THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

R.C.No.1 OF 2011

ORDER: *(Per Hon'ble Sri Justice M.Satyanarayana Murthy)*

The Institute of Chartered Accountants of India, by virtue of power conferred under Section 21 (5) of the Chartered Accountants Act, 1949 (hereinafter, for short, referred to as "the Act"), has made this reference to this Court for passing an appropriate order against the respondent imposing penalty/punishment.

The Institute of Chartered Accountants of India is a premier institution established under the Chartered Accountants Act, 1949 to regulate the Chartered Accountants Profession in India.

The respondent – Sri P.V.R. Iyyengar is a Chartered Accountant, who was appointed as a concurrent auditor for the Bank of Maharashtra Khairatabad branch at Hyderabad for the period from 01.04.2001 to 31.03.2002. Detailed guidelines and instructions were given to the respondent regarding conduct of concurrent audit, and he was advised to submit his monthly reports incorporating various irregularities/ deficiencies observed in different areas of banking operations in the said branch. One such area related to reporting on new advances sanctioned during a particular month, and they were required to submit a statement giving details of advances sanctioned and secured against deposits/NSCs/KVP/LIC policy etc, and also regarding various irregularities observed in sanction of such advances, if any. Besides other check points, as enumerated in the guidelines provided to them, they were also advised to check whether proper documentation was completed in respect of such advances before their disbursement. Broad description of items to be seen/checked while conducting concurrent audit of various functional areas of Bank were incorporated.

M/s. Divine Galaxy, a partnership firm consisting of Sri K. Sridhar and K. Anand Rao, opened a current account with Bank of Maharashtra, Khairatabad Branch on 28.02.2001. The partnership deed of the firm revealed that the firm was established on 10.02.2001 to carry on business of resort project at Tirupathi. Sri K.Sridhar was instrumental in mobilizing FCNR deposits for the branch and arranged FCNR deposits as follows:

Sr.No	Date	Amount (US$)	Amount (Rs.)	Depositor
1	08.03.2001	5,00,000	230.00 lakh	Mr.G.B.Thadani Hongkong
2	14.03.2001	8,80,000	404.80 lakh	-do-
3	30.03.2001	5,19,306	238.88 lakh	-do-
4	27.04.2001	5,06,970	233.21 lakh	Mr.Budhrani Jakarta
5	08.05.2001	4,96,370	228.33 lakh	-do-
	Total	29,02,646	1335.22 lakh	

M/s.Galaxy Industries availed loans from Khairatabad Branch, during March and May, 2001, against the security of FCNRs belonging to Sri G.B.Thadani pretending to be his business associates, which are as follows:

Sr.No.	Date	Amount of Loan	Security	Loan O/S balance as on
1.	21.03.01	300.00	FCNR Receipts US $ 5.00 lakh	317.78
2.	11.05.01	300.00	US $ 8.80 lakh	175.95 (*)

(*) Only Rs.168.00 lakh were disbursed.

The General Manager pointed out several irregularities committed by the Branch Manager while sanctioning loans to M/s. Divine Galaxy Industries and others. The following are the illegalities allegedly committed by the Branch Manager:

(a) While sanctioning loan of Rs.300.00 lakh in May, 2001, the Branch Manager did not ensure to get signatures of the deposit holders on the loan documents and failed to retain the deposit receipts. After sanction of loan of Rs.300.00 lakh on 11.05.2001, the set of documents and the deposit receipts were handed over to Sri.Sridhar for getting signatures of Sri Thadani, but the original depositors denied to subscribe their signatures as surety against their deposits for availment of loans.

(b) The Branch Manager of Khairatabad Branch most callously handled the request of granting loans against third party FCNRs violating the rules of Bank, released loans without getting loans documents signed by guarantor and deposit holder and also without getting the deposit receipts discharged by the depositors and exposed the Bank to a loss of about Rs.4.94 crores in collusion with Sri Sridhar and Sri Anand Rao of M/s Divine Galaxy Inc.

(c) The Branch Manager also violated Central Office guidelines conveyed vide circular No.AX1/CMB/ FEX/Cir.06/2001 dated 19.01.2001 that loan against FCNR (B) deposits to 3rd parties should be granted only when the depositor himself executes the loan documents in the presence of bank officials and the same is acceptable to the Bank.

(d) The Branch Manager did not obtain discharged fixed deposit receipts and other relevant loan guarantee documents as per usual procedure of the Bank.

Based on the aforesaid irregularities certain charges were framed against the Branch Manager, Bank of Maharashtra, Khairatabad branch.

Though the respondent was appointed as concurrent auditor to verify the accounts of the Bank of Maharashtra, Khairatabad Branch, to unearth the fraud or illegality committed by staff of the bank, he <u>did not report those irregularities in the monthly statement/report submitted by him in the month of May, 2001</u> and thus the respondent did not discharge his duty diligently. He also failed to report the irregularities committed by the Branch Manager to the General Manager of the Bank while submitting <u>his report regarding two advances to a tune of Rs.472.50 lakhs sanctioned earlier to the same firm in the month of March, 2001</u> with the same modus operandi. As a result, the fraud remained un-noticed for a long time, and was likely to result in substantial financial loss to the Bank.

The lacuna in the audit report was pointed out to the respondent. He, in turn, replied that he had verified documents which were made available to him by the Branch Manager, and that he was not aware of the transactions which took place in the months of April and May, 2001. The respondent, being a concurrent auditor, was duty bound to make adequate enquiries/checking, and should have insisted that the Branch

Manager make available the required documents, but he did not insist that the Manager produce necessary documents. If, for any reason, the Branch Manager did not co-operate with the Concurrent Auditor, he would have contacted the Regional Office of the Complainant Bank situated at Hyderabad. Thus, the respondent was casual and negligent in his approach in discharging his duties.

If the aforesaid allegations are proved, it would render the respondent guilty of professional misconduct within the meaning of Clauses (5), (6) and (7) of Part I of the Second Schedule read with Sections 21 and 22 of the Chartered Accountants Act, 1949.

