The bills submitted by the contractor have been approved for payment merely on the basis of signature of architect on such bills. Non issuance of certificate can be said to be a mere technical issue because, it is also on record that the architect had parallelly signed each and every bill of the contractor and stated that "Check and found O.K".

6.9 The approval of second phase construction is supported by two reasons:

a. Tender were not obtained for the second phase of construction.

b. There is Significant increase in rates for the 2nd phase as compared to the 1st phase.

6.10 It was decided to complete the structural work of second phase in continuation of 1st phase to save time. As the decision was taken after approval of the Ld. Competent Authority i.e., the Vice President, ICAI.

6.11 Further, on a bare perusal of page 65, 66, 67, 68, 69 of the Forensic Audit, it was clearly stated that the approval of Second Phase on revised rate was approved by the RBA, the then Vice President and the finance committee on 31.01.2013 and 01.02.2013 respectively. The approval was made for revised cost of Rs. 12.95 lacs and 2nd phase construction. The attention is also drawn to 7.5 at Page No. 68 where in the Forensic Auditor has assumed without any conclusive evidence that the then building Committee Chairman Shri Ravi Holani had only forwarded the minutes to the then Vice-President for his approval and consent on 29-01-2013 by email. CA Ravi Holani did not expressly mention his approval disapproval but had sought the approval of higher authority in this regard.

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6.12 The competent authority has responded to the query regarding requirement or approval of RBA for appointment of the architect and the contract. Extract of the response is reproduced below:

"xxxx

As already intimated vide our mail dated 28.12.2015, there was no specific guideline for construction projects of branches. Even guidelines dated 05th May 2006 do not specifically mention about particular Department of which approval was required for appointment of architect/contractor. that come used in the guidelines "competent authority" and the term "competent authority" has not been defined in the said guidelines. The general practice followed by the dealing Department or officer weather in RBA or HRD was to get the same approved by the Chairman of Building Committee of the branch/project concern and/or approved/ noted by the Building Committee concerned and thereafter by the President in office."

6.13 The response of RBA is self-speaking and proves that there were no such specific guidelines from ICAI for construction projects of branches. It is stated that RBA had not provided any copy of such guidelines even when such a demand was made by the building committee by way of an email.

6.14 Most important correspondence is email dated 17.01.2013 which has been given by the Vice president to the Respondent. However, all the subsequent communication took place between ICAI and Varanasi Branch and at any place there was no evidence which proved that being building committee chairman, he was involved in taking any decision without giving any information and taking permission from all the Superior Auditors.

6.15 It is also on record that the President inaugurated the construction process by Bhumi-Pujan on 27, Nov 2011. If the appointment of the Architect and Contractor was not confirmed and approved by the H.O, how the next process to release fund etc. by the Finance Committee could had been done?

6.16 The Guidelines issued on 5th May 2006 (ICAL/HRD/(A)/Const./ Guidelines) are not applicable in the case of branch building and was never issued to Branches or Building Committees as evident from the covering letter. Further as also evident from the covering of the Guidelines it is not issued by the Council but by the competent authority.

OBSERVATIONS OF THE BOARD:

7.1 At the outset, the Board was of the view that since the subject matter of all the four (4) cases is substantially the same, the Board decided to hear the parties to the case in all the four (4) cases simultaneously and arrive at a common Finding in all the four (4) cases. The Board further noted that the following role was assigned to the Respondent(s) as the members of the Building Committee of Varanasi Branch of ICAI during 2011-12 to 2013-14:

