

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 2505 of 2010

Reserved on: September 29, 2010

Decision on: November 22, 2010

TALLURI SRINIVAS

..... Petitioner

Through: Mr. S. Ganesh, Senior Advocate with
Mr. R. Sudhinder, Mr. Vibhu Bakru, Mr. Rahul
Ravindran and Ms. Prerana Amitabh, Advocates.

versus

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
THROUGH: ITS SECRETARY & ANR.

..... Respondents

Through: Mr. Rakesh Agarwal with
Mr. Pulkit Agarwal, Advocate for R-1/ICAI.
Mr. Jatan Singh, CGSC for R-2/UOI.

And

W.P.(C) No. 5352 of 2010

SUBRAMANI GOPALKRISHNAN

..... Petitioner

Through: Mr. N.K. Kaul, Senior Advocate with
Mr. R. Sudhinder, Mr. Amit Sibal and
Mr. Rahul Ravindran, Advocates.

versus

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
THROUGH: ITS SECRETARY & ANR.

..... Respondents

Through: Mr. Ramji Srinivasan, Senior Advocate
with Mr. J. J. Bakshi, Mr. Zeyaul Haque and
Mr. Amitesh S. Bakshi, Advocates for R-1/ICAI.
Mr. Ravinder Agarwal, CGSC for R-2/UOI.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether reporters of the local news papers
be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

JUDGMENT
22.11.2010

1. Although the facts in these two writ petitions are slightly different, the questions involved are more or less similar. Both Petitioners, being the members of the Institute of Chartered Accountants of India ('ICAI'), i.e. the Respondent No. 1 in both the petitions seek to challenge a prima facie opinion dated 17th September 2009 arrived at by the ICAI and the disciplinary proceedings that have commenced consequent thereto. Both Petitioners seek a direction to the ICAI to keep the respective disciplinary proceedings against them in abeyance till the conclusion of the criminal cases against each of them.

Factual Background

2. The Petitioner in Writ Petition (C) 2505 of 2010, Mr. Talluri Srinivas ('Srinivas') is a Chartered Accountant by profession and a member of the ICAI since 1990. Srinivas was a partner with M/s Price Waterhouse ('PW'), a firm of Chartered Accountants registered with the ICAI. In the year 2000, PW were appointed as the statutory auditors of Satyam Computer Services Limited ('SCSL'). While the statutory audits of SCSL for the years 2001 to March 2007 were conducted and the reports were signed by Mr. Subramani Gopalkrishnan ('Gopalkrishnan') (the Petitioner in Writ Petition (C) 5352 of 2010), the statutory audit for the quarters ending on 30th June 2007 and 30th September 2008 were conducted and signed by Srinivas.

3. On 7th January 2009, Mr. B. Ramalinga Raju, the then Chairman of SCSL wrote a letter to his Board of Directors in which *inter alia* he disclosed that the balance sheet of SCSL as on 30th September 2008 carried inflated (non-existent) cash and bank balances of Rs. 5,040/- crores (as against Rs. 5361

crore reflected in the books) and accrued non-existent interest of Rs. 376 crores, an understated liability of Rs. 1,230 crores on account of funds arranged by him and an overstated debtors position of Rs. 490 crores (as against Rs. 2651 crores reflected in the books). He also disclosed that for the September quarter, the company had reported a revenue of Rs. 2,700/- crores and an operating margin of Rs. 649 crores (24% of revenues) as against the actual revenue of Rs. 2,112 crores and an actual operating margin of Rs. 61 crores (3% revenues). This had resulted in artificial cash and bank balances going up by Rs. 588 crores in the Second Quarter alone. Mr. Raju tendered his resignation as the Chairman of SCSL and stated that he was prepared to subject himself to the law of the land and face the consequences thereof.

4. On 10th January 2009, the ICAI wrote a letter to M/s Price Waterhouse, Bangalore (PW, Bangalore) referring to the letter dated 7th January 2009 addressed by Mr. Raju to the Board of Directors of SCSL. It was stated by the ICAI that from the perusal of the said letter of Mr. Raju and the newspaper reports, it emerged that the audit figures for the years 2004-05 till the quarter ending on 30th September 2008 had been certified by PW, Bangalore as reflecting the true and fair picture of the accounts, which was now admitted even by the Chairman of SCSL to be incorrect. This meant that the PW, Bangalore “had failed to carry out necessary checks which are required while undertaking the audit of the financial statements and certifying the quarterly results of the company.” ICAI alleged that the PW, Bangalore had violated the accounting principles while auditing/ certifying the accounts/quarterly results of SCSL for the aforementioned years/Quarters; that in spite of the aforesaid irregularities/manipulations in

the financial statements, PW, Bangalore had stated that financial statements together with the notes thereon gave a true and fair view; that PW, Bangalore had failed to disclose material facts which were not disclosed in financial statements of SCSL; that it had failed to report material misstatement known to it as statutory auditors, which appeared in the financial statements of SCSL. It was thus alleged that PW, Bangalore did not exercise due diligence and was grossly negligent in the conduct of its professional duties as statutory auditors of SCSL for all these years.

5. In the said letter dated 10th January 2009 addressed to PW, Bangalore the ICAI stated that the letter dated 7th January 2009 of Mr. Raju and the newspaper reports had been treated as “information” within the meaning of Section 21(2) of the Chartered Accountants Act, 1949 [as amended by the Chartered Accountants (Amendment) Act, 2006 with effect from 17th November 2006] (hereinafter ‘CA Act’). PW, Bangalore was called upon “to disclose the name or names of the member or members who is/are answerable to the allegation/s and send a copy of the aforesaid information letter along with its enclosures to the said member/members and he/they be requested to send his/their Written Statement, if any, in triplicate, within 21 days of the receipt of this letter.” It was further stated that the member or members answerable, should also send a declaration duly signed in the enclosed format and in the event that the name/s of member/s answerable was not disclosed “then all the members who were partners or employees of the firm on the date of occurrence of the alleged misconduct, shall be responsible for answering the allegation or allegations contained in the information.” On 14th January 2009, similar notices were sent to Price

Waterhouse, Kolkata (‘PW, Kolkata’) and Price Waterhouse, New Delhi (‘PW, New Delhi’).