On receipt of the complaint by the Institute, a copy thereof was sent to the respondent calling upon him to submit his written statement. In pursuance of the notice, the respondent submitted his written statement duly verified on 23.06.2004. Later, the complainant submitted his rejoinder on 26.07.2004. Thereupon, the respondent submitted his comments duly verified on 29.09.2004. The Institute placed the complaint, written statement, rejoinder and comments before the Council at its meeting held in the month of April, 2005 at New Delhi. The Council, being satisfied with the material placed before it, was, prima facie, of the opinion that the respondent was guilty of professional misconduct. It decided to cause an enquiry to be made in the matter by the Disciplinary Committee. Thereupon a Disciplinary Committee was appointed, and the Committee fixed the date of hearing on 17.08.2005 at Hyderabad. On 17.08.2005 the complainant, the respondent along with his counsel Sri C. Kasyapa Sastry and witnesses Sri S.S.R. Prasad and Sri K. Ramana Murthy appeared before the Committee. During the enquiry, the attention of the respondent was drawn to Regulation 15 (2) of the Chartered Accountants Regulations, 1988, the respondent pleaded not guilty. Thereafter, the witness Sri S.S.R. Prasad was examined by the Committee, was cross-examined by the complainant and the representative of the respondent. Thereafter, the witness Sri K.Ramana Murthy was examined by the Committee and cross-examined by the Complainant and the representative of the respondent.

Later, the disciplinary committee afforded an opportunity to the counsel for the respondent to put any questions to the complainant, but he did not question the complainant. The Committee examined the respondent. During examination, the complainant was directed to submit some documents. After completion of examination of parties, the complainant and the counsel for the respondent made their final submissions.

Upon hearing argument of the complainant and the counsel for the respondent, and considering the evidence available on record, the Committee submitted its report dated 03.02.2006 to the Council opining that the respondent was guilty of professional misconduct within the meaning of Clauses (5), (6) and (7) of part I of the Second Schedule read with Sections 21 and 22 of the Act.

On receipt of the report from the Disciplinary Committee, the Council, by its letter dated 30.05.2008, fixed the date for consideration of the report in its forthcoming meeting, and requested the respondent to send their written representations, if any, and also intimated them to appear, if they so desired, either in person or through a member of the Institute duly authorised by him to make oral submissions. Later, by the Institute's letter dated 17.07.2008, the complainant and the respondent were informed that the report of the disciplinary committee would be considered by the Council on 08.08.2008 at its meeting to be held from 07th to 09th August, 2008 at New Delhi, and requested him to send his representations, if any, in the matter and also informed that he could appear before the Council either in person or through a member of the Institute before the Council on the day fixed. But the complainant did not submit any written representation on the report of the Disciplinary Committee and neither he nor his authorised representative appeared before the Council for making oral submissions. The respondent submitted his written representation dated 18.06.2008 on the report of the Disciplinary Committee, and appeared through his authorised representative CA. M.Naganathan before the Council for making oral submissions.

Upon consideration of the entire material including representations made by the respondent and oral submissions of CA.M.Naganathan, authorized representative of the respondent, the Council decided to accept the report of the Disciplinary Committee finding the respondent guilty of professional misconduct, which falls within the meaning of Clauses (5), (6) and (7) of Part I of the Second Schedule read with Sections 21 and 22 of the Act, and made a reference to this Court along with recommendation for removal of the respondent's name from the Register of members for a period of three (3) months.

During hearing, Sri C.V.Rajeev Reddy, learned counsel for the Institute, while reiterating the facts of the case, would contend that the misconduct attributed to the respondent was a serious misconduct and against public interest, since the amount deposited in the Bank and lent by the Bank belonged to the depositors and in case, if any loss was caused to the Bank, as the same was not detected by the respondent, the ultimate sufferer were the depositors to a tune of Rs.4.94 crores. The monthly report, submitted by the respondent, did not disclose the actual financial condition of the Bank, and the public at large suffered for not knowing the financial condition of the Bank. The respondent, being a concurrent auditor, was under an obligation to verify the transactions as per the directions issued by the Bank authorities, but the respondent failed to discharge his duty as per the guidelines issued by the Bank for conducting concurrent audit and, on account of his callousness, the Bank was put to substantial loss to a tune of Rs.4.94 crores. Thus, the conduct of the respondent is in derogation of his duty being a concurrent Auditor, and he was liable for punishment. He placed reliance on several judgments, which we will discuss at the appropriate stage.

Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, raised several contentions, which are as follows:

(a) The nature of proceedings before this Court are quasi-judicial and quasi-criminal in nature, the standard of proof as required in criminal prosecutions is to be applied to disciplinary proceedings also.

(b) The power to impose punishment is only conferred on the Court; and as the Statute does not prescribe any guidelines as to how to exercise such power, the reference should be decided following the principles of natural justice.

(c) The standard of proof that could be applied to cases of professional misconduct by legal practitioners can also be applied to the misconduct attributed to the respondent, a professional Chartered Accountant.

(d) In order to accept the findings, and to impose penalty, it is the duty of the Court to conclude that the act of the respondent is wilful, deliberate or culpable negligence otherwise it would not fall within the definition of gross negligence.

(e) The act, allegedly performed by the respondent, would not fall within the meaning of Clause (7) of Part I of the Second Schedule read with Sections 21 and 22 of the Chartered Accounts Act, 1949.

Finally, he requested this Court to exonerate the respondent for the alleged acts of misconduct by finding him not guilty while placing reliance on several judgments, which we will refer to at appropriate stage in the order.

In view of the rival contentions and, on perusing the material on record, the points that arise for consideration are as follows:

(1) Whether the scope of reference and powers of the High Court in a reference under Section 21 (5) and (6) of Chartered Accountants Act, 1949 are so wide as to re-examine the conclusions arrived at by the Institute?

(2) Whether the proceedings are quasi-judicial and quasi-criminal in nature, if so, what is the standard of proof

applicable to disciplinary proceedings against a professional?

(3) Whether the act attributed to the respondent amounts to gross negligence for not submitting the monthly statements indicating the actual financial position of the Bank; if so, would such act would fall within the ambit of Clause (7) of Part 1 of the Second Schedule read with Sections 21 and 22 of the Chartered Accountants Act, 1949?

(4) Whether the alleged act, committed by the respondent, is wilful, deliberate or culpable negligence to attract gross negligence?

