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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 6488/2011

Date of order: 5th September, 2011

NARESH CHANDRA AGARAWAL Petitioner
Through Mr. Anurag Kumar Agarwal,
Advocate.

Versus

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA AND ORS. Respondents
Through Mr. Rakesh Agarwal, Advocate
for respondent No. 1.
Mr. Sachin Datta, CGSC and Mr.
Abhimanyu Kumar, Advocate for
respondent No. 2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not ? | Yes. |
| 3. Whether the judgment should be reported in the Digest ? | Yes. |

DIPAK MISRA, CJ.:

Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner, a Chartered Accountant, has prayed for declaring Rule 9(3)(b) of Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as the '2007 Rules') as ultra vires as the said Rule

transgresses and supplants Section 21-A(4) of the Chartered Accountants Act, 1949 (for brevity, 'the 1949 Act').

2. We have heard Mr. Anurag Kumar Agarwal, learned counsel for the petitioner, Mr. Sachin Datta, learned Standing Counsel for Union of India and Mr. Rakesh Agarwal, learned counsel for the respondent-institute.

3. On a perusal of the pleadings that have been asseverated in the writ petition, we find the challenge pertains to the alleged transgression by the rule making authority of the statutory provision. Section 21 deals with 1949 Act, which occurs in Chapter-V, which deals with misconduct. It deals with Disciplinary Directorate. The said provision reads as follows:

“21. Disciplinary Directorate.

- (1) The Council shall, by notification, establish a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it.
- (2) On receipt of any information or complaint along with the prescribed fee, The Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct.
- (3) Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, he shall place the matter 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, he shall place the matter before the Disciplinary Committee.

(4) In order to make investigations under the provisions of this Act, the Disciplinary Directorate shall follow such procedure as may be specified.

(5) Where a complainant withdraws the complaint, the Director (Discipline) shall place such withdrawal before the Board of Discipline or, as the case may be, the Disciplinary Committee, and the said Board or Committee may, if it is of the view that the circumstances so warrant, permit the withdrawal at any stage.”

4. Section 21A provides for Board of Discipline. Section 21A(c) stipulates that the Director (Discipline) shall function as the Secretary of the Board. Sub-section 4 of Section 21A reads as follows:

“21A.(4) The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case; and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.”

5. On a studied scrutiny of the aforesaid statutory provisions, it is clear that the Director (Discipline), who is the Secretary of the Board of Discipline, has been conferred the power to submit

reports before the Board of Discipline with all the information on the complaints for the purpose of formation of an opinion. If the Director (Discipline) is of the opinion that there is no prima facie case and the Board of Discipline agrees with the opinion of the Director (Discipline), the matter is closed. In case of disagreement, the Board of Discipline may advise the Director (Discipline) to carry further investigation.

6. The Rule 9(3)(b), which is the subject matter of assail is as follows:

“9.(3) Where the Director is of the prima facie opinion that the member or the firm is not guilty of any misconduct either under the First Schedule or the Second Schedule, he shall place the matter before the Board of Discipline, and the Board of Discipline,-

(b) if it disagrees with such opinion of the Director, then it may either proceed under chapter IV of these rules, if the matter pertains to the First Schedule, or refer the matter to the Committee to proceed under Chapter V of these rules, if the matter pertains to the Second Schedule or both the Schedules, or may advise the Director to further investigate the matter.”

7. It is submitted by Mr. Anurag Kumar Agarwal, learned counsel for the petitioner that the Section mandates that the Board of Discipline if it disagrees with the Director (Discipline), it shall close the matter but the Rule as has been framed

empowers the Board of Discipline either to proceed with Chapter-IV of these Rules if the matter pertains to the First Schedule or refer the matter to the Committee of Disputes to proceed under Chapter-V of these Rules if the matter pertains to Second Schedule or both the schedules. It is urged by him when the Section provides in a categorical manner either to close the case or direct further investigation, the question of reference to the Dispute Committee does not arise.