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Particulars	2011-12	2012-13	2013-14
Central Council member and Chairman of Branch Infrastructure Committee	CA. Ravi Holani (Respondent No.4)	CA. Ravi Holani (Respondent No.4)	CA. Mukesh Singh Kushwah
Chairman of Varanasi Branch	CA. Pyaare Krishna Agarwal (Respondent No.2)	CA. Santosh Kumar Singh (Respondent No.3)	CA. Santosh Kumar Singh (Respondent No.3)
Secretary of Varanasi Branch	CA. Rahul Kumar Singh (Respondent No.1)	CA. Rahul Kumar Singh (Respondent No.1)	CA. Manoj Kumar Agarwal
Treasurer of Varanasi Branch	CA. Santosh Kumar Singh (Respondent No.3)	CA. Pyaare Krishna Agarwal (Respondent No.2)	CA. Rahul Kumar Singh (Respondent No.4)

7.2 The Board also noted that the present proceedings were initiated on the basis of following documents:-

S No	Date	Document
1.	05/05/2006	Guidelines for construction and maintenance works
2.	08/09/2011	Letter of Intent issued by Varanasi Branch to Architect M/s Dev and Associate
3.	11/01/2012	Work Order issued by Varanasi Branch to Contractor M/s Anand Enterprises alongwith final negotiated rates
4.	15/08/2012	Request letter of Contractor M/s Anand Enterprises for increase in rates due to increase in raw material prices
5.	18/12/2012	Letter of Contractor M/s Anand Enterprises for revision of agreement rates due to completion of contract period on 10/01/2013 & IInd Phase work allotment
6.	03/11/2013	Valuation Report of Registered Valuer for Construction of Varanasi Branch Building

7.	09/01/2014	Report of the Enquiry Committee of Varanasi Branch of CIRC
8.	12/04/2014	Due Diligence audit report of Building Project at CIRC of ICAI, Varanasi issued by M/s O.P. Tulsuan & Co.
9.	21/03/2016	Forensic Audit Report for Building Project of Varanasi Branch of CIRC of ICAI issued by M/s G.D. Apte & Co.

Also, the case is limited to the forensic report wherein no response was sought from the Respondent(s) before finalizing the forensic report and no opportunity of being heard was granted to them even after raising objections.

7.3 The Board further noted that the Forensic Audit Report dated 21st March 2016 was the bedrock for all the allegations alleged against all the four Respondent(s). The said forensic report was subject to certain limitations as stated hereunder: -

"Correspondence by way of Emails

We have been given access only to the Email ID Varanasi@icai.in and we have accessed & downloaded those Emails which were found relevant for the purpose of our audit out of over 15000 emails (Sent & Received). We accept no responsibility for any. email correspondence which might have taken place through personal email ids of office bearers and officials of the ICAI at Varanasi Branch/ICAI HO or any other emails IDs or through emails which were not made available to us or which might have been deleted.....

Availability & maintenance of records at the Branch

We requested on 18.11.2015 the Branch to obtain, from the Bank (Union Bank of India) copies of cheques issued to the Contractor. However, the same were not provided to us.

Interactions Incomplete or those which could not take place

Varanasi Branch could not organise our interaction with CA. Ravi Holani & CA. Rajat Mehra. We assume no responsibility as regards impact on our findings in our report, in case these interactions would have taken place.

Further, we have not received replies to some of the questions included in our questionnaire from members of then Building Committee, CA. Rahul Kumar Singh & CA Santosh Kumar Singh & CA P K Agrawal. We assume no responsibility about our findings arising out of incomplete information provided by these members. "

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7.4 As regard the charge specified at para 2.1 above, the Board noted that the Respondent(s) placed on record the Minutes of Meeting of the Building Committee held on 4th September 2011 wherein the Architect i.e. M/s Dev & Associates had been appointed and it was decided that on receipt of the acceptance letter from him, the appointment letter will be issued to him. The Board noted that in the said meeting apart from the four Respondent(s), one official of the RBA was also present. It was also stated in the said Minutes as under:

"Considering the Practical feasibility and considering the time bound project chairman of-building committee has proposed to select the Architect locally from Varanasi and other members affirmed this. Accordingly all the above (i) to (vi). Architech were asked to give their Presentation before the committee and and being undertaken in hand and their approach to undertaking institute Project considering the laws of VDA.