<u>P O I N T No.1</u>:

This reference is made by the Institute under Section 21 (5) of the Act to impose penalty/punishment making a recommendation to remove the name of the respondent from the Register of Members for a period of three (3) months after recording a finding on the misconduct of the respondent. Learned counsel for the respondent mainly contended that it was the duty of the Court, while exercising disciplinary jurisdiction, to reappraise the entire material, and this Court can even come to a different conclusion setting aside the findings recorded by the Council of the Institute. Therefore, the jurisdiction of this Court is wide enough like the jurisdiction that can be exercised by this Court on the original side. Learned Counsel requests this Court to reappraise the entire evidence to come to an independent conclusion based on the material available on record. In support of his contentions, he placed reliance on the judgments of Apex Court in "***Council of the***

Institute of Chartered Accountants v. B.Mukherjea[1]", "***Institute of Chartered Accountants of India v. L.K.Ratna and Ors***.[2]" and "***Institute of Chartered Accountants of India v. M/s Price Waterhouse and another***[3]". Sri C.V.Rajeev Reddy, learned counsel for the Institute, did not raise any objection regarding the scope of enquiry in a reference under Section 21 (5) of the Act. He placed reliance on the same judgment of the Apex Court rendered in ***Council of the Institute of Chartered Accountants v. B.Mukherjea*** (referred supra).

To decide the scope of enquiry in a reference, it is necessary to advert to the provisions of the Act and Regulations framed thereunder for better appreciation.

"Section 21 of the Act deals with procedure in inquiries relating to misconduct of members of Institute. Section 21 (5) and (6) reads as under:

> Section 21 (5) of the Act: 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 sub-section (4), it shall forward the case to the High Court with its recommendations thereon.
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> Section 21 (6) of the Act: On receipt of any case under sub-section (4) or sub-section (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:-
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> (a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;
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> (b) reprimand the member;
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> (c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;
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> (d) refer the case to the Council for further inquiry and report."

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[1] AIR 1958 SC 72
[2] AIR 1987 SC 71
[3] AIR 1998 SC 74

The power conferred on this Court, by Section 21 (6) of the Act, enables it to direct the proceedings to be filed, or to dismiss the complaint, as the case may be; reprimand the member; remove him from the membership of the Institute either permanently or for such period as it thinks fit; or to refer the case to the Council for further inquiry and report. The power conferred on this Court, in dealing with a reference made under Section 21 (5) of the Act, is unfettered and without any statutory restriction. In order to decide whether the complaint should be dismissed, or for any order to be passed imposing punishment on a member of the Institute, this Court must examine the entire material on record, come to an independent conclusion, and record a finding whether the member of the Institute is guilty of professional misconduct as defined in Section 22 of the Act.

Regulation 15 of the Regulations prescribes the procedure for an enquiry to be conducted before the Disciplinary Committee, and Regulation 16 prescribes the action to be taken on the report of the disciplinary committee. Neither of these provisions regulate the scope of an enquiry in a reference made to this Court under Section 21 (5) of the Act.

Even though a recommendation is made, recording a finding that the member of the Institute is guilty under Section 21 (5), the Act confers power on this Court to examine afresh whether the misconduct attributed to the member is established, and this Court can direct the complaint to be filed or dismiss it if it finds no material under Section 21 (6) of the Act. After examining the material on record, the Court must record its own conclusions/findings as to the misconduct attributed to the member of the Institute. Depending upon the gravity of the misconduct proved against the member of the Institute, this Court is entitled to impose any punishment or penalty, including a punishment other than that recommended by the Institute.

Section 21 (1) of the Act deals with two categories of cases, in which the alleged misconduct of the members of the Institute can be enquired into, viz., based on the information received or complaint made to the Institute against the conduct of any member of the Institute i.e. a Chartered Accountant. The Council is, however, not bound to hold any enquiry straightaway. After examination of the complaint or information, if the Council finds that the facts alleged against the member, if proved, would render the member unfit, it may order an enquiry. If the disciplinary committee finds the member of the Institute guilty, it is required to submit a report to the Council. The Council is required to follow the procedure prescribed under Regulation 16, and if it finds that the matter falls exclusively within the ambit of Section 21 (5) of the Act, it should then refer the matter to this Court for a penalty to be imposed.

On a reference made by the Institute, this Court can exercise the power conferred under Section 21 (6) of the Act. In such a reference, the jurisdiction and powers of the High Court, while dealing with cases under sub-sections (2), (3) and (4) of Section 21 of the Act, are limited. The Calcutta High Court took the view that, even if a wider construction is put on the material words used in Sections 21 and 22, they would not be justified in passing any orders against the respondent in the proceedings, because the finding which had been referred to the High Court was only one, and that was that the respondent was guilty of professional misconduct in the narrow sense of the term. In other words, the High Court was of the view that, if a wider construction is placed on the material words of the Section, it would be making out a new case on the reference, and the Court would not be justified in adopting such a course. The Apex Court, in "**Council of the Institute of Chartered Accountants v. B. Mukherjea"** (referred supra), held that the view of the Calcutta High Court was not well-founded. Section 21(2) lays down the procedure to be followed by the High Court when a finding, made by the Council, is referred to it under Section 21 (1). Notice, of the day fixed for the hearing of the reference, should be given to the parties specified in Section 21 (1), and an opportunity of being heard has to be afforded to them. Section 21 (3) then lays down that the High Court may either pass such final orders on the case as it thinks fit or refer it back for further inquiry by the Council, upon receipt of the finding after such inquiry, to deal with the case in the manner provided in sub-section (2), and to pass final orders thereon. It is clear that, in hearing a reference made under Section 21 (5), the High Court can examine the correctness of the findings recorded by the statutory bodies in that behalf. The High Court can even refer the matter back for further inquiry by the Council, and record a fresh finding. It is not as if the High Court is bound in every case to consider the merits of the finding as it has been recorded, and to either accept or reject the said finding. If, in a given case, it appears to the High Court that, on the facts alleged and proved, an alternative finding may be recorded, the High Court can as well send the case back to the Council with appropriate directions in this regard. The powers of the High Court, under Section 21 (3), are undoubtedly wide enough to enable it to adopt any course which, in its opinion, will enable it to render justice to the parties.