6. On 30th January 2009, PW replied to the ICAI stating, *inter alia*:-

“As regards the furnishing of the names of member/s that are answerable to the allegations, key members are as under:

1. Mr. S. Gopalkrishnan, Partner (Membership No. F – 18863) for the period April 1, 2000 to March 31, 2007.
2. Mr. S. Talluri, Partner (Membership No. F – 20864) for the period April 1, 2007 to September 30, 2008.
3. Mr. P. Shiva Prasad (Membership No. 204076) for the period April 1, 2001 and March 31, 2005.
4. Mr. C.H. Ravindranath (Membership No. 204494) for the period April 1, 2005 and September 30, 2008.”

7. PW also informed that Gopalkrishnan and Srinivas had been arrested by the local police and were, therefore, out of reach. The ICAI was requested to grant all the members, whose names were disclosed, some more time to respond to the notice dated 10th January 2009. PW also gave its response to the queries raised. As mentioned hereinbefore, on 23rd January 2009 Srinivas was arrested. Gopalkrishnan was arrested on 24th January 2009.

8. On 20th February 2009, the criminal investigation was transferred to the Central Bureau of Investigation (‘CBI’) and RC No. 4(S)/2009 was registered against Gopalkrishnan, Srinivas and seven other accused persons under Sections 409, 420, 468, 471, 477-A, 201, 120-B IPC.

9. At the instance of the CBI, a Multi Disciplinary Investigation Team (‘MDIT’) was constituted and a report was prepared by the ICAI Group on

5th April 2009. In para 1.2 of the said report it has been mentioned that Mr. Uttam Prakash Agarwal, President of the ICAI and Mr. Amarjit Chopra, Vice President of the ICAI, represented the ICAI in the MDIT. In Para 1.3, it is stated that Mr. Agarwal constituted a group of local Chartered Accountant professionals from Hyderabad under the convenorship of Mr. Shanti Lal Daga, a member of the Central Council of ICAI, based in Hyderabad to provide requisite support and to help the CBI in its investigation of the scam. It is stated that Mr. Daga then led the group and interacted with Mr. V.V. Laxmi Narayana, the DIG who was heading the probe, and Mr. J.L. Negi, the Coordinator of the CBI investigation team. Para 1.4 of the report of the ICAI Group states that the Group has been entrusted with the “task of verification of compliances or otherwise by Price Waterhouse, the auditors of the company, with various auditing and assurances standards and guidance notes issued by ICAI, in respect of cash and bank balances, sales, receivables, interest accrued and tax deducted at source relating to fixed deposits and its impact on financial reporting and auditor’s report thereon. Therefore, the verification by the Group is limited to the above heads of account of the financial statements.” The report further stated that the ICAI Group had “restricted its enquiry to the aforesaid heads of accounts and related matters for the years ending 31st March 2005, 31st March 2006, 31st March 2007, 31st March 2008 and for the quarters ended 30th June 2008 and 30th September 2008.”

10. The ICAI Group in para 19.1 of its report arrived at the following conclusions:

“19.1 The statutory auditors have failed to exercise reasonable
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care and compliance with various auditing and assurance standards issued by the Institute of Chartered Accountants of India as a generally accepted auditing practice while reporting on the financial statements and the materiality of the misstatements are so huge that it has rendered the financial statements for all these years as untrue and unfair. However, the executive, management and staff have drawn substantial amounts as remunerations, commission, incentives, bonuses, ESOPs. The management has also declared the dividends to its shareholders under the Companies Act, 1956. However, all these overstatements and misstatements have reported the EPS at a higher level in the financial reporting annually as well as quarterly which has directly impacted the movement of the share prices in the stock exchanges market in India and abroad.”

11. On 7th April 2009, the CBI filed its first charge sheet in the Court of the Additional Chief Metropolitan Magistrate (‘ACMM’) naming the Petitioners Gopalkrishnan and Srinivas and seven others as accused persons. Among the documents relied upon by the CBI was the report of the ICAI Group, which was a part of the MDIT.

12. Under Section 21(2) of the CA Act, on receipt of any information or complaint by the ICAI, the Director (Discipline) should arrive at a *prima facie* opinion on the occurrence of the alleged misconduct. Under Section 21(3), it is stated that where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule to the CA Act, then the matter will be placed before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned

in the Second Schedule or in both the Schedules, then the matter will be placed before the Disciplinary Committee.

13. The Director (Discipline) placed the *prima facie* opinion dated 17th September 2009 before the Disciplinary Committee. The view expressed therein was that Gopalkrishnan and Srinivas were *prima facie* guilty of professional misconduct within the meaning of Clauses (5), (6), (7), (8) and (9) of Part I of the Second Schedule to the CA Act. A *prima facie* opinion was also formed that the two Petitioners were guilty of other misconduct within the meaning of Section 22 read with Section 21 of the CA Act.

14. On the basis of the above *prima facie* opinion which was considered by the Disciplinary Committee, a separate notice dated 8th October 2009 was sent by the ICAI to each of the Petitioners enclosing the copy of the *prima facie* opinion and asking each of them to send their written statement along with supporting documents and a list of witnesses within 21 days. At that point of time, both the Petitioners were in judicial custody.

15. On 22nd November 2009, a supplementary charge sheet was filed by the CBI. A second supplementary charge sheet was filed on 7th January 2010.

16. On 4th February 2010, Srinivas was granted bail by the Supreme Court in CrI. Appeal No. 257 of 2010. The relevant portion of the order read as under:

“We do not express any opinion on the merits of this case regarding the nature of offence or gravity thereof allegedly committed by the accused-appellant.

Having regard to the fact that the appellant had been in custody for more than one year, we are of the view that he be released on bail subject to certain conditions:-

1. The appellant is permanent resident of Hyderabad. He will report to the investigating officer - S.P. (C.B.I.) once in two months in the first week.
2. The appellant shall appear in Court as and when the case is posted for hearing.
3. The appellant shall be available for further interrogation/investigation as and when required on the written requisition by the investigating agency.
4. The appellant shall not tamper with any evidence and shall not influence the prosecution witnesses.
5. The appellant shall execute bail bonds of Rs.20 lacs (Rupees twenty lacs only) with two solvent sureties of the like amount to the satisfaction of the Trial Court.
6. On executing the bail bonds he be released on bail pending trial.”