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Further same were opened by the committee the quoted rates was as under:

- 1 Dev & Associates 1.50% of cost of project includes all charges for supervision of service tax
- 2 Feel & Form 1.25% + 50% supervision
- 3 Kapoor & Associates 2.75% + service Tax

The committee considering the above rates decided to select m/s Deve and Associates as architects for building with the rate 1.50% excluding service Tax but including all the Further, the committee has discussed with Arch. Sachin Singh of Dev & Associated detailed scope of work, and that was admitted by him to give detailed specification acceptance letter."

7.5 The Board also noted that the Respondent brought on record a copy of the Press Notice for selection of Architect, copy of the communication dated 7th September 2011 from the Architect i.e. M/s Dev & Associates addressed to the Varanasi branch wherein the scope of work was duly provided by him followed by the LOI issued to him.

7.6 On a conjoint reading of the above, the Board was of the view that the Respondent(s) cannot be held liable for the alleged irregularities as their scope of fiduciary responsibility was limited and role was recommendatory in nature. Accordingly, the Board held the Respondent No.1, Respondent No.2, Respondent No.3 and Respondent No.4 Not Guilty in respect of the said charge.

7.7 As regard the charge specified at para 2.2 above the Board observed that the Respondent(s) placed on record Minutes of Meeting dated 13th October 2011 wherein the Contractor was appointed i.e. M/s Anand Enterprises. The following members were present in the meeting:

- a) CA. Pyare Krishna Agarwal
- b) CA. Santosh Kumar Singh
- c) CA. Dr/ Rahul Kumar Singh

d) CA. Ravi Holani

The relevant extract of the Minutes is as under:

"Since, M/s Anand Enterprises satisfies the main three conditions as detailed above of the pre-qualification tender, it is decided to take consent from..... for taking the consent from ICAI, New Delhi a summary of pre-qualification tender is prepared and mailed to Shri CA Ravi Holani Ji for further action after telephonic discussion and verbal discussion with him."

Thus, the Board was of the view that the Respondent(s) cannot be held liable for the alleged irregularities as their scope of fiduciary responsibility was limited and role was recommendatory in nature. Accordingly, the Board held the Respondent No.1, Respondent No.2, Respondent No.3 and Respondent No.4 Not Guilty in respect of the said charge.

7.8 As regard the charge specified at para 2.3, 2.4, 2.5 and 2.6 above in respect of Respondent No.1, Respondent No.3 and Respondent No.4 with respect to irregularities in the payments made to contractor, process bill of Rs 13.39 lakhs submitted by the Contractor has been paid without issuing any work order, Approval of Second phase of construction and Payment of Escalation, the Board decided to deal with them together as the same were interconnected having financial implication.

7.9 The Board on perusal of the Forensic Audit Report observed that from Bill No. ICAI-1 to ICAI-13 as submitted by the Contractor, from the period 17th February, 2012 to 3rd March, 2013 an amount of INR 5,04,261/- was charged as service tax from the Varanasi Branch of ICAI. However, from the work order dated 11th January, 2012, it is noted that in the clause of "Contract Sum", it is mentioned as under:

"the awarded contract shall be of Rs. 1,38,73,522/-. The amount payable shall be subjected to deduction of all applicable taxes such as TDS and WCT etc. as per the government laws and Rules."

Further, in the Due Diligence Audit Report, it is also stated with respect to the service tax payment as under:

"It was specifically mentioned in the para A.7.4 of the financial tender prepared by the architect that cost of project would be inclusive of service tax. In spite of this fact an additional service tax payment has been made to the contractor. This must be kept in mind at the time of completion of the contract that the estimated cost should be compared with the gross amount including service tax and not by net amount, i.e. service tax paid should be treated as a part of project cost. Till date service tax has been paid of Rs 5.15 Lacs."