In **Institute of Chartered Accountants of India v. L.K. Ratna** (referred supra) the Apex Court discussed the scope of an enquiry in a reference under Section 21 (5) of the Act, and held that it was apparent that, in the scheme incorporated in Section 21 of the Act, there were separate functionaries, the Disciplinary Committee, the Council and, in certain cases, the High Court. The controlling authority was the Council, which was only logical for the Council is the governing body of the Institute. When the Council receives information or a complaint alleging that a member of the Institute is guilty of misconduct, and it is *prima facie* of the opinion that there is substance in the allegations, it refers the case to the Disciplinary Committee. The Disciplinary Committee plays a subordinate role. It conducts an inquiry into the allegations. Since the inquiry is into the allegations of misconduct by the member, it possesses the character of a quasi-judicial proceeding. The Disciplinary Committee, thereafter, submits a report of the result of the inquiry to the Council. The Disciplinary Committee is merely a Committee of the Institute, with its functions specifically limited by the provisions of the Act. As a subordinate body, it reports to the Council, the governing body. The report will contain a statement of the allegations, the defence entered by the member, a record of evidence and the conclusions upon that material. The conclusions are the conclusions of the Committee. They are only tentative. They cannot be regarded as 'findings'. The Disciplinary Committee is not vested by the Act with power to render any findings. It is the Council which is empowered to find whether the member is guilty of misconduct. Both Section 21(2) and Section 21(3) are clear as to that. If, on receipt of the report, the Council finds that the member is not guilty of misconduct, Section 21(2) requires it to record its finding accordingly, and to direct that the proceedings shall be filed or the complaint shall be dismissed. If, on the other hand, the Council finds that the member is guilty of misconduct, Section 21(3) requires it to record a finding accordingly, and thereafter to proceed in the manner laid down in the succeeding sub-sections. The finding by the Council is the determinative decision as to the guilt of the member, and because it is determinative, the Act requires it to be recorded. A responsibility as grave as the determination that a member is guilty of misconduct, and recording of that finding, has been specifically assigned by the Act to the governing body, the Council. It is also apparent that it is only upon a finding being recorded by the Council that the Act moves forward to the final stage of penalisation. The recording of the finding by the Council is the jurisdictional springboard for the penalty proceeding which follows.

At this point it is necessary to advert to the nature 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 the removal of a member's name from the Register for several years which would deprive him of the right to a certificate of practice. As is clear from Section 6(1) of the Act, he cannot practice without such a certificate. In the circumstances there is every reason to presume in favour of an opportunity being given to the member of being heard by the Council before it proceeds to pronounce upon his guilt. As 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. 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 to the conclusion that the member is entitled to a hearing by the Council before it can find him guilty.

In **Institute of Chartered Accountants of India v. M/s Price Waterhouse** (referred supra) the Apex Court held that a combined reading of the relevant provisions in Section 21 and Regulation 16 did indicate that recording of a finding of guilt or non-guilt by the Council was mandatory to take further action or to dismiss the complaint or for further process. The Council was required to consider independently the explanation submitted by the member and the evidence adduced in the enquiry before the Disciplinary Committee, and the report of the Disciplinary Committee. It provided an in-built mechanism under which the Council itself was required to examine the case of the professional or other misconduct of a member of the Institute or associate member, taking the aid of the report submitted by the Disciplinary Committee, the evidence adduced before the Committee, and the explanation offered by the delinquent member. The entire material constitutes the record of the proceeding before the Council to reach a finding whether or not the delinquent member had committed professional or other misconduct. Otherwise, the primacy accorded to the report of the Disciplinary Committee would attain finality, denuding the Council of the power of discipline over the members of the Institute, and that would have a deleterious effect on the maintenance of discipline among the members or associate members of the Institute.

In ***Institute of Chartered Accountants of India v. M/s Price Waterhouse and another*** (referred supra) the Apex Court held that a combined reading of relevant provisions in Section 21 and Regulation 16 does indicate that recording of a finding of guilt or non-guilt by the Council is mandatory to take further action or to dismiss the complaint or for further process. The Council is required to consider independently the explanation submitted by the member and the evidence adduced in the enquiry before the Disciplinary Committee and the report of the Disciplinary Committee. It provides an in-built mechanism under which the Council itself is required to examine the case of professional or other misconduct of a member of the Institute or associate member, taking the aid of the report submitted by the Disciplinary Committee, the evidence adduced before the Committee and the explanation offered by the delinquent member. Entire material constitutes the record of the proceeding before the Council to reach a finding whether or not the delinquent member committed professional or other misconduct. Otherwise, the primacy accorded to the report of the Disciplinary Committee attains finality, denuding the Council of the power of discipline over the members of the Institute; that would render deleterious effect on the maintenance of discipline among the members or associate members of the Institute.

The Division Bench of this Court in "***Council of the Institute of Chartered Accountants of India v. G.Pattabhi Rama Charya***[4]" considered the scope and held that in exercise of the jurisdiction under Section 21 of the Act, the High Court would take action against the finding Member only if the High Court accepts the finding recorded by the Council and not otherwise.

The Division Bench of Madras High Court in "***M.S.Krishnaswami v. The Council of the Institute of Chartered Accountants of India***[5]" held as follows:

> "It was argued for the petitioner that whatever might have been the position where disciplinary action is taken in exercise of inherent jurisdiction, where such a jurisdiction is conferred by a Statute, the proceedings become impressed with the character of civil proceedings and Article 133 will apply to them. We are unable to agree with this contention. We fail to see how the right of appeal can depend on whether the order was passed in exercise of a jurisdiction which is conferred by, a Statute on the court. If there is a right of appeal only against orders passed in civil proceedings, the determination of this right must depend on the nature of the jurisdiction that is exercised and not on the source of authority which confers that jurisdiction. In fact the decision in -- 'Bir Kishore Roy v. Emperor', 4 Pat L J 423, is with reference to an order passed under the special jurisdiction conferred by the Legal Practitioners Act and the court held that the appeal to the Privy Council was incompetent whether the disciplinary jurisdiction was exercised under the clauses of the Letters Patent or under a Statute."

