

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.11.2014

+ **W.P.(C) 2213/2013 & CM 4199/2013**

VIPIN MALIK

..... Petitioner

versus

**THE INSTITUTE OF CHARTERED
ACCOUNTANTS OF INDIA**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr V. P. Singh, Senior Advocate with
Ms Yukti Gupta.

For the Respondent : Mr J. S. Bakshi.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner impugns the decision of the Council of Institute of Chartered Accountants of India (hereinafter referred to as 'ICAI') remanding the matter relating to petitioner's alleged professional misconduct to the disciplinary committee, for undertaking further enquiry with regard to specific issues relating to alleged misconduct on the part of the petitioner. The said specific issues were communicated to the petitioner by letter dated 08.03.2013. Accordingly, the petitioner has prayed for filing/quashing the said disciplinary proceedings registered as Case No. 25/CA (16)/1997/DC.

2. The principal controversy to be addressed is whether the disciplinary enquiry against the petitioner/petitioner's firm is liable to be quashed on account of delay.

3. Briefly stated, the relevant facts for considering the above controversy are that the petitioner is a Chartered Accountant, a member of ICAI, and a constituent partner in a firm of accountancy professionals –V. Malik & Associates. An advertisement in respect of the said professional firm was published in the "Accountancy Journal" published by the Institute of Chartered Accountants of England and Wales, in United Kingdom. The said advertisement reads as under:-

“V. MALIK & ASSOCIATES

CHARTERED ACCOUNTANTS

We are a Practising firm of Chartered Accountants having our Head Office at New Delhi, India.

We are handling Assignments like Audit. Due Diligence Reviews, Taxation for Multi-national Corporations, Foreign Exchange Laws, advice and assistance in Exchange Control matters, Financing Options analysis/rehabilitation plans, Working Capital Management, Project Feasibility Studies, Business Plans, Assistance in obtaining Approvals for Foreign Investment, Industrial Licensing, Foreign Exchange Control, Incorporation of Companies, Negotiating Joint Venture Agreements etc.

The Principal of the Firm is also Director on Boards of different Companies including Director on the Control Board of Reserve Bank of India.

We are looking for association with reputed international Chartered Accountant Firms and Consulting Firms.

Please contact for further information on the following address:

V. MALIK & ASSOCIATES
Flat No.8, Golf Apartments, Sujan Singh Park
NEW DELHI – 110003 (INDIA)
PHONE – Off: 4601142 & 4611910
FAX 011 – 4627549 011 – 6465964”

4. The Disciplinary Committee of ICAI became aware of the aforesaid advertisement sometime in 1997 and called upon the petitioner's firm to furnish its comments particularly with reference to the provisions of Clauses (6) and (7) of Part I of the First Schedule to the Chartered Accountants Act, 1949 (hereafter referred to as the "Act") and the Code of Conduct issued by the Council of ICAI. The petitioner responded to the said letter and furnished its comments, essentially, contending that the insertion was made in the Accountancy Journal for purpose of seeking association with other international firm(s) of Chartered Accountants and the details of the petitioner's firm was given for the said purposes. It was further asserted that the petitioner's firm had not given any specific instructions to the Institute of Chartered Accountants of England and Wales for printing the insertion but only suggested the details to be provided in the normal course. Apparently, it was also contended that as the insertion was made in a journal outside India, the Code of Conduct for members of ICAI and the Act did not apply.

5. The comments furnished by the petitioner did not find favour with the concerned committee of ICAI and the information with respect to the insertion was treated as "information" for the purposes of section 21 of the Act; the petitioner's firm was called upon disclose the person(s) answerable for the said advertisement with a request for the said person(s) to furnish their statement. The petitioner submitted a statement on his behalf as well as on behalf of his firm on 01.12.1997. The said information as well as the statement of the petitioner was considered by the Council of ICAI in May 1999 and the Council formed a "*prima facie*" view that petitioner was

guilty of professional and/or other misconduct and, thus, referred the matter to the Disciplinary Committee, for enquiry.

6. In substance, the petitioner's case before the Disciplinary Committee was that the advertisement was inserted without his instructions; although the petitioner had verbally requested the Institute of Chartered Accountants of England and Wales to put him touch with other reputed international firms, for the benefit of his clients, there was no intention to solicit any business. It was further stated that the said advertisement was not paid for by the petitioner/petitioner's firm.