17. On 26th February 2010, notices were issued by the ICAI to Srinivas with respect to the disciplinary proceedings pending against him as well as Mr. Ch. Ravindranath. On 26th March 2010, Srinivas replied to the ICAI stating that Mr. Ravindranath had been cited as a witness in the criminal case pending before the Special Court, CBI against Srinivas. The proceedings for which the ICAI had summoned Srinivas as a witness in the disciplinary proceedings against Mr. Ravindranath arose from the very same acts of alleged omission or commission which formed the basis for various charges alleged against Srinivas in the pending criminal case. Accordingly, it was submitted by Srinivas that his appearance as a witness in the disciplinary

proceedings against Mr. Ravindranath would severely prejudice his position in the criminal cases pending trial. As regards the disciplinary proceedings against himself, Srinivas pointed out that he would be dealing with it separately. By a separate letter dated 26th March 2010, Srinivas stated that the disciplinary proceedings against him should be deferred since the alleged acts of omission or commission on the basis of which disciplinary proceedings had commenced formed not only the basis of *prima facie* opinion but also formed the basis for various charges against him in the criminal cases. Srinivas expressed his apprehension that “any disclosure of my explanations or defenses until the final conclusion of my aforesaid pending criminal trial before the Special Court at Hyderabad, would seriously impact my defence in the above criminal trial.”

18. On 6th April 2010, the ICAI wrote to Srinivas asking him to attend as a witness in the disciplinary proceedings against Mr. Ravindranath failing which he would be subject to the consequence of non-attendance as laid down in Rule 12 of Order XVI of the Code of Civil Procedure, 1908 read with Section 21-C of the CA Act. By a separate communication received by Srinivas on 9th April 2010, the ICAI informed him that although the hearing on 30th March 2010 had been adjourned by the Disciplinary Committee, the scope of inquiry by the Disciplinary Committee and that of the criminal court were on a separate footing and, therefore, at the next date of hearing, i.e. 18th April 2010, he should remain present and further that no adjournment would be granted under any circumstances.

19. W.P. (C) 2505 of 2010 was filed by Srinivas in this Court on 15th April
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2010. On 16th April 2010, while directing notice to issue in the petition, this Court directed that the hearing fixed before the Disciplinary Committee of the ICAI on 18th April 2010 would be postponed by ten days. In the meanwhile, the Petitioner was to prepare and file a chart to show the exact allegations in the charge-sheet of the CBI and those in the show cause notice issued by the ICAI in the disciplinary proceedings.

20. On 25th June 2010 Gopalkrishnan was granted bail by the High Court of Andhra Pradesh subject to the following conditions:-

“1. The petitioner-A.4 shall execute bail bond of Rs.20,00,000/- (Rupees twenty lacs only) with two solvent sureties of the amount to the satisfaction of the Additional Chief Metropolitan Magistrate, Nampally, Hyderabad, whereas petitioner-A.10 shall execute bail bond of Rs.20,00,000/- (Rupees twenty lacs only) with two solvent sureties of the like amount to the satisfaction of the XIV Additional, Chief Metropolitan Magistrate, Hyderabad.

2. In view of the fact that the Investigation is still in progress in connection with diversion of funds, the petitioners are directed to report before the investigating agency, daily at 10 a.m until further orders.

3. The petitioners shall appear in the Court as and when the case is posted for hearing.

4. The petitioners shall be available for further interrogation as and when required, on the written requisition by the investigating agency.

5. The petitioners shall not tamper with any evidence and shall not influence the prosecution witnesses.

6. On executing the bail bonds they be released on bail pending trial.

However, the prosecution is at liberty to file cancellation of bail, if it is brought to the notice of the prosecuting agency that the present

petitioners violate the conditions imposed by this Court.”

21. On 6th July 2010, two separate letters were sent by the ICAI to Gopalkrishnan. One required him to appear as a witness on 23rd July 2010 at 2 pm in the disciplinary proceedings against Mr. Ch. Ravindranath and Mr. P. Shiva Prasad who had both managed audits with the PW, Bangalore. In the other letter, Gopalkrishnan was asked to appear on 23rd July 2010 at 3 pm in the disciplinary proceedings against him. By separate letters dated 19th July 2010, Gopalkrishnan explained why he could not appear either as a witness in the disciplinary proceedings against Mr. Ravindranath and Mr. Shiva Prasad and also in the disciplinary proceedings against himself. This was more or less on the same lines as the stand of Srinivas.

22. Thereafter on 26th July 2010, by separate letters, the ICAI required Gopalkrishnan to again appear before the Disciplinary Committee on 12th August 2010 with reference to both the enquiries initiated against Mr. Ravindranath and Mr. P. Siva Prasad as well as the one pending against him. In the circumstances, Gopalkrishnan filed W.P.(C) 5352 of 2010 in this Court on 6th August 2010.

23. As regards the plea of Gopalkrishnan that he should not be asked to appear in the disciplinary proceedings against Mr. Ravindranath and Mr. Shiva Prasad, after hearing the submissions of counsel for both, the Petitioner as well as the ICAI, this Court on 9th August 2010 while disposing of the CM No. 10545 of 2010 passed the following order:

“1. Notice. Mr. Tiku and Mr. Ravinder Agarwal, CGSC accept

notice on behalf of Respondent Nos.1 and 2.

2. There are two inquiries for which two separate notices dated 26th July 2010 have been issued to the Petitioner by the Institute of Chartered Accountants of India ('ICAI'). The first show cause notice (at page 222 of the paper book) is regarding the inquiry against the Petitioner himself in which he has been asked to appear before the Disciplinary Committee on 12th August 2010.

3. In regard to the above inquiry, it is not in dispute that the Petitioner was head of the audit team of Price Waterhouse, the firm who were the statutory auditors for Satyam Computers Services Ltd for the years 2000 to 2007. He is facing criminal proceedings and a chargesheet in this regard has been filed against him by the Central Bureau of Investigation ('CBI'). He was granted bail by the High Court of Andhra Pradesh. This case is pending in the court of concerned Additional Chief Metropolitan Magistrate at Hyderabad.