In "***Council of the Institute of Chartered Accountants of India v. C.H.Padliya and another***[6]" the Madhya Pradesh High

[4] LAWS (APH)-2014-1-93
[5] AIR 1953 Mad 79
[6] 1977 MPLJ 722

Court, after following the principles laid down in ***Council of the Institute of Chartered Accountants v. B.Mukherjea*** (referred supra), held that the powers of the High Court under sub-section (6) of section 21 of the Act in hearing the reference under sub-section (5) thereof, and the provisions of Regulation 36 read with Part II of the second Schedule to the Act and their application to the facts of the case is wider and the High Court may direct that the proceedings be filed or dismiss the complaint, reprimand the member or remove him from membership of the Institute either permanently or for such period. The High Court is also empowered under section 21(7) of the Act to transfer the case subject to such other conditions, if any, as it thinks fit to impose, to another High Court if it appears to it that the transfer of a pending case will promote the ends of justice or tend to the general convenience of the parties and that the powers in a reference under Section 21 (5) of the Act are wider and the Court can come to any independent conclusion based on the material notwithstanding the findings recorded by the Council and recommendations made for imposing penalty or punishment.

In "***The Council of the Institute of Chartered Accountants of India v. Shri Dilip Kumar De***[7]" the High Court of Calcutta while deciding the case of misconduct of Chartered Accountant discussed the scope of reference and powers vested on the Court in the reference made to this Court, concluded that the powers of the High Court are wider in view of the scheme for disposal of cases relating to misconduct and it is apparent that even in cases of misconduct of lesser degree specified in the First

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[7] AIR 2011 Cal 233

Schedule to the Act, once a member is found guilty by the Council based on enquiry by the Disciplinary Committee, the law does not authorize the Council to totally exonerate such person and at least a penalty in the form of "reprimand" must be imposed as provided in Sub-section (4) of Section 21 of the Act. If the member is found to be not guilty on enquiry even in cases of misconducts specified in Second Schedule to the Act, law does not require approval of such finding by High Court and the Council itself is authorized to drop the proceedings or dismiss the complaint on such finding. But when a member has been found guilty of the graver misconducts mentioned in Second Schedule, it is absurd to suggest that the Council may decide even not to recommend the minimum punishment of reprimand provided for the misconducts mentioned in the first schedule. The scheme of the Act has permitted dropping of proceedings or dismissal of complaint only on a finding that the member is not guilty and not otherwise. Therefore, the order referred to in Clause (a) of sub-section (6) of Section 21 can be passed only if the finding of guilt recorded by the Council is set aside by the High Court. Thus, the High Court is vested with wider power even to disagree with the findings recorded by the Council.

The Apex Court in "***P.D.Gupta v. Ram Murti and another***[8]" discussed the scope of jurisdiction of the High Court to interfere with the finding recorded by the Bar Council of India and other statutory bodies held that the Bar Council of India and State Bar Councils are statutory bodies. Those bodies perform varying functions under the Act and the Rules framed thereunder. Bar

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[8] AIR 1998 SC 283

Council of India has laid standards of professional conduct for the members. Code of conduct in the circumstances can never be exhaustive. Bar Council of India and State Bar Councils are representatives' bodies of the Advocates on their rolls and are charged with responsibility of maintaining discipline amongst members and punish those who go astray from the path of rectitude set out for them. When the disciplinary committee, has considered all the relevant circumstances and has come to the conclusion that the advocate is guilty of misconduct, there is no reason to take a different view. Supreme Court also find no ground to interfere with the punishment awarded to P.D.Gupta.

The High Court of Gujarat in "***Council of the Institute of Chartered Accountants of India v. P.C.Parekh***[9]" while deciding the scope of jurisdiction of the High Court regarding interference with the findings recorded by the disciplinary committee held that the High Court has been entrusted important function in context of the behaviour of the members of this noble profession in the disciplinary matters which come up before it. It has wide powers extending to removal from membership of the institute either permanently or for a specified period. It may direct the proceedings to be filed or dismiss the complaint. This enables the Court to examine the nature of misconduct alleged and the facts and circumstances brought on record in connection therewith against the delinquent. There is a serious responsibility on the Court a duty to itself, to the profession, and to the whole of the community to be careful not to accredit any person as worthy of the public confidence who cannot establish his right to that credential.

[9] (2003) 129 TAXMAN 80 (Guj.)

However, when an important statutory body like the Council finds a member of the institute guilty of the misconduct and forwards the case to the High Court with its recommendation under Section 21(5) of the Act, its findings based on the material on record would ordinarily not be disturbed unless found to be unjust, unwarranted or contrary to law.

The Gujarat High Court further held that the Council is one such representative body charged with responsibility of ensuring discipline and ethical conduct amongst its members and impose appropriate punishment on members who are found to have indulged in conduct which lowers the esteem of the professionals as a class. Adopting the aforesaid approach, it is not possible to find any infirmity, either on facts or in law, in the reasoning and the findings recorded by the Disciplinary Committee and the petitioner Council by holding the respondent as being guilty of "other misconduct" under Section 21 read with Section 22 of the Act and declined to interfere with the findings.

In "***West Bengal Electricity Regulatory Commission v. CESC Ltd.***[10]" the Apex Court held as follows:

> ***"that the appellate power of the High Court statutorily is not hedged in by any restriction, but in our opinion, the High Court merely because it has unrestricted appellate power, should not interfere with the considered order of the Commission unless it is satisfied that the order of the Commission is perverse, not based on evidence or on misreading of evidence, keeping in mind the fact that the Commission is an expert body...............***
>
> ***............Further, in regard to the exercise of appellate power against the orders of expert Tribunals, on facts, the***

[10] 2002 (8) SCC 715

> ***Appellate Court which is not an expert forum should be doubly careful while interfering with such expert forum's findings on facts.........”***

In view of the law declared by the various High Courts and the Apex Court, more particularly, in ***Council of the Institute of Chartered Accountants v. B.Mukherjea*** (referred supra), the powers of the High Court, in a reference under Section 21 (5) of the Act, are wide; and the Court can exercise its jurisdiction to do complete justice to the parties before it. Therefore, we are in complete agreement with the contentions of Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, in holding that the powers of this Court, in a reference under Section 21 (5) of the Act, are wide and this Court can pass any order as contemplated under Section 21 (6) of the Act. Accordingly, the point is answered.

P O I N T No.2:

Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, would contend that the proceedings, before the Committee and the Council, are quasi-judicial and quasi-criminal in nature. The initial onus will always lie on the Institute to prove the guilt of the respondent beyond reasonable doubt and the principle of appreciation, i.e. preponderance of probabilities, applicable to Civil Cases cannot be applied to quasi-criminal cases i.e. disciplinary proceedings before the authorities.

