

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 20.01.2015

+

W.P.(C) 4284/2012 & CM No. 8890/2012, CM No. 12079/2012

NARESH THARAD

..... Petitioner

versus

**THE INSTITUTE OF CHARTERED
ACCOUNTANTS OF INDIA AND ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Subhiksh Vasudev, Mr. Karanveer Jindal
and Ms Yukti.

For the Respondents : Mr J.S. Bakshi, Mr. A.S. Bakshi and
Mr. Ankush Sharma for R-1.
Mr. Anil Soni, CGSC with Mr. Saakshi
Agarwal for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition seeking quashing of the report of the Disciplinary Committee of the Institute of Chartered Accountants of India (hereafter 'ICAI') dated 10.02.2012 (hereafter the 'impugned report').

2. According to the petitioner a fair opportunity for being heard has been denied to him. The limited controversy to be considered is whether the proceedings before the Disciplinary Committee of the ICAI (hereafter the 'Disciplinary Committee') fall foul of the principles of natural justice.

And, whether any interference is warranted by this Court at this stage of the disciplinary proceedings in question.

3. Briefly stated the facts to relevant for considering the issues involved are as under:-

3.1. A complaint dated 03.03.2009, in respect of alleged misconduct on the part of the petitioner, was received from respondent no. 2. The said complaint was forwarded to the petitioner, who filed his written statement and thereafter, a rejoinder was filed by respondent no.2. After examining the said documents, Director (Discipline), ICAI rendered a prima facie opinion dated 04.05.2010 wherein the petitioner was held to be prima facie guilty of professional misconduct under clauses (7), (8), and (9) of Part I of second schedule to the Chartered Accountants Act, 1949 (hereafter the 'Act').

3.2. The prima facie opinion of Director (Discipline), ICAI dated 04.05.2010 was considered by the Disciplinary Committee and by letter dated 09.08.2010 the petitioner was called upon to submit his written statement within 21 days. At the request of the petitioner, the time to file the written statement was initially extended to 30.09.2010 and again to 15.10.2010. However, no such written statement was filed by the petitioner.

3.3. By letter dated 08.12.2010, petitioner was called upon for personal hearing before the Disciplinary Committee on, 26.12.2010, at the office of ICAI, Kolkata. By letter dated 16.12.2012 – which was received by the Disciplinary Committee on 21.12.2010 - the petitioner requested for an adjournment on the ground that he would be travelling out of station on

26.12.2010. This request for adjourning the hearing scheduled on 26.12.2010 was declined.

3.4. Thereafter, the hearing of the Disciplinary Committee was fixed on 25.11.2011 at the office of ICAI, Kolkata and the petitioner was informed of the same by letter dated 16.11.2011. By letter dated 22.11.2011, the petitioner requested for an adjournment on medical grounds; the petitioner forwarded a medical certificate, which indicated that the petitioner was advised bed rest till 28.11.2011. However, on 25.11.2011, the hearing was concluded in the absence of the petitioner. By the impugned report dated 10.02.2012, sent to the petitioner by letter dated 15.06.2012 and received by the petitioner on 19.6.2012, the petitioner was held to be guilty of professional misconduct under clauses (7), (8), and (9) of Part I of second schedule to the Act.

4. The issue whether the petitioner was denied a fair hearing has to be considered in the aforesaid backdrop.

5. It is apparent from the above that the petitioner was given opportunity to appear before the Disciplinary Committee. On the first occasion a hearing was fixed by the Disciplinary Committee on 26.12.2010. The petitioner sought an adjournment, which was declined. Although the petitioner did not appear, the hearing was adjourned since the complainant also did not appear on the said date.

6. Thereafter, the petitioner had filed a writ petition (being W.P.(C) 63/2011) before this Court challenging the, *prima facie*, opinion recorded by the Director (Discipline). Apparently, the Disciplinary Committee did

not hold any further hearings while the matter was pending before this Court. The writ petition was dismissed by an order dated 06.01.2011 and the petitioner preferred an appeal (LPA 168/2011) against the said order dismissing the writ petition preferred by the petitioner (W.P.(C) 63/2011). LPA 168/2011 was also dismissed by an order dated 16.08.2011. Before the Division Bench, the learned counsel for the parties agreed that the appeal could be disposed of with the direction to the ICAI to resume the disciplinary proceedings from the week commencing 03.10.2011. This was recorded in the order dated 16.08.2011 whereby the LPA preferred by the petitioner (LPA 168/2011) was rejected.