4. Mr. Talluri Srinivas, the Petitioner in Writ Petition (Civil) No. 2505 of 2010 was the head of the audit team of Price Waterhouse for the subsequent years 2007 to 2009. He too is facing criminal trial, pursuant to the charge sheet filed by the CBI in his case. This Court had passed an interim order on 16th April 2010 in W.P.(C)No. 2505 of 2010 postponing the date of the disciplinary proceedings against Mr. Srinivas before the Disciplinary Committee of the ICAI. The said interim order has continued. The said writ petition is listed in this Court next on 20th October 2010.

5. Mr. Kaul, learned Senior counsel appearing for the Petitioner submits that as far as the enquiry against the Petitioner is concerned, the question of law raised in the present writ petition is identical to the question of law raised by Talluri Srinivas and, therefore, a similar interim relief should be granted to the Petitioner.

6. Mr. Kaul points out that, as done in the case of Mr. Srinivas, the Petitioner too has produced a chart to show that there is an overlap of the disciplinary and criminal proceedings. He states that the Petitioner's case is covered by para 22 (ii) of the judgment of the Supreme Court in *M. Paul Anthony v. Bharat Gold Mines Ltd. (1999) 3 SCC 679*.

7. Having considered the above submissions, this Court directs that the disciplinary proceedings against the Petitioner shall remain stayed till the next date of hearing.

8. The second notice dated 26th July 2010 requires the Petitioner to remain present as a witness in the disciplinary proceedings initiated against Mr. P. Siva Prasad and Mr. Ravindranath which has also been fixed for 12th August 2010. Both Mr. P. Siva Prasad and Mr. Ravindranath have been cited as prosecution witnesses by the CBI in the chargesheet filed against the Petitioner. It is submitted that the Petitioner may not be compelled to make any statement before the Disciplinary Committee that may prejudice his defence in the criminal trial.

9. Mr. Tiku, on the other hand, submits that the Petitioner has been cited as a witness by the above two persons and the Respondent ICAI is under an obligation under the statute to summon him. He, nevertheless, states that the Petitioner will be under no compulsion to make any statement before the Disciplinary Committee which he might think will prejudice his defence in the criminal trial. Mr. Tiku added that if the Petitioner appears before the Disciplinary Committee and states that he does not wish to make any statement in view of the pending criminal trial, the Disciplinary Committee will not insist on his making a statement.

10. In view of the above statement of Mr. Tiku, there is no need for this Court to direct the postponement of the proceedings against

Mr. P. Siva Prasad and Mr. Ravindranath scheduled for 12th August 2010. The Petitioner is under no compulsion to make any statement which might prejudice his defence in the criminal proceedings. No adverse inference will be drawn by the Disciplinary Committee if the Petitioner declines to make a statement.

11. Mr. Kaul states that in view of the fact that the Petitioner is required to appear before the CBI on 12th August 2010 at 10 am, he may be permitted to appear before the Disciplinary Committee after 1 pm. Mr. Tiku states that there will be no difficulty in this regard.

12. The application stands disposed of.”

Submissions of Counsel

24. Mr. S. Ganesh, learned Senior counsel appearing for the Petitioner Srinivas, refers to the specific paragraphs of the CBI's charge sheet and the paras of the *prima facie* opinion formed by the Director (Discipline), ICAI to show that the subject-matter of both the disciplinary proceedings as well as the criminal case in the Special Court, CBI against Srinivas are more or less identical. Referring to the list of witnesses cited by the CBI, he points out that the Superintendent of Police (SP), CBI as well as the General Manager, SEBI whose statements were relied upon in the disciplinary proceedings, are also the witnesses in the criminal trial. If Srinivas were to cross-examine the SP, CBI in the disciplinary proceedings then he will be required to disclose his entire defence and the cross-examination in the criminal case will be an empty formality. He pointed out that Mr. Uttam Prakash Agarwal, President of the ICAI was also cited as a witness in the criminal trial, and he is also a witness in the disciplinary proceedings. A reference is also made to a news

item where the ICAI was reported to have requested the CBI and the SEBI to share the evidence gathered both against Srinivas and Gopalkrishnan and they had also requested the CBI and the SEBI to be their witnesses. A reference was made to the report dated 5th April 2009 of the ICAI Group, which formed a part of the MDIT, the conclusions of which formed the basis for the *prima facie* opinion dated 17th September 2009 of the Director (Discipline). The said report of the ICAI Group also formed the basis of the charge sheet. Relying on the judgments of the Supreme Court in ***M. Paul Anthony v. Bharat Gold Mines Ltd. (1999) 3 SCC 679*** and ***Indian Overseas Bank v. P. Ganesan (2008) 1 SCC 650***, it is submitted that since the criminal case against Srinivas is on identical facts as in the disciplinary proceedings initiated by the ICAI and the charges in the criminal case were of a grave nature, the disciplinary proceedings should be stayed till the conclusion of the criminal case. He submitted that since the Special Court, CBI is proceeding with the case which is at the stage of framing of charges, and there is no other case before that court, the criminal trial is not expected to take any further time. It may be mentioned here that after the hearing concluded, counsel for the Petitioners placed before this Court a copy of an order dated 26th October 2010 passed by the Supreme Court in CrI.A. Nos. 2068-72 of 2010 cancelling the bail granted to Mr. Raju and four other accused persons and directing conclusion of the trial by the Special Court by 31st July 2011.

25. Mr. Ganesh further submitted that it was not open to Srinivas to exercise any right of silence before the Disciplinary Committee of the ICAI and if he does so, an adverse inference could be drawn against him by the
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Disciplinary Committee in regard to the very same charges which formed the subject matter of the criminal case. He would, therefore, be compelled to disclose his defence and this would be violative of his fundamental right against self-incrimination under Article 20(3).