The phrase “Quasi-criminal” mean a lawsuit or equity proceeding that has some, but not all, ***of the qualities of a criminal prosecution***. It may appear either in a Common law or a Civil law jurisdiction. It refers to ***“a court’s right to punish for actions or omissions as if they were criminal.”*** The origins of the phrase comes from the

Latin word, *quasi*, meaning somewhat, sort-of, alike or akin to criminal law, as in Quasi-contract. The word "Quasi" is used "to indicate that one subject resembles another, with which it is compared, in certain characteristics, but there are intrinsic and material differences between them. During a civil or equity trial, a court may act as if it were a criminal case to punish a person for contempt of court. In some cases, a court may impose asset forfeiture or another penalty. For example, a court has the right to punish actions or omissions of a party in a child support case as if they were a criminal, penalizing the parent with a sentence of jail term. Quasi-criminal proceedings include a wide variety of matters, including prosecution for a violation of the law or ordinance, psychiatric matters, motor vehicle law, status offences, family court actions, and equity proceedings such as a Writ.

In criminal cases, generally, Courts try cases following the prescribed procedure, and impose punishment either of a sentence or a fine or both, but in disciplinary proceedings, more particularly under the Act, the punishment which may be imposed is not a jail term or fine like any other criminal proceeding. The punishment which may be imposed under Section 21 of the Act, if the respondent is found guilty of misconduct, cannot be equated to a sentence or a fine imposed on a person being found guilty in a criminal prosecution. The standard of proof required in criminal cases and civil cases also vary.

In "**S.A.L.Narayan Row and another v. Ishwarlal Bhagwandas**[11]" the Supreme Court held that, generally speaking, a proceeding is a civil proceeding only if it relates to a civil right

[11] AIR 1965 SC 1818

whether resting on common law or created by statute. The nature of the proceeding depends not upon the nature of the tribunal which is invested with the authority to grant relief, but upon the nature of the right violated, and the appropriate relief which may be claimed. A civil proceeding is, therefore, one in which a person seeks to enforce, by appropriate relief, the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration, express or implied, of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc. There is thus a marked difference between Civil Proceeding and Criminal Proceeding.

If the principles laid down in **S.A.L. Narayan Row and another v. Ishwarlal Bhagwandas** (referred supra) is applied to the facts of the present case, the proceedings before this Court, before the Council and Committee are not criminal proceedings, and the rules of evidence applicable to criminal cases cannot be applied to the disciplinary proceedings initiated against the respondent.

Sri E.V.V.S.Ravi Kumar, Learned counsel for the respondent, contends that the proceedings instituted against the respondent are quasi-criminal in nature and, consequently, this Court should insist on proof of misconduct beyond reasonable doubt like in criminal prosecution. He has placed reliance on a Division Bench judgment of the Madhya Pradesh High Court in **Council of the Institute of Chartered Accountants of India v. C.H. Padliya** (referred supra), wherein it is held as follows:

> "It may be convenient at this stage to consider the question as to on whom the onus of proof lies in the present case. The guide line and the clue to answer this question lies upon the nature and character of the proceedings initiated against the respondent Chartered Accountant. The scheme, intendment and object of section 21 referred to earlier when read with the use of the expressions "complaint", "guilty of any professional or other misconduct", "Disciplinary Committee", "inquiry and the nature of the punishment provided to be imposed by the Council or the High Court as the case may be against a member who is found to be guilty of any professional or other misconduct" would indicate and ***leave no doubt in our minds that the proceeding initiated against a member in inquiries relating to misconduct is akin to though not in fact a criminal prosecution***. At every stage, the statute provides for a reasonable opportunity of being heard to the delinquent member of the Institute against whom disciplinary proceedings have been initiated. Principles of natural justice must be followed by the Inquiry Authority, the Council as well as the High Court and the evidence has to be recorded by the Disciplinary Committee. The Council and the Disciplinary Committee are empowered with the same powers as are vested in the Civil Court for summoning and enforcing the attendance of any person and examining him on oath, the discovery and production of any document, and receiving evidence on affidavit. The member against whom a complaint is lodged or a charge is framed is permitted to lead his own evidence to vindicate his stand about the charge. Where no prima facie case has been made out, the Council itself may ignore the information or complaint but it has to refer the matter to the Disciplinary Committee, if in its opinion, there is a prima facie case against the member. The proceeding is undoubtedly quasi-judicial in character. In our considered opinion it is a quasi-judicial and quasi-criminal in character which is akin to criminal prosecution, though not exactly a criminal prosecution. It is akin to the proceedings of professional misconduct against a legal practitioner under the Legal Practitioners Act."

It was further held that the standard of proof that ought to be applied to cases arising under the Legal Practitioners Act is the same proof which is required for conviction on a criminal charge. The charge must be proved beyond reasonable doubt. Therefore, a charge that is required to be proved, against a professional for his misconduct, is like in a criminal prosecution.

He also relied on **Council of the Institute of Chartered Accountants of India v. G.Pattabhi Rama Charya** (referred supra) wherein a Division Bench of this Court, relying on the judgment of the Calcutta High Court in "**S. Ganesan v. A.K. Josceiyne**[12]", held that professional misconduct on the part of the person exercising one of the technical professions cannot fairly or reasonably be found, merely on a finding of a bare non-performance of a duty or some default in performing it. The charge is not one of inefficiency, but of misconduct and in an allegation of misconduct, imputation of a certain mental condition is always involved. It would be impossible for any professional man to exercise his profession if he was to be held guilty of misconduct simply because he had not, in a given case, been able to do all that was required in the circumstances or had misconceived his duty or failed to perform a part of it. I think the test must always be whether in addition to the failure to do the duty, partial or entire which had happened, there had also been a failure to act honestly and reasonably.

In **S. Ganesan v. A.K. Josceiyne** (referred supra) the Calcutta High Court held that **mental condition of the professional is to be established** to hold him guilty of misconduct. The Supreme Court, in "**Pandurang Dattatraya Khandekar v. The Bar Council of Maharashtra, Bombay**[13]" and "**H.V. Panchaksharappa v. K.G. Eshwar**[14]", considered a charge of

[12] AIR 1957 Cal 33
[13] AIR 1984 SC 110
[14] AIR 2000 SC 3344

professional misconduct against Advocate under the Advocates Act.