7. Notice for the hearing scheduled before the Disciplinary Committee on 25.11.2011 was duly received by the petitioner. This time the petitioner sought an adjournment on the ground of his ill health, which was declined.

8. The notes of the hearing held on 25.11.2011 indicate that the petitioner's request for an adjournment was not acceded to. It is apparent from the above that the Disciplinary Committee did not entertain the petitioner's request for an adjournment on either of the two occasions.

9. A perusal of the notes of hearing also indicates that the Director (Discipline) had stated before the Disciplinary Committee that "*Earlier the case was fixed on December 2010 and it was adjourned at his request...*". Apparently, the said statement was made to persuade the Disciplinary Committee to reject the petitioner's request for adjourning the hearing. It does appear that the decision of the Disciplinary Committee to decline the petitioner's request for an adjournment was influenced by the statement made by the Director (Discipline), as the President of the Disciplinary

Committee had immediately thereafter recorded his decision to go ahead with the proceedings *ex-parte*.

10. It is not in dispute that the statement made by the Director (Discipline) was not accurate as the petitioner's request for an adjournment of the hearing scheduled on 26.12.2010 had not been acceded to and was rejected by a letter dated 22.12.2010. In the circumstances, one can safely deduce that the Disciplinary Committee proceeded on the erroneous assumption that the petitioner had been previously granted an adjournment.

11. Having stated the above, it is also necessary to observe that the Disciplinary Committee had not accepted the medical certificate which was sent by the petitioner along with his request for an adjournment of the hearing scheduled on 25.11.2011 since it did not mention any particular ailment that required the petitioner to be put on bed rest.

12. At this stage, it is also necessary to refer to the Chartered Accountants (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (hereafter the 'Rules'). Rule 18 of the Rules provides for the procedure to be followed by the Disciplinary Committee and is quoted below:-

“18. Procedure to be followed by the Committee.- (1) The Committee shall be guided by the principles of natural justice and shall follow the procedure in dealing with all cases before it, as laid down in this Chapter.

(2) If the Committee decides to proceed further under clause (b) of sub-rule (2) of rule 9 or if it receives a reference from Board of Discipline under clause (b) of sub-rule (3) of rule 9, it

shall expeditiously cause to deliver to the respondent and the complainant, a copy each of the following,—

- (a) prima facie opinion formed by the Director; and
 - (b) particulars or documents relied upon by the Director, if any, during the course of formulation of prima facie opinion.
- (3) The Committee shall inform the respondent, as the case may be to file a written statement, within such time as may be specified

Provided that the Committee may give him additional time for submitting his written statement, on application by the respondent on his adducing sufficient reasons to the satisfaction of the Committee for seeking additional time.

Provided further that such additional time shall not be given more than once and if the respondent still does not submit a written statement, the Committee shall presume that he has no further submissions to make and shall proceed to decide the case on merits.

(4) The respondent shall send a copy of his written statement, along with supporting documents and a list of witnesses, to the Director and the complainant within the stipulated time.

(5) The complainant or the Director may, after receipt of the written statement, submit a rejoinder to the Committee, with a copy to the respondent, along with supporting documents, if any.

(6) The Presiding Officer of the Committee shall fix a date, hour and place of hearing, which shall not ordinarily be later than 45 days from the date of receipt of *prima facie* opinion and the committee shall cause a notice to be sent of such date, hour and place to the Director, respondent and complainant and require them to appear before it in person to make oral submissions, if any.

Explanation. — For the purpose of this rule the appearance includes, unless and otherwise directed, appearance by an

advocate or through any authorized representative, who may be a Chartered Accountant, Cost Accountant or Company Secretary.

(7) During the first hearing, the Committee shall read out the charge or charges to the respondent along with the summary of prima facie opinion arrived at by the Director, and ask the respondent whether he pleads guilty to the charge or charges made against him :

Provided that if the respondent does not appear for the first hearing even after one adjournment, the reading out of charge or charges along with the summary of prima facie opinion shall be made in his absence and the case proceeded with in accordance with the provisions of this Chapter.

(8) If the respondent pleads guilty, the Committee shall record the plea and take action as per provisions under rule 19.

(9) If the respondent does not plead guilty, then the Committee shall fix a date for examination of witnesses and production of documents.

(10) The Committee may, on application of the Director, issue notice for appearance to any of his witnesses directing him to attend or to produce any other document or material evidence.

(11) On the date so fixed, the Committee shall proceed to take all such evidence as may be produced by the Director, including oral examination of witnesses and production of documents :

Provided that the Committee may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

(12) After the presenting of evidence by the Director is over, the complainant shall be given an opportunity, if present during the hearing, to present any additional evidence after satisfying the Committee that such evidence is relevant and has not been brought forward during the presentation by the Director.