26. Appearing for Gopalkrishnan, Mr. N.K. Kaul, learned Senior counsel pointed out that soon after the statement made by Mr. Raju, both Gopalkrishnan and Srinivas had been suspended from PW. Gopalkrishnan had since retired from PW. Mr. Kaul doubted the objectivity of the proceedings before the Disciplinary Committee since the report of the ICAI Group headed by its President and consisting of its Vice-President had already formed an opinion in their report dated 5th April 2009, which formed the basis of the *prima facie* opinion of the Director (Discipline). The disciplinary proceedings conducted by the ICAI after such pre-judgment of the conduct of the Petitioners was unlikely to be fair or objective. He also referred to a statement made in the counter affidavit at para A of the Preliminary Objections that “the discretionary jurisdiction of this Hon’ble Court may therefore not to be permitted to be used by the unscrupulous Chartered Accountants as they are a part of the conspiracy involving a fraud of Rs. 7000 crores.” Mr. Kaul submitted that statements like these betrayed the biased attitude of the ICAI, even before the disciplinary proceedings against Gopalkrishnan commenced.

27. Mr. Kaul points out that Gopalkrishnan has not been discharging any function as a Chartered Accountant ever since he was suspended from PW and he does not intend to do so till the conclusion of the criminal trial. It is

submitted that the constitutional right against self-incrimination cannot be violated on account of the insistence by the ICAI to proceed with its disciplinary proceedings. He points out that Ms. Vandana D. Nagpal, the Director (Discipline), ICAI has been cited as a witness at Serial No. 37 of the List of Witnesses forming part of the charge-sheet filed by the CBI. The Secretary of the ICAI, Mr. T. Kartikeyan has also been cited as a witness.

28. Appearing for the ICAI, Mr. Ramji Srinivasan, learned Senior counsel first submitted that the entire basis of alleging that the subject-matter of both, the proceedings before the Disciplinary Committee and the Special Court, CBI is the same, is misconceived. According to him, the disciplinary proceedings cannot possibly enquire into the charges of criminal conspiracy, fraud, cheating and cannot possibly award any punishment for those offences, which only a criminal court can. He also submits that the standard of proof adopted by the disciplinary proceedings would be based on “the preponderance of probabilities”, which was different from the standard of “proof beyond all reasonable doubt” to be adopted in the criminal proceedings. Thirdly, it is submitted that the focus of the disciplinary proceedings initiated by the ICAI was very different from that of the criminal trial. One of the charges to be examined by the criminal court was that both Srinivas and Gopalkrishnan held themselves out to be the partners of PW, whereas in fact they were partners only of PW, Bangalore. The question of cheating of SCSL was not part of the disciplinary proceedings at all. Referring to the charge by the CBI that Srinivas was acting in collusion with Mr. Raju, it is submitted that this again could not be the subject matter of the disciplinary proceedings. The disciplinary proceedings would be

concerned only with the discrepancy in the accounts and, therefore, its scope of enquiry will be much narrower than what will be examined by the Special Court, CBI.

29. Mr. Srinivasan then contended that although the criminal case has been assigned to a fast-track court, the fact that there are 433 witnesses and the case is still at the stage of framing of charges, the trial is unlikely to conclude speedily. He further submitted that one of the grounds on which bail was sought and is granted was that the criminal trial is going to be a long drawn one. Having made that submission before the Supreme Court and obtained bail, it did not lie in the mouth of the Petitioners to now urge that the disciplinary proceedings can be stayed in view of the expeditious disposal of the criminal trial. He submitted that on the other hand the decisions in *State of Rajasthan v. B.K. Meena (1996) 6 SCC 417*; *Depot Manager APSRTC v. Mohd Yousuf Miya (1997) 2 SCC 699*; *Kendriya Vidyalaya v. T. Srinivas (2004) 7 SCC 442* and *Hindustan Petroleum Corporation Ltd. v. Sarvesh Berry (2005) 10 SCC 471* emphasized that the disciplinary proceedings cannot be postponed indefinitely to await the conclusion of a criminal trial.

30. It is submitted that there is no provision in the CA Act for suspending the two Petitioners from practice as Chartered Accountants. It would cause severe prejudice to public interest if, despite facing serious criminal charges as well as charges of professional misconduct, the Petitioners are permitted to have the disciplinary proceedings against them under the CA Act postponed indefinitely. Reliance is also placed on the judgments of this *W.P.(C) Nos. 2505 & 5352 of 2010*

Court in *Brahma Prakash Kalra v. NTPC* 96 (2002) DLT 369, *CT. Krishan Kumar v. Union of India* [judgment dated 31st May 2007 in Writ Petition (C) 2384 of 2007] and of the Bombay High Court in *Anupama Naik v. Standard Chartered Bank* 2007 BCR (4) 549. Mr. Srinivasan submitted that by appearing before the disciplinary proceedings and offering their explanations for misconduct, no prejudice could be caused to either Petitioner. If they are exonerated on a lesser standard of proof, they would not be prejudiced in the criminal trial at all. Mr. Srinivasan submitted on instructions that in the disciplinary proceedings, the examination of SP (CBI) as a witness is only for the purposes of marking the documents, i.e. the CBI's charge sheet. Likewise, the other witnesses from the CBI will be examined only for the purposes of marking the relevant records. He submitted that Mr. Uttam Prakash Agarwal is not proposed to be examined as a witness in the disciplinary proceedings, and would not participate in the disciplinary proceedings. It is submitted that merely labeling the charges in a criminal case as 'grave' will not suffice and the burden will be on the Petitioners to show that these are, in fact, grave criminal charges. It is submitted that the disciplinary proceedings ought to be allowed to proceed in accordance with law.

Factors influencing stay of disciplinary proceedings pending criminal trial

31. Before proceeding to discuss the contentions of the counsel for the parties, it is necessary to recapitulate the current legal position as regards the continuation of disciplinary proceedings when a criminal trial on the same charges is pending.

32. The question whether the disciplinary proceedings can be allowed to proceed when a criminal trial is pending on the same charges has invariably arisen in the domain of service law. The cases discussed hereinafter will show that the context invariably has been of an employee facing disciplinary proceedings over a set of charges, which are either similar or identical to the charges forming the subject matter of a criminal trial in which such employee is the accused.