It is not in dispute that, even in disciplinary proceedings, there should be some evidence to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond reasonable doubt, the enquiry officer should, after analysing the evidence on record, determine whether, on the preponderance of probabilities, the charge is proved. While doing so, he cannot take into consideration irrelevant facts, and refuse to consider relevant facts, and shift the burden of proof on to the charged officer. The Enquiry Officer cannot also reject relevant testimony of witnesses on the basis of surmises and conjectures. A charge in a departmental proceedings, as held in "**M.V.Bijlani v. Union of India and Ors.**[15]", is not required to be proved beyond reasonable doubt like in a criminal trial, but should be proved on a preponderance of probabilities.

In "**A, a pleader v. The Judges of the High Court of Madras**[16]" the Privy Council held that the evidence should be carefully taken and judged according to the ordinary standards of proof.

A Constitution of the Supreme Court, in "**Gulabchand v. Kudilal**[17]", after adverting to the law laid down in **Jarat Kumari Dassi v. Bissessur**[18] and referring to the definitions of "proved, disproved and not proved" contained in Section 3 of the Indian Evidence Act, held as follows:

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[15] AIR 2006 SC 3475
[16] AIR 1930 PC 144
[17] AIR 1966 SC 1734
[18] I.L.R.39 Cal. 245

> "……It is apparent from the above definitions that the Indian Evidence Act applies the same standard of proof in all civil cases. It makes no difference between cases in which charges of fraudulent or criminal character are made and cases in which such charges are not made. But this is not to say that the Court will not, while striking the balance of probability, keep in mind the presumption of honesty or innocence or the nature of the crime or fraud charged. ***In our opinion, Woodroffe, J., was wrong in insisting that such charges must be proved clearly and beyond reasonable doubt***……"

In view of the law laid down by the Constitution Bench of the Apex Court, in "**Gulabchand v. Kudilal**" (referred supra), and the Judgment of the Privy Council in "**A, a pleader v. The Judges of the High Court of Madras"** (referred supra), it must be held that the standard of proof required to establish a charge, in a disciplinary proceedings, is on a preponderance of probabilities, and cannot be equated with the standard of proof in a criminal prosecution, wherein a charge is required to be proved beyond reasonable doubt. Accordingly, this point is decided.

POINT Nos: 3 and 4:

The respondent – Sri P.V.R.Iyyengar is a Chartered Accountant, who was appointed as a concurrent auditor for the Bank of Maharashtra, Khairatabad branch at Hyderabad for the period of 01.04.2001 to 31.03.2002. Detailed guidelines and instructions were given to the respondent regarding conduct of concurrent audit, and he was advised to submit monthly reports incorporating various irregularities/ deficiencies observed in different areas of banking operations in the said branch. One such area related to reporting on new advances sanctioned during a particular month, wherein they were required to submit a statement giving details of advances sanctioned and secured against deposits/NSCs/KVP/LIC policy etc. and also various irregularities observed in sanction of such advances, if any. Besides other check points, as enumerated in the guidelines provided to them, they were also advised to check whether proper documentation was completed in respect of such advances before their disbursement. Broad description of items to be seen/checked, while conducting concurrent audit of various functional areas of Bank, were incorporated.

M/s.Divine Galaxy, a partnership firm consisting of Sri K.Sridhar and K.Anand Rao, opened a current account at Bank of Maharashtra, Khairatabad Branch on 28.02.2001. The partnership deed of the firm revealed that the firm was established on 10.02.2001 to carry on business of resort project at Tirupathi. Sri K.Sridhar was instrumental for mobilizing FCNR deposits for the branch, and he arranged FCNR deposits as follows:

Sr.No	Date	Amount (US$)	Amount (Rs.)	Depositor
1	08.03.2001	5,00,000	230.00 lakh	Mr.G.B.Thadani Hongkong
2	14.03.2001	8,80,000	404.80 lakh	-do-
3	30.03.2001	5,19,306	238.88 lakh	-do-
4	27.04.2001	5,06,970	233.21 lakh	Mr.Budhrani Jakarta
5	08.05.2001	4,96,370	228.33 lakh	-do-
	Total	29,02,646	1335.22 lakh	

M/s.Galaxy Industries availed loans from Khairatabad Branch, during March and May, 2001, against the security of FCNRs belonging to Sri G.B.Thadani pretending to be his business associates, which is as follows:

Sr.No.	Date	Amount of Loan	Security	Loan O/S balance as on

1.	21.03.01	300.00	FCNR Receipts US $ 5.00 lakh	317.78
2.	11.05.01	300.00	US $ 8.80 lakh	175.95 (*)

(*) Only Rs.168.00 lakh were disbursed.

The General Manager pointed out several irregularities committed by the Branch Manager while sanctioning loans to M/s. Galaxy Industries and others. The following are the allegations made against the Branch Manager:

(a) While sanctioning the loan of Rs.300.00 lakh in May, 2001, the Branch Manager did not ensure to get signatures of the deposit holders on the loan documents and failed to retain the deposit receipts. After sanction of loan of Rs.300.00 lakh on 11.05.2001, the set of documents and the deposit receipts were handed over to Sri.Sridhar for getting signatures of Sri Thadani, but the original depositors denied to subscribe their signatures as surety against their deposits for availment of loans.

(b) The Branch Manager of Khairatabad Branch most callously handled the request of granting loans against third party FCNRs violating the rules of Bank, released loans without getting loans documents signed by guarantor and deposit holder and also without getting the deposit receipts discharged by the depositors and exposed the Bank to a loss of about Rs.4.94 crores in collusion with Sri Sridhar and Sri Anand Rao of M/s Divine Galaxy Inc.

(c) The Branch Manager also violated Central Office guidelines conveyed vide circular No.AX1/CMB/

FEX/Cir.06/2001 dated 19.01.2001 that loan against FCNR (B) deposits to 3rd parties should be granted only when the depositor himself executes the loan documents in the presence of bank officials and the same is acceptable to the Bank.

(d) The Branch Manager did not obtain discharged fixed deposit receipts and other relevant loan guarantee documents as per usual procedure of the Bank.

Based on the aforesaid irregularities certain charges were framed against the Branch Manager, Bank of Maharashtra, Khairatabad branch.