(13) The respondent shall be then called upon to enter upon his defence and produce his evidence.

(14) If the respondent applies to the Committee to issue any notice for compelling attendance of any witness for the purpose of examination or cross-examination, or the production of any document or any material object, the Committee shall issue such notice unless it considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by it in writing.

(15) The witnesses summoned at the instance of the complainant under sub-rule (12) or the respondent under sub-rule (14) shall not be eligible for reimbursement of expenses incurred for attending the hearing.

(16) After evidences have been presented, the Director and the respondent shall present their arguments before the Committee :

Provided that after the Director has presented his argument, if the complainant, provided he is present during the hearing, feels that any vital argument has been left out by the Director, may present the argument, after convincing the Committee of the same.

(17) The Committee shall consider the evidences and arguments produced before it and arrive at a finding on whether the respondent is guilty or not of any professional or other misconduct.

(18) The Committee may, at the request of any of the parties before it or due to other reasons, and on such terms as it thinks fit, and at any stage of the proceedings, adjourn the hearing :

Provided that such adjournment shall not be given more than once at any stage of the proceedings.

Explanation. - For the purpose of this rule, inability of the complainant, advocate, authorized representative or witness, to

appear shall not be treated as a valid reason for adjournment of a hearing.”

13. A plain reading of Rule 18(1) of the Rules indicates that the Disciplinary Committee is to be guided by the principles of natural justice. Rule 18(7) of the Rules indicates that at the first hearing, the Disciplinary Committee is to read out the charge or charges to the respondent along with a summary of the *prima facie* opinion arrived at by the Director and ask the concerned member whether he/she pleads guilty of the charges. The proviso to Rule 18(7) of the Rules indicates that if the concerned member does not appear “*even after one adjournment, the reading out of charge or charges along with the summary of prima facie opinion shall be made in his absence*”. This, clearly, indicates that it would be necessary for the Disciplinary Committee to at least grant one adjournment on account of non appearance of the concerned member. It is also important to note that under Rule 18(9) of the Rules if the concerned member does not enter the plea of guilty, the Disciplinary Committee would fix a date for examination of witnesses and production of documents. Admittedly, in the present case the charges along with summary of *prima facie* opinion were not read as required under proviso to Rule 18(7) of the Rules. Rule 18(13) of the Rules indicates that after the Director has presented the evidence against the concerned member, he was to be called upon to enter his defence and produce his evidence. A perusal of the notes of the hearing held on 25.11.2011 indicate that the entire procedure was compressed in a single hearing as the petitioner was absent on that date.

14. It cannot be disputed that finding a Chartered Accountant guilty of misconduct has serious adverse consequences. The Supreme Court in

Institute of Chartered Accountants of India v. L.K. Ratna & Ors.: AIR

1987 SC 71 had observed as under:

“13. At this point it is necessary to advert to the fundamental character of the power conferred on the Council. The Council is empowered to find a member guilty of misconduct. The penalty which follows is so harsh that it may result in his removal from the Register of Members for a substantial number of years. The removal of his name from the Register deprives him of the right to a certificate of practice. As is clear from Section 6(1) of the Act, he cannot practice without such certificate. In the circumstances there is every reason to presume in favour of an opportunity to the member of being heard by the Council before it proceeds to pronounce upon his guilt. As we have seen, the finding by the Council operates with finality in the proceeding, and it constitutes the foundation for the penalty imposed by the Council on him. We consider it significant that the power to find and record whether a member is guilty of misconduct has been specifically entrusted by the Act to the entire Council itself and not to a few of its members who constitute the Disciplinary Committee. It is the character and complexion of the proceeding considered in conjunction with the structure of power constituted by the Act which leads us to the conclusion that the member is entitled to a hearing by the Council before it can find him guilty. Upon the approach which has found favour with us, we find no relevance in *James Edward Jeffs and Ors. v. New Zealand Dairy Production and Marketing Board and Ors.* [1967] 1 AC 551 cited on behalf of the appellant. The Court made observations there of a general nature and indicated the circumstances when evidence could be recorded and submissions of the parties heard by a person other than the decision making authority. Those observations can have no play in a power structure such as the one before us.”