8. The Chapter-IV of the 1949 Act deals with Board of Discipline. Chapter-V deals with the Disciplinary Committee. Section 21A(4) clearly stipulates that if the Board of Discipline disagrees, it may advise the Director (Discipline) to further investigate the matter. It is, however, not possible to accept that the Board cannot disagree with the report of Director (Discipline) or in case of disagreement the Board can only direct further investigation by the Director (Discipline) and not refer the matter to the Disciplinary Committee when violation/breach of the Second Schedule or both schedules is alleged. Any such restriction on the Board of Discipline is not expressly stipulated and should not impliedly inferred if we examine the provisions dealing disciplinary proceedings.

9. Section 21A sub-section (3) reads:-

“21A.(3) Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:-

- (a) reprimand the member;
- (b) remove the name of the member from the Register up to a period of three months;
- (c) impose such fine as it may think fit which may extend to rupees one lakh.”

10. Section 21B is as under:

“ 21B. Disciplinary Committee

- (1) The Council shall constitute a Disciplinary Committee consisting of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy;
Provided that the Council may constitute more Disciplinary Committees as and when it considers necessary
- (2) The Disciplinary Committee, while considering the cases placed before it shall follow such procedure as may be specified.
- (3) Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall

afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:-

- (a) reprimand the member;
 - (b) remove the name of the member from the Register permanently or for such period, as it thinks fit;
 - (c) impose such fine as it may think fit, which may extend to rupees five lakhs.
- (4) The allowances payable to the members nominated by the Central Government shall be such as may be specified.”

11. Section 21(4) stipulates that the Disciplinary Directorate shall follow the procedure as they may be specified. The procedure is specified in Rules including the impugned Rule 9(3)(b). We have also examined Chapter IV of 2007 Rules which includes Rules 13, 14 and 15, which prescribe the procedure. As noticed above, Director (Discipline) functions as the Secretary of the Board of Discipline. However, it is difficult to accept that in case Director (Discipline) gives a closure report on the basis of his or her opinion that there is no prima facie case, the Board of Discipline/Disciplinary Committee must accept that opinion and the only option to the Board of Discipline is to advise the Director (Discipline) to investigate the matter further. The provisions do not postulate finality to the prima facie opinion of the Director (Discipline). On the other hand,

Director (Discipline) is the Secretary of the Board. The final determination whether or not a member is guilty of professional or other mis-conduct in the First Schedule or the Second Schedule, is decided by the Board of Discipline or the Disciplinary Committee. The argument raised and the interpretation placed by the petitioner is contrary to the legislative intent and will make the provisions unworkable as it would make the Board of Discipline and the Disciplinary Committee powerless in case the Director (Discipline) gives a negative prima facie report. The phrase 'prima facie' itself shows that report of the Director (Discipline) is tentative and not final. The finality is attached to the orders which are ultimately passed either by the Board of Discipline or the Disciplinary Committee.

12. Quite apart from the above, the term used in Section 21A(4) is "may". The Board is not bound in all cases of disagreement to refer for reinvestigation. In our considered opinion, when discretion has been granted, the word "may" should not be read here as "shall". The word "may" must take the literal colour in the present case. It gives discretion or choice to the Board. As the word "may" is deliberately used and

conveys the legislative intent, we do perceive that it should be interpreted as “shall”. It has to be borne in mind that Rule 9(3)(b) is procedural and states how the steps should be taken and, therefore, it would be an anathema to the basic conception of statutory interpretation that Section 9(3)(b) transgresses or encroaches upon the power conferred under Section 21A(4). On the contrary, it only supplements.

13. In view of the aforesaid, we do not find the Rule to be ultra vires.

14. Before parting with the case, we may note that the petitioner has made certain individual grievances for which he may file an independent writ petition, if so advised.

15. With the aforesaid observation, the writ petition stands disposed of.

CHIEF JUSTICE

SANJIV KHANNA, J.

SEPTEMBER 05, 2011
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