7. The Disciplinary Committee considered the charges against the petitioner and the firm as well as the submissions made on their behalf. Since the petitioner had unequivocally stated that he has neither released any advertisement nor made any payment, the Disciplinary Committee sought information from the Institute of Chartered Accountant in England and Wales, with respect to release of the advertisement in question. However, the Disciplinary Committee did not receive any information from the said institute and, therefore, in its report dated 17.01.2001 came to a conclusion that in absence of any information from the Institute of Chartered Accountant in England and Wales, the evidence available was *"not sufficient to hold that there was any intention of the Respondent to solicit any business or to advertise his personal attainment."*

8. The aforesaid report dated 17.01.2001 of the Disciplinary Committee was considered by the Council of ICAI in its meeting held from 07.01.2002 to 10.01.2002 and was not accepted. The Council decided to remand the

matter to the Disciplinary Committee for further enquiry on certain specific issues. The communication dated 18.04.2002 was also addressed to the petitioner, *inter alia*, informing him the decision of the Council as under:-

“On consideration of the Report of the Disciplinary Committee along with the written representations dated 9th July, 2001, 13th July 2001, 16th August 2001, 11th September 2001, 15th November 2001 and 28th December 2001 of the Respondent, the Council decided not to accept the said report and refer it back to the Disciplinary Committee for further enquiry on specific issues.”

9. Thereafter, there was a complete silence on the part of ICAI and/or the Disciplinary Committee for the next 11 years. After a lapse of over a decade, the disciplinary proceedings were resurrected; by a letter dated 08.03.2013, the petitioner was informed by ICAI that the Disciplinary Committee would conduct a hearing on 19.03.2013 for the purposes of enquiry with respect to the issues annexed with the said letter. The issues enclosed read as under:-

“1. The Committee in context with the charge raised in the instant information case may ascertain from the Respondent as to how and at whose instance the advertisement was published in the Accountancy Journal of the Institute of Chartered Accountants of England and Wales in the month of August 1996 wherein details as regard the professional attainments of the principal of the Respondent firm have been mentioned vis-à-vis the provisions contained in the Code of Ethics.

2. The Committee may ascertain as to at whose behest the advertisement has been released apart from ascertaining who made the payment or whether the same was published free of cost.”

10. It is apparent from the above, that substance of the said issues were identical to those that had been put to the petitioner in 1997 while considering whether the advertisement should be considered as an information for the purposes of taking any disciplinary action. Subsequently, in the later part of 1999, the Disciplinary Committee had again confronted the petitioner with the said allegations. The petitioner had responded to the allegations of misconduct by stating that although the petitioner had spoken to the Institute of Chartered Accountants of England and Wales to put him in touch with reputed international Chartered Accountants firms, he had not given any instructions for the advertisement in the Accountancy Journal. Further, the petitioner had denied that any advertisement had been released by him. The petitioner had also taken a plea that Clauses (6) and (7) of Part I of the First Schedule to the Act should be construed liberally, in the light of the rapid changes in the functioning of accountancy professionals.

11. It is, thus, seen that the Council of ICAI had not raised any new issues or narrowed down the controversy in any manner.

12. Plainly, there has been an inordinate delay in the process, which has not been explained. It also cannot be ascertained from the pleadings whether the delay was on the part of Council of ICAI in specifying the specific issues or on the part of the Disciplinary Committee to communicate the same to the petitioner and commence the proceedings.

13. Before considering the question whether the disciplinary proceedings should be filed/quashed on account of delay, it is necessary to refer to

Section 21 of the Act, which is the relevant statutory provision concerning enquiries relating to misconduct on the part of the members of ICAI.

Section 21 of the Act, as it existed prior to 17.11.2006, reads as under:-

“21. Procedure in inquiries relating to misconduct of members of institute.

- (1) Where on receipt of information by, or of a complaint made to, it, the Council is prima facie of opinion that any member of the Institute has been guilty of any professional or other misconduct, the Council shall refer the case to the Disciplinary Committee, and the Disciplinary Committee shall thereupon hold such inquiry and in such manner as may be prescribed, and shall report the result of its inquiry to the Council.
- (2) If on receipt of such report the Council finds that the member of the Institute is not guilty of any professional or other misconduct, it shall record its finding accordingly and direct that the proceedings shall be filed or the complaint 'shall be dismissed, as the case may be.
- (3) If on receipt of such report the Council finds that the member of the Institute is guilty of any professional or other misconduct, it shall record a finding accordingly and shall proceed in the manner laid down in the succeeding sub- sections.
- (4) Where the finding is that a member of the Institute has been guilty of a professional misconduct specified in the First Schedule, the Council shall afford to the member an opportunity of being heard before orders are passed against him on the case, and may thereafter make any of the following orders, namely:
 - (a) reprimand the member;

- (b) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit: Provided that where it appears to the Council that the case is one in which the name of the member ought to be removed from the Register for a period exceeding five years or permanently, it shall not make any order referred to in clause (a) or clause (b), but shall forward the case to the High Court with its recommendations thereon.
- (5) Where the misconduct in respect of which the Council has found any member of the Institute guilty is misconduct other than any such misconduct as is referred to in subsection (4), it shall forward the case to the High Court with its recommendations thereon.
- (6) On receipt of any case under subsection (4) or subsection (5), the High Court shall fix a date for the hearing of the case and shall cause notice of the date so fixed to be given to the member of the Institute concerned, the Council and to the Central Government, and shall afford such member, the Council and the Central Government an opportunity of being heard, and may thereafter make any of the following orders, namely:--
- (a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;
 - (b) reprimand the member;
 - (c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;
 - (d) refer the case to the Council for further inquiry and report.”