33. In *Delhi Cloth & General Mills Ltd. v. Kushal Bhan* AIR 1960 SC 806, it was acknowledged that it was not a principle of natural justice “that an employer must wait for the decision at least of the criminal trial court before taking action against an employee.” However, it was observed by the Supreme Court that “**if the case is of a grave nature or involves questions of fact or law, which are not simple**, it would be advisable for the employer to await the decision of the trial court, so that the defence of the employee in the criminal case may not be prejudiced.” (emphasis supplied)

34. In *Tata Oil Mills Co. Ltd. v. Workmen* AIR 1965 SC 155, it was held to be “desirable” to stay the domestic enquiry pending final disposal of the criminal case. In *Jang Bahadur Singh v. Baij Nath Tiwari* AIR 1969 SC 30, it was held that “the initiation and continuation of disciplinary proceedings in good faith is not calculated to obstruct or interfere with the course of justice in the pending court proceeding. The employee is free to move the court for an order restraining the continuance of the disciplinary proceedings.” In *Kusheshwar Dubey v. Bharat Coking Coal Ltd.* AIR 1988 SC 2118, the Supreme Court after analyzing the case law found that “it is

neither possible nor advisable to evolve a hard and fast strait-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation.” In the facts of that case, it was found that since the “criminal action and the disciplinary proceedings are grounded upon the same set of facts”, the disciplinary proceedings should have been stayed.

35. In *Nelson Motis v. Union of India AIR 1992 SC 1981*, it was held that the disciplinary proceedings could be continued even after the employee had been acquitted by the criminal court since the standard of proof was different. Moreover, the Court found that the subject matter of the disciplinary proceedings in that case was not exactly the same as in the criminal case.

36. In *State of Rajasthan v. B.K. Meena (1996) 6 SCC 417*, the State Government issued a memo of charges in regard to the allegation that the Respondent had misappropriated public funds while working as Additional Collector-cum-Project Director, District Rural Development Agency, Jaipur in the year 1989. An FIR had been registered in relation thereto on 12th March 1990. The Respondent had been arrested on 26th March 1990. After responding to the articles of charges in the disciplinary proceedings, the Respondent filed a petition before the Central Administrative Tribunal, Jaipur challenging the disciplinary proceedings. The CAT stayed the disciplinary proceedings. Thereafter the State of Rajasthan revoked the order of suspension and reinstated him. The Respondent thus amended his petition before the CAT and asked for the stay of the disciplinary enquiry. The CAT

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stayed the disciplinary proceedings pending the conclusion of the criminal trial. The Supreme Court reversed the CAT's order. After analyzing the relevant case law, it observed as under (SCC @ p.422-423):

“14. It would be evident from the above decision that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings, it is emphasised, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast Rules can be enunciated in that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is "that the defence of the employee in the criminal case may not be prejudiced." **This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case.** The ground indicated in *D.C.M.* and *Tata Oil Mills* is not also an invariable rule. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending consideration is that the disciplinary enquiry cannot be - and should not be - delayed unduly. So far as criminal cases are concerned, it is well-known that they drag on endlessly where high officials or persons holding high public offices are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion. That is the reality in spite of repeated advice and

admonitions from this Court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of the delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. **While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course.** All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the decisions referred to above.” (emphasis supplied)

37. The other factor on facts which weighed with the Supreme Court in ***B.K. Meena*** was that (SCC @ p. 423):

“The irregularities alleged against the respondent are of the year

1989. The conclusion of the criminal proceedings is nowhere in sight. (Each party blames the other for the said delay and we cannot pronounce upon it in the absence of proper material before us.) More than six years have passed by. The charges were served upon the respondent about 4 years back. The respondent has already disclosed his defence in his elaborate and detailed statement filed on 9.2.93. There is no question of his being compelled to disclose his defence in the disciplinary proceedings which would prejudice him in a criminal case. The charges against the respondent are very serious. They pertain to misappropriation of public funds to the tune of more than Rupees one crore. The observation of the Tribunal that in the course of examination of evidence, new material may emerge against the respondent and he may be compelled to disclose his defence is, at best, a surmise - a speculator reason. We cannot accept it as valid.”

The further factor that weighed with the Supreme Court was that the standard of proof in the disciplinary proceedings and that in the criminal trial would be different. It must be mentioned here that the observations in para 14 in ***B.K. Meena*** were heavily relied upon by Mr. Srinivasan, learned Senior counsel for the Respondent No. 1 ICAI to urge that the disciplinary proceedings may be stayed only where there are criminal cases involving questions of grave nature of both fact and law. He urged that in the present case there were no grave questions of law, which have been shown by the Petitioners to be involved in the criminal proceedings that warranted stay of disciplinary proceedings.

38. In ***Depot Manager APSRTC v. Mohd Yousuf Miya***, the APSRTC initiated disciplinary proceedings against the Respondent driver on the ground that he had caused an accident in which a cyclist died. Prosecution

was also launched against the driver under Section 304, Part II of the IPC in the criminal court. The High Court stayed the departmental enquiry pending criminal trial. This ruling of the High Court was reversed by the Supreme Court. After discussing the earlier decisions, it was observed in that case that the charge in the disciplinary proceedings was about the failure to anticipate the accident and prevention thereof. It was concluded that “it has nothing to do with the culpability of the offence under Section 304-A and 338 IPC.”

It was reiterated that (SCC @ p. 704):

“It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law.”

39. In *M. Paul Anthony v. Bharat Gold Mines Ltd.*, the appellant was a Security Officer in Bharat Gold Mines, a government undertaking. In a police raid, a mining sponge gold ball weighing 4.5 grams and 1276 grams of gold-bearing sand were recovered from the appellant’s house. He was placed under suspension and disciplinary proceedings were commenced. Criminal proceedings were also initiated. On the conclusion of the disciplinary proceedings, the appellant was dismissed from service. Thereafter he was acquitted by the criminal court with the categorical finding that the prosecution had failed to establish its case. On the basis of

his acquittal, he requested for reinstatement which was turned down. After unsuccessfully challenging it before the High Court, the appellant approached the Supreme Court. It was held that the criminal case and departmental proceedings were based on identical set of facts and in the circumstances, “it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.” The witnesses who were examined by the enquiry officer in the departmental proceedings were the same witnesses who were examined in the criminal case. Since there was no iota of difference in the facts and evidence in the departmental and criminal proceedings, it was concluded that “the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case.” In arriving at the above conclusion, the Supreme Court had an occasion to review the entire case law up to that point in time and summarized the position as under (SCC @ p. 691):

“22. The conclusions which are deducible from various decisions of this Court referred to above are:

- (i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.
- (ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the Departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest.”