15. Although, there have been significant amendments in the procedure for disciplinary proceedings, the above observations made by the Supreme

Court clearly establish that the nature of disciplinary proceedings make it imperative that sufficient opportunity be provided to the concerned member before pronouncing him guilty of misconduct. A bare perusal of Rule 18 of the Rules also indicates that the framers of the rules were conscious of the implications of the disciplinary proceedings and have thus specified detailed procedure to ensure that disciplinary proceedings are fair and transparent. Needless to state, it is essential for the Disciplinary Committee to follow the Rules not only in letter but also in spirit.

16. The learned counsel for the respondent has stated that there was no violation of principles of natural justice and the request of the petitioner for adjournment of the hearing scheduled on 25.11.2011 was only for the purpose of delaying the proceedings. It is quite possible that the intention of the petitioner may have been to delay the proceedings. However, as the disciplinary proceedings may have a serious adverse consequence on the concerned member, it would be appropriate to err on the side of granting an opportunity to the concerned member rather than to deprive him of a fair hearing. In this case, the procedure before the Disciplinary Committee was also truncated to conclude in a single day and the concerned member had no opportunity to present any arguments to persuade the Disciplinary Committee to reject any of the evidence presented by the Director (Discipline).

17. Although the petitioner had requested that the hearing scheduled on 26.12.2010 be adjourned, the same was declined. In my view, there was no occasion to refer to the same while considering whether the petitioner's request for an adjournment, of hearing scheduled on 25.11.2011 on medical

grounds, should be entertained. The petitioner had submitted a medical certificate and in the event the Disciplinary Committee found the same suspect, it was open for the Disciplinary Committee to call for further information. It cannot be disputed that refusing an adjournment and proceeding *ex parte* where the concerned member is not in a position to attend on medical grounds would amount to denying an opportunity of a hearing.

18. In **Capt. M. Paul Anthony v. Bharat Gold Mines Ltd.:** (1999) 3 SCC 679, one of the grounds of challenge to the order of dismissal passed by the Disciplinary Authority was that the appellant (therein) informed the enquiry officer by number of letters supported by medical certificates about his illness with a request to adjourn the departmental proceedings, however, the enquiry Officer rejected the request and recorded his findings holding the appellant (therein) guilty. The Supreme Court set aside the disciplinary proceedings and held as under:-

“33. Since in the instant case the appellant was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex parte proceedings against him, we are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non-payment of subsistence allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the enquiry officer at such proceedings, which were held *ex parte*, stand vitiated.”

19. In *State Bank of India v. Chandra Govindji*: (2000) 8 SCC 532, the application for adjournment filed on the ground of medical illness of the counsel was rejected by the Rent Controller. On appeal, the High Court observed that earlier also reasonable opportunities were granted, however, the appellant (therein) had failed to avail those opportunities and the adjournment was rightly refused by the Rent Controller. On appeal, the Supreme Court set aside the order of lower authorities refusing the adjournment and held as under:-

“7. In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. The earlier adjournment, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on flimsy grounds the same would have been rejected. Therefore, in our view, the High Court as well as the learned District Judge and the Rent Controller have all missed the essence of the matter.”

20. The learned counsel for the respondent Institute contended that the present writ petition should not be entertained at this stage as the petitioner has an equally efficacious remedy of appeal under Section 22G of the Act. Undoubtedly, the petitioner would have an equally efficacious remedy by way of appeal under Section 22G of the Act and in normal circumstances Courts would be reluctant to interfere in proceedings under Article 226 of the Constitution of India where an equally efficacious remedy is available to the petitioner. However, it is well established that existence of an

alternate remedy would not bar the jurisdiction of this Court under Article 226 of the Constitution of India. Having been persuaded to accept the view that a fair hearing ought to have been granted to the petitioner, I am unable to accept the contention that the petitioner be relegated to file an appeal under Section 22G of the Act.

21. During the course of the arguments, the learned counsel for the petitioner had conceded that the petitioner had not filed the written statement and would not be seeking any opportunity to file the same. The learned counsel for the petitioner had limited his request to be granted a hearing before the Disciplinary Committee. He had specifically submitted that the petitioner would not be seeking recall of any witness for the purpose of cross examination or an opportunity to file a written statement.

22. Accordingly, the impugned report is set aside and the matter is remanded to the Disciplinary Committee to afford the petitioner an opportunity to be heard. The Disciplinary Committee would schedule a hearing to afford the petitioner an opportunity to be heard on the evidence and material already produced by the Director (Discipline). The petitioner would also be granted an opportunity to present documents, if so required, before the Disciplinary Committee.

23. The petition is disposed of with the aforesaid directions. All pending applications also stand disposed of. No order as to costs.

VIBHU BAKHRU, J

JANUARY 20, 2015
RK