14. A plain reading of Section 21 of the Act, as it existed at the material time, indicates that proceeding against the petitioner is still at its initial stages. As stated above, the report submitted by the Disciplinary Committee was not accepted by the Council and the matter was remanded to the Disciplinary Committee to examine the specific issues. If the disciplinary proceedings were to be carried to its logical end, the same would entail the Disciplinary Committee to make a fresh recommendation after hearing the petitioner. The recommendation made by the Disciplinary Committee would then be placed before the Council.

15. On the basis of the report of the Disciplinary Committee, the Council would have to either record a finding that the petitioner was not guilty of any misconduct or provide the petitioner yet another opportunity to be heard before returning a finding that the petitioner was guilty of professional misconduct as specified in the First Schedule of the Act. The delay has to be viewed keeping in mind the aforesaid procedure.

16. The offending advertisement was published in August 1996, the disciplinary proceedings were effectively commenced in 1997 and the report of the Disciplinary Committee was finalized almost four years later in 2001. The proceedings are now sought to be revived, 12 years later. There is also no explanation offered for this delay and in my view this delay cannot but be termed as inexcusable.

17. The learned counsel for the respondent has cited the decisions of the Supreme Court in Niranjan Hemchandra Sashittal v. State of Maharashtra: (2013) 4 SCC 642 and Ranjan Dwivedi v. CBI, Through

the Director General: (2012) 8 SCC 495, in support of its contention that delay is not fatal to criminal proceedings and the same are not to be quashed on the ground of delay.

18. In **Niranjan Hemchandra Sashittal** (supra), the Supreme Court noted that the accused has approached the Court on other occasions including for quashing of the criminal proceedings which had been dismissed. The Court also took note of the several adjournments that had been taken by the accused and declined to quash the proceedings on account of delay. The Supreme Court explained the factors to be kept in mind while weighing the rights of the accused for a speedy trial, in the following manner:-

“24. It is to be kept in mind that on the one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time-limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective.

25. In the case at hand, the appellant has been charge-sheeted under the Prevention of Corruption Act, 1988 for disproportionate assets. The said Act has a purpose to serve. Parliament intended to eradicate corruption and provide deterrent punishment when criminal culpability is proven. The intendment of the legislature has an immense social relevance. In the present day scenario, corruption has been

treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small and in certain cases, it is extremely high. The gravity of the offence in such a case, in our considered opinion, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenets of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law. Be it noted, system of good governance is founded on collective faith in the institutions. If corruptions are allowed to continue by giving allowance to quash the proceedings in corruption cases solely because of delay without scrutinising other relevant factors, a time may come when the unscrupulous people would foster and garner the tendency to pave the path of anarchism.”

19. After considering the above said factors, the Supreme Court found that the balance was tilted in favour of the prosecution and hence declined to exercise jurisdiction under Article 32 of the Constitution of India. In **Abdul Rehman Antulay v. R.S. Nayak: 1992 1 SCC 225**, a constitution bench of the Supreme Court had explained that the concept for speedy trial was relevant and had to be viewed in the context of various factors. The relevant extract from the said judgment is quoted below:

“83. But then speedy trial or other expressions conveying the said concept—are necessarily relative in nature. One may ask—speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind.....”

20. The Supreme Court, in Para 86 of the judgment, had further enunciated the principles on the basis of which rights would be evaluated. The principles relevant to the right to speedy trial are extracted below:-

“(5) While determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on—what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

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(8) Ultimately, the court has to balance and weigh the several relevant factors—‘balancing test’ or ‘balancing process’—and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order—including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded—as may be deemed just and equitable in the circumstances of the case.”

21. It is necessary to bear in mind that the aforesaid principles regarding right to speedy trial were settled in the context of criminal proceedings and

not domestic proceedings for professional misconduct. Although the nature of two proceedings is different, the right for a speedy adjudication is equally applicable as the same is a facet of fairness which has been read into Article 21 of the Constitution of India. Indisputably, the petitioner would have the right for the speedy conclusion of proceedings initiated against him which by their nature are prejudicial to him.