40. On account of the above decision in *M.Paul Anthony*, much of the argument in the present petitions centered on whether the Petitioners were facing charges in the criminal cases which were identical to that forming subject matter of the disciplinary proceedings before the ICAI; whether the charges in the criminal court were of a grave nature, and whether they involved “complicated questions of law and fact.”

41. To continue the discussion of the decisions on the point, the question again arose in *Kendriya Vidyalaya v. T. Srinivas*. There the Respondent, while working with the appellant Kendriya Vidyalaya Sangathan (‘KVS’) as an Upper Division Clerk, was arrested with the CBI and charged for the

offence under Section 7 read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 ('PCA'). During the pendency of the criminal trial, departmental proceedings were initiated. The Tribunal stayed the disciplinary proceedings till the disposal of the trial. The KVS challenged the decision in the High Court stating that they should be permitted to proceed in the departmental enquiry at least in regard to Charge 3 which was independent of Charges 1 and 2. This was rejected by the High Court holding that Charge 3 was interconnected with the other two charges. The Supreme Court, while allowing the appeal of the KVS, found that the Tribunal and the High Court proceeded on an erroneous principle as if the stay of the disciplinary proceedings "is a must in every case where there is a criminal trial on the very same charges." The Court followed the decision in *State of Rajasthan v. B.K. Meena*, and reversed the High Court's judgment.

42. In *State Bank of India v. R.B. Sharma (2004) 7 SCC 27*, the High Court order staying the departmental proceedings was reversed by the Supreme Court only on the ground that the High Court had come to an abrupt conclusion that the employee had been able to show that the entire matter in the departmental proceedings and the criminal court was the same. Since no details had been given to justify this conclusion, it was directed that the High Court should rehear the matter.

43. In *HPCL v. Sarvesh Berry*, the CBI raided the house of the Respondent in 1998 and charged him with having been in possession of assets disproportionate to his known sources of income. After obtaining sanction for prosecution, the CBI filed a charge sheet. The criminal trial did not

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progress for at least four years. In the disciplinary proceedings initiated by the employer, there were three charges. The first related to possession of assets disproportionate to the known sources of income and the other two related to misconduct relating to non-disclosure or non-submission of property returns as required by the conduct rules. A Division Bench of the High Court held that the second and third charges were related to the first charge and it would not be safe to permit the employer to continue the departmental proceedings till the completion of the criminal case. Allowing the appeal of the employer, the Supreme Court held as under (SCC @ p. 475):

“8. The purposes of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So, crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of a grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as

per the evidence defined under the provisions of the Indian Evidence Act 1872 (in short the "Evidence Act"). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

Thereafter in para 13 it was observed as under (SCC @ p. 477):

"13. It is to be noted that in cases involving Section 13(1) (e) of the P.C. Act, the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income. The expression 'known sources of income' is related to the sources known to the authorities and not the accused. The Explanation to Section 13(1) of the P.C. Act provides that for the purposes of the Section, "known sources of income" means income derived from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. How the assets were acquired and from what source of income is within the special knowledge of the accused. Therefore, there is no question of any disclosure of defence in the departmental proceedings. In the criminal case, the accused has to prove the source of acquisition. He has to satisfactorily account for the same. Additionally, issues covered by charges 2 and 3 cannot be the subject matter of adjudication in the criminal case."

Consequently the employer was permitted to continue the departmental proceedings.

44. In *NOIDA Entrepreneurs Association v. NOIDA* (2007) 10 SCC 375, it was again held that there was a subtle difference between a departmental enquiry and the criminal proceedings, the standards of proof in which were different. The order of the State Government not to continue the departmental enquiry was held unsustainable and the departmental enquiry was directed to continue. In *Indian Overseas Bank v. P. Ganesan*, the Supreme Court again answered in the negative the question whether the pendency of a criminal case by itself would be a sufficient ground for stay of the departmental proceedings. Additionally in that case, it was noticed that the departmental proceedings against the employees in question had made considerable progress and a large number of witnesses had already been examined.

Applicability of the M Paul Anthony test to the present cases

45. The judgments of the Supreme Court discussed hereinbefore by and large permitted the continuation of disciplinary proceedings notwithstanding the pendency of a criminal case on the same charges. In applying the law explained in the above cases to the present petitions, the Court is called upon to examine: (a) are the charges on which the disciplinary proceedings are proposed to be held identical or nearly similar to the charges on which they are facing criminal proceedings? (b) Are the criminal charges of a grave nature? (c) Do the charges involve complicated questions of law and fact?

46. It may at the outset be noticed that in the criminal case, arguments on charge which were in progress when these petitions were argued have been

framed by the Special Judge on 25th October 2010. The offences mentioned in the charge sheets do allege that the Petitioners have committed offences which could be characterized as being of a 'grave' nature. These include the offences under Sections 409, 420, 468, 471, 477-A, 201 r/w Section 120-B IPC. Secondly, a comparison of the charges in the disciplinary proceedings with those in the criminal trial indicates that while the charges in the former will all be examined in the latter as well, the converse is not true. There would be additional matters that are likely to be examined in the criminal trial. This brings up the third limb, i.e. whether the charges involve complicated questions of law and fact? It may be recalled that in ***B.K. Meena*** the Supreme Court has reiterated that criminal case should be of a grave nature "involving complicated questions of fact and law." In other words, it is not sufficient for a Petitioner resisting departmental proceedings to show that the criminal case is based on an identical set of facts but that it involves complicated questions of both fact and law.