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7.10 The Board also noted that the Respondent(s) in their defense also informed that all the bill raised by the contractor was running bill as written on each bill and in the payment of running bill concept when final bill is presented any amount paid in excess may be recovered from Retention Money of Rs. 629785/- (available at annexure of due diligence audit report Details of all running bills) and earnest money of Rs.300000/- total Rs.929785/-. Further, such earnest and retention money were fixed as fixed deposit in nationalized bank by building committee (Present value Rs. 17,11,658/- as per information available through RTI). As per point no 4 of Minutes of Infrastructure Committee of Varanasi Branch of ICAI dated 17.07.2019, Contractor has given a letter that he has forgo all his claims including earnest money and retention money. So even if the service tax was excess payment, ICAI was having deduction as security, was only for adjustments to be applied at the end of contract.

7.11 The Board also referred to the following judgment dated 27th November, 2008 in the Writ Petition (c) No.26625 & 27899 of 2008 of Hon'ble High Court of Kerala, having similar facts and circumstances as detailed below:-

"Petitioners have taken rooms on rent from the respondent Municipality, They have been called upon to pay service tax, It is their case that the demand for service tax is illegal - According to the petitioners, under the agreement, there is no provision for payment of service tax. Therefore, the demand for payment of service tax is illegal. It is their contention that there is no authority with the Municipality to pass it on to the petitioners. He also referred to Chapter IXA of the Constitution to contend that the Municipality is a unit of the State and, therefore, levy of service tax on the property or on the income of the Municipality is unsustainable."

The Board noted that the Hon'ble High Court of Kerala in the said case held as under:-

"As far as the first question is concerned, namely whether the tax is to be borne by the service provider, the Municipality in this case, I am of the view that it can be passed on by the service provider. The tax as held by the Apex Court is clearly an indirect tax. It is open to the legislature even if it is an indirect tax to provide that it shall not be passed on to the consumer. Example of such law is Section 5A of the KCST Act which provides for levy of purchase tax. It prohibits the passing on of the tax to the consumer. The same is the position in respect of the turnover tax under Section 5(2)(c) of the KCST Act. Therefore, examples are not wanting when the legislature intended that be it an indirect tax, it should be borne by the assessee and it cannot be passed on. There is no such prohibition in the matter of service tax. That apart, the bench decision of this court as already noted, specifically declares that service tax can be passed on by the service

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provider. Therefore, there is no merit in the contention that service tax cannot be passed on by the Municipality to the tenants.

The second question is whether in the absence of the contract it is open to the Municipality to pass it on. The tax is primarily on the service provider. As already noted, it does prevent passing on of the tax to the tenants. A statutory right exists in favour of the Municipality to pass it on as already noted. It is open to the Municipality to decide not to pass on the burden. But, when the Municipality elects to demand the payment of tax, I would think that it may not be open to the petitioners particularly in a writ jurisdiction to set up the contract as pointed out that it is in violation of the contract to demand payment of service tax. I see no merit in this contention and it is rejected.

The last contention is on the basis of Article 268A. It is not a contention which specifically raised. Of course, it is contended by Sri Gopinath Menon that there is a law also. In such circumstances, there is no merit in the said contention. In view of this, no further contention has been raised before me. Writ petitions fail and they are dismissed."

7.12 Thus, on a conjoint reading of the above, the Board was of the view that in common parlance, the service tax is charged by the service provider on the recipient of the service and the tax so collected is deposited with the Government service recipient can claim the service tax paid as input credit. Further, the Board was of the view that in case there was any ambiguity in the terms of the Work Order or tender documents, the Respondent(s) cannot be held liable for the same as their scope of fiduciary responsibility was limited.