22. In order to apply the principles as enunciated by the Supreme Court, first of all, it is necessary to examine the allegation against the petitioner. It was alleged that the petitioner had violated Clauses (6) and (7) of Part I of the First Schedule of the Act which read as under:-

“(6) solicits clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means:

Provided that nothing herein contained shall be construed as preventing or prohibiting—

(i) any chartered accountant from applying or requesting for or inviting or securing professional work from another chartered accountant in practice; or

(ii) a member from responding to tenders or enquiries issued by various users of professional services or organisations from time to time and securing professional work as a consequence;

(7) advertises his professional attainments or services, or uses any designation or expressions other than chartered accountant on professional documents, visiting cards, letter heads or sign boards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Chartered Accountants of India or of any other institution

that has been recognised by the Central Government or may be recognised by the Council;

Provided that a member in practice may advertise through a write up, setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council;”

23. A plain examination of the advertisement in question indicates that the petitioner was stated to be a Director on Boards of different companies including a Director on the Board of Reserve Bank of India. *Prima facie*, this does indicate that the professional attainments of the petitioner had been advertised. However, it is doubtful whether the said statement can be held to mean that petitioner was using a designation other than that of a Chartered Accountant. Further, the advertisement, clearly, is for the purpose of seeking association with other international chartered accountant firms; whether the same can be construed as soliciting clients or professional work would be a contentious issue. However, it is apparent that the alleged misconduct is not grave, therefore, a severe punitive action would not be warranted. The gross delay also indicates that ICAI has also not considered the matter grave enough for being pursued aggressively.

24. Secondly, the delay has to be viewed in the context of other factors that may have resulted in the delay such as the workload, number of witnesses/accused, the complex nature of the offence or evidence required etc. The charge in the present case is neither complex nor required any extensive evidence. Even in absence of a communication from the Institute of Chartered Accountants in England and Wales, it could have been reasonably established that the advertisement was at the instance of the

petitioner and his firm as it was admitted that the petitioner had requested the said institute for putting him in touch with foreign firms and also supplied all the details which were published. It would be difficult for the petitioner to sustain his contention that advertisement was issued *suo moto* by the said institute, without any charges, on the basis of a verbal communication; this would not require any time consuming enquiry. In this view, the inexcusable delay of over 11 years clearly violates the right of the petitioner for a speedy disposal.

25. There is yet another aspect that needs to be considered. The purpose of disciplinary proceedings is to ensure that the members conform to the code of conduct as prescribed during the member's professional working life. This object would be completely defeated and would lose its relevance if disciplinary proceedings were to span decades. In the present case, the petitioner has continued to practice as a Chartered Accountant and as a member of ICAI for over 17 years after the alleged misconduct. In the circumstances to now proceed further to take a punitive action for an alleged misconduct done 18 years ago would hardly be meaningful.

26. The learned counsel for the petitioner has relied upon the decision of a Division Bench of this Court in **The Council of the Institute of Accountants of India, New Delhi v. Dinesh Kumar and Anr.**: 1991 (21) DRJ 238 where this Court without going into the merits of the findings of the Disciplinary Committee had directed that the proceedings be filed on account of a delay of four years. The relevant extract of the said decision reads as under:-

“Therefore, for a moment question the findings and bonafides of the Disciplinary Committee which was accepted by the Council. But than we find there has been a great deal of delay by the Council in not acting upon the report to the Disciplinary Committee. They delay is almost for a period of four years which has remained unexplained. There is nothing on record to show as to why it took almost four years for the Council to deliberate upon the report of the Disciplinary Committee and, thus, keep the matter banging to the extreme prejudice of the respondent. Mr. Jain was at pains to explain that due to huge pendency of work with the Council it did not get time to consider the report of the Disciplinary Committee. Such an Explanation is just stated to be rejected. A case like the present one where there is a charge of misconduct against a professional has to be disposed of with utmost expedition. The approach, in the present case, of the Council appears to us to be rather lackluster and the delay inexcusable. We are told that all these years respondent has not been able to get any work of public undertakings and other institutions because of pendency of the disciplinary proceedings. We have noted above, the Council itself had resolved on 1 June 1987 to treat such an infraction merely as technical. It is not disputed before us that whole of the payment has since been made to the articulated clerk by the respondent. The complaint was made on 31 March 1982 and as the sequence of events narrated above would show the Council could meet only on 1 and 2 June 1987 to consider the report of the Disciplinary Committee of 12 September 1983. We find that there have been too much aches in the case, and in the circumstances of the case we will direct that the proceedings be filed. We make no order as to costs.”

27. In my view, the ratio decidendi of the aforesaid decision would be squarely applicable in the facts of the present case.

28. In view of the above, the writ petition is allowed and the disciplinary proceedings against the petitioner and/or his firm V. Malik & Associates being Case No. 25/CA (16)/1997/DC are directed to be filed.

29. Accordingly, the writ petition and the application stand disposed of.

VIBHU BAKHRU, J

NOVEMBER 03, 2014
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