47. The learned senior counsel for the ICAI was right in the submission that apart from merely stating that the charges involve complicated questions of law and fact there has been nothing actually shown by the Petitioners to demonstrate this. Whether in fact the charges that are stated to have been framed on 25th October 2010 by the Special Judge involve complicated questions of law and fact cannot be determined unless they are studied in some detail and further after the trial progresses. Also, the mere fact that the number of witnesses is large or that the alleged fraud is of a large sum need not by itself mean that the questions of fact and law are complicated.

Thirdly, even if in criminal cases, the facts may be invariably complicated,
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the question of law need not be. Understandably therefore, the learned senior counsel for the Petitioners did not address the Court on this particular aspect except to repeat the requirement of *M Paul Anthony* that the criminal case involved complicated questions of law and fact. This however is not sufficient if the court has to be persuaded to stay the disciplinary proceedings.

48. The inescapable conclusion is that the third and important limb of the test evolved in the decisions discussed hereinbefore and succinctly summarised in *M Paul Anthony* has not been shown by the Petitioners to be satisfied in their cases viz., that the criminal cases in which they are arrayed as accused involve complicated questions of law and fact. They have therefore been unable to persuade this Court, on the basis of the law explained above, to stay the disciplinary proceedings pending the conclusion of the criminal trial.

Other factors

49. One important factor in each of the above decisions that have been discussed is that the issue arose in the context of service law where the desirability of permitting an employee continuing to discharge official duties pending disciplinary proceedings weighed with the courts. In the present writ petitions, although the Petitioners cannot be equated with government servants, they too have been charged with professional misconduct in not discharging their duties, as expected of a professional chartered accountant in terms of the CA Act. A chartered accountant who continues to have a privilege of practising as such notwithstanding the fact that he may be facing

charges of professional misconduct is indeed a matter of concern. It is no less than having a government servant facing disciplinary proceedings on serious charges. What is more significant is that a chartered accountant cannot be suspended from practice and there is nothing to prevent a chartered accountant practising as such till such time the disciplinary proceedings come to an end.

50. Relying on the observations of the Supreme Court in *M Paul Anthony* [SCC para 22 (v)] to the effect that the disciplinary proceedings can be asked to continue if “the criminal case does not proceed or its disposal is being unduly delayed”, it was urged that since there is a designated fast track court that has been asked to conclude the criminal trial before 31st July 2011, the disciplinary proceedings, even if stayed on account of the pendency of the criminal case, could be resumed and proceeded with soon thereafter and would therefore not get indefinitely postponed. This Court is not persuaded to accept this submission. The penultimate paragraph of the Supreme Court’s order dated 26th October 2010 acknowledges that if the trial is unable to conclude before 31st July 2011 the accused whose bail have been cancelled can apply afresh for bail. In any event, unless this Court is shown that the charges involve complicated questions of law and fact the case for stay of disciplinary proceedings pending the conclusion of the criminal trial cannot be said to be made out.

The right against self-incrimination

51. One of the points urged by learned Senior counsel for the Petitioners is that during the course of cross-examination of the witnesses for the ICAI in *W.P.(C) Nos. 2505 & 5352 of 2010*

the disciplinary proceedings, the Petitioners will be compelled to disclose their defence which might prejudice them in the criminal trial and, therefore, this would take away one of their valuable rights under Article 20(3) of the Constitution as far as the criminal trial is concerned. Article 20(3) talks of the right against self-incrimination. The scope and ambit of this right has been explained in ***Romesh Chandra Mehta v. State of West Bengal AIR 1970 SC 940***. The context in that case was about facing proceedings under the Sea Customs Act, 1878 while facing criminal trial on the same set of charges. It was argued that by being compelled to disclose the defence in the proceedings under the Sea Customs Act, the Petitioner there would be disclosing the entire defence in the criminal trial and, therefore, it would be violative of his constitutional right under Article 20(3). This plea was, however, negated by the Supreme Court on the following reasoning (AIR @ p. 945):

“11. The remaining contention that a person against whom an enquiry is made by the Customs Officer under the Sea Customs Act is a person accused of an offence and on "that account he cannot be compelled to be made a witness against himself, and the evidence if any collected by examining him under Section 171-A of the Sea Customs Act is inadmissible has, also no substance. By Article 20(3) of the Constitution a person who is accused of any offence may not be compelled to be a witness against himself. The guarantee is, it is true, not restricted to statements made in the witness box. This Court in ***State of Bombay v. Kathi Kalu Oghad AIR 1961 SC 1808*** observed at p. 1817:

""To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or

otherwise.

‘To be a witness’ in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing."

But in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person it has to be established that when he made the statement sought to be tendered in evidence against him, he was a person accused of an offence. Under Section 171-A of the Sea Customs Act, a Customs Officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by Clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression "any person" includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act

with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate. In *Maqbool Hussain v. The State of Bombay*, 1953 SCR 730, the Court held that a person against whom an order for confiscation of goods had been made in proceedings taken by Customs Officers under Section 167 of the Sea Customs Act and was subsequently prosecuted before a Magistrate for offences under the Foreign Exchange Regulation Act, 1947, could not plead the protection of Article 20(2), since he was not "prosecuted" before the Customs authorities, and the order for confiscation was not a "punishment" inflicted by a Court or judicial tribunal within the meaning of Article 20(2) of the Constitution and the prosecution was not barred."

52. The position in law would be no different as regards the Petitioners having to depose before the disciplinary committee in proceedings under the CA Act. Consequently, this Court is unable to accept the plea that by being asked to appear in the disciplinary proceedings under the CA Act, the fundamental right of the Petitioners under Article 20(3) vis-à-vis the criminal trial would be violated. The contention that the Petitioners have no right of silence in the disciplinary proceedings and, therefore, their statements in those proceedings will amount to disclosure of their defence in the criminal trial is without merit in view of the fact that the very nature of the two proceedings is different as explained in the above decisions.

Conclusion

53. For all of the aforementioned reasons, this Court finds no ground having

been made out by the Petitioners for the grant of the reliefs as prayed for.

The writ petitions are dismissed with costs of Rs. 10,000/- each which will be paid by the each of the Petitioners to the Respondent No. 1 ICAI within a period of four weeks. The interim orders stand vacated.

S. MURALIDHAR, J.

NOVEMBER 22, 2010
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