7.13 The Board also noted that the Contractor from time and again had submitted Invoices verified by the Architect wherein most of the Invoices had the term 'Bill checked and found OK' which was written by the Architect. Also, the Board observed that there were series of communication between the Respondent(s) and the HO, ICAI. In one such email dated 23rd January, 2013 RBA, ICAI demanded the Minutes of Building Committee which approved the cost of materials in order to seek approval from the authority for release of next installment of Rs. 50 Lacs and sanction of additional cost of Rs. 111.35/- lacs. In reply to the said email, vide email dated 23rd January, 2013 the minutes dated 20th August were submitted and it was clarified that '*..... the increase of cost due to price rise of Rs. 12.95 lacs is separate from 1st phase sanction of Rs. 166.66 lacs and is also separate from 2nd phase estimate of Rs. 98.10. lacs.*'

In reply to the said email, the RBA, ICAI demanded the minutes of Building Committee which approved 2nd phase estimate of Rs. 98.40 Lacs.

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7.14 At this juncture, the Board was of the view that it is imperative to consider the following from the Forensic Audit Report:

"The Claim of escalation was examined by RBA on the basis of the following documents.....

.....
Since the proposal was recommended by the Building Committee of Varanasi Branch, vide RBA Section office note dated 31/01/2013, the following points were proposed for approval by the then Secretary Shri T. Karthikeyan and the then President CA J.N. Shah:

- 1. Release of III installment of Rs. 50 lacs towards 1st phase of Building as already approved by the Finance Committee at its 25th Meeting held on 12th July, 2012.*
- 2. The recommendation of Building Committee for (1) increase of rate of contractor for Rs 12.95 lacs, as per bill no. 8 dated 1.1.2013 verified and approved by the Architect and (2) IInd phase estimate as finalized by the Architect amounting to Rs 98.4 lacs, was proposed to be placed at 29th Meeting of Finance Committee fixed for 1.2.2013.*

The above proposals were endorsed by the then Secretary and approved by the then President."

7.15 In view of the above, the Board was of the view that it is evident that the revision of rates and increased cost of material was neither approved nor sanctioned by the Respondent(s). Also, the role of the Respondent(s) in the payment of escalation was more recommendatory in nature. Accordingly, no misconduct can be attached to the Respondent(s) in this respect and thus, the Board held the Respondent No.1, Respondent No.3 and Respondent No.4 Not Guilty in respect of the said charge.

7.16 As regard the charge specified at para 2.8 above regarding non-compliance of ICAI Guidelines wherein significant Guidelines issued on 5th May 2006 (ICAI/HRD/(A)/Const./Guidelines/) were not adhered to in respect of the construction of Building at Varanasi, it is the defence of the Respondent(s) that the Building Committee and the Chairman of the Building Committee had requested to supply the Guidelines in respect of construction of building and the same were not supplied to them. In this respect, they referred to the email communication dated 18th November 2011 from the Respondent no. 1 to Sh. B. Pradhan, RBA and his reply thereto vide email dated 25th November 2011. The Board also noted that in the Forensic Audit report in this respect, it was provided as under:

"RBA Section at ICAI HO has not ensured that the above guidelines for construction were made available to the Building Committee for implementation.

RBA Section has also failed in monitoring that the construction activity was carried out as per the guidelines."

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Thus, it is evident that the Construction Guidelines, if any, were not made available to the Building Committee despite requesting the same. Hence, the Board was of the view that the Respondent(s) cannot be held liable for non-compliance of the same and it cannot be said to be misconduct on their part as they had diligently requested for the said guidelines, which were not informed/made available for them. Accordingly, the Board held the Respondent No.1, Respondent No.2, Respondent No.3 and Respondent No.4 Not Guilty in respect of the said charge.

CONCLUSION:

8. Thus, in conclusion, in the considered opinion of the Board, all the four Respondent (s) namely Respondent No.1, Respondent No.2, Respondent No.3 and Respondent No.4 are **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, retd.)

(Government Nominee)

Sd/-

CA. Priti Savla

(Member)

DATE: 10-02-2024

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy

बिष्वा नाथ तिवारी / Bishwa Nath Tiwari
कार्यकारी अधिकारी / 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, Shahdara, Delhi-110032