Though the respondent was appointed as the concurrent auditor to verify the accounts of the Bank of Maharashtra, Khairatabad Branch, did not report those irregularities in the monthly statement submitted by him in the month of May, 2001 and thus the respondent did not discharge his duty diligently. He also failed to report the irregularities committed by the Branch Manager to the General Manager of the Bank while submitting his report regarding two advances to a tune of Rs.472.50 lakh sanctioned earlier to the same firm in the month of March, 2001 with the same modus operandi. As a result, the fraud remained unnoticed for a long time, and is likely to result in substantial financial loss to the Bank.

The lacuna in the audit report was pointed out to the respondent, and he in turn replied that he had verified documents which were made available to him by the Branch Manager, and that he was not aware of the transactions that took place in the months of April and May, 2001. The respondent, being a concurrent auditor, was duty bound to make adequate enquiries/checking, and should have insisted the Branch Manager to make available the required documents, but he did not insist the Manager to produce necessary documents. If, for any reason, the Branch Manager did not cooperate with the Concurrent Auditor, he could have contacted the Regional Office of the Complainant Bank situated at Hyderabad. The respondent was casual and negligent in his approach, and in discharging his duties.

The main contention of Sri C.V.Rajeev Reddy, learned counsel for the Institute, is that the duty of the Auditor is to verify each and every account, and certify the truth or otherwise of the entries made in the accounts; but the respondent failed to discharge his duties as Concurrent Auditor of the Bank, and he issued the concurrent audit report for the months of April and May, 2001 without proper verification, and without checking various registers being maintained by the Bank, thereby, the respondent was guilty of gross negligence in preparing and submitting the monthly concurrent audit report.

Per contra, Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, would contend that the respondent had no intention to defraud the Bank or the public at large while issuing the concurrent audit report; he bonafidely believed that the bank had maintained the accounts and registers properly; when the negligence attributed to the respondent is not culpable, intentional or planned, he cannot be found guilty of gross negligence under Section 21 (7) read with Section 22 of the Act; mere negligence is not sufficient to take action against the respondent for professional misconduct, unless it is proved that it is intentional and planned; in the present case, there is no material to establish that the respondent was grossly negligent in discharging his duties; and he cannot, therefore, be found guilty of the misconduct defined under Section 22 of the Act. Learned Counsel would request this Court to exonerate the respondent of the charges.

At this stage, for better appreciation, it is relevant to extract the scope of Concurrent Audit:

Concurrent audit is an examination which is contemporaneous with the occurrence of transactions or is carried out as near thereto as possible. It attempts to shorten the interval between a transaction and its examination by an independent person. There is an emphasis in favour of substantive checking in key areas rather than test checking. This audit is essentially a management process integral to the establishment of sound internal accounting functions and effective controls and setting the tone for a vigilant internal audit to preclude the incidence of serious errors and fraudulent manipulations.

A concurrent auditor may not sit in judgement of the decisions taken by a branch manager or an authorised official. This is beyond the scope of concurrent audit. However, the auditor will necessarily have to see whether the transactions or decisions are within the policy parameters laid down by the Head Office, they do not violate the instructions or policy prescriptions of the RBI, and specifically that they are within the delegated authority.

In very large branches, which have different divisions dealing with activities, concurrent audit is a means by which the person in-charge of the branch would ensure, on an ongoing basis, that the different divisions function within laid down parameters and procedures.

In view of the significant developments in the banking sector during the past decade, it was required that new areas posing risk may be brought under the purview of concurrent audit. A large number of activities/operations are being carried out in a centralized manner at various units set up for that purpose and the scale of transactions/operations undertaken at these units is large. With a view to ensuring that the functioning of these units is as per the internal as well as regulatory guidelines, and mitigating the risk associated with large-scale operations, such non-branch units may be brought under the purview of concurrent audit.

While selecting the branches for concurrent Audit, the risk profile of the branches needs to be considered. The branches with high risk are to be subjected to concurrent audit irrespective of their business size. Further, all specialized branches viz., Agri, SME, Corporate, Retail Assets, Portfolio Management, Treasury, Forex, Back Office, etc., may be covered under concurrent audit. Certain areas where risk has reduced on account of computerization, implementation of core banking system may be excluded from the purview of concurrent audit. Concurrent audit at branches should cover at least 50% of the advances and 50% of deposits of a bank, and to examine various activities as per Reserve Bank of India guidelines.

In view of the objectives of the concurrent audit, it was the duty of the concurrent auditor to take steps with the help of the

Regional Office or Head Office when the Branch Manager did not provide necessary information, and had refused to permit him access to the online accounting system, but the respondent did not inform the same to the Regional Office or Head Office being a Concurrent Auditor whose duty was to unearth the fraud or irregularities committed by the Branch Officials in dealing with various customers while advancing loans etc in the course of business. Thus the very purpose of concurrent audit is to detect the fraud, if any, committed by the branch officials.

Concurrent Audit:

Audit or verification of transactions or activities of an organisation concurrently as the transaction or activity takes place.

1. It is early warning system for timely detection of irregularities.
2. It is done on regular basis.
3. Mandatory for Banks to cover at least:
   a. 50% of total deposits &
   b. 50 % of total advances
4. Following should be considered.
   a. Large/very large branches
   b. Special branches
   c. Large problem branches
   d. H.O. department dealing with treasury/funds management & handling Investment Portfolio
   e. Any other branch/department at discretion of bank.
5. It can be undertaken by internal inspection staff or independent C.A.

Scope of Concurrent Audit	Cash	• Any abnormal receipts and payments • Proper accounting of cash remittances • Proper accounting of cash receipts • Expenses by cash involving sizeable amount.
	Advances	• Ensure that loans and advances have been sanctioned properly. • Whether the sanctions

		are as per delegated authority. • Securities and documents have been received and properly charged. • Post disbursement supervision and follow-up is proper or not. • Whether the letters of credit issued by the branch are within the delegated power. • Check the bank guarantees issued. • Proper follow-up of overdue bills of exchange. • Verify classification of advances. • Verify that instances of exceeding delegated powers have been promptly reported to controlling/Head Office.
	Foreign Exchange	• Check foreign bills. • Whether inward/outward remittance have been properly accounted for. • Check extension and cancellation of forward contracts for purchase and sale of foreign currency. • Ensure that balances in Nostro accounts in different foreign currencies are within the limit. • Ensure adherence to the guidelines issued by RBI. • Ensure verification/ reconciliation of Nostro and Vostro account.
Objective	Its objective is to see whether transactions or decisions are within the policy parameters laid down by H.O., they don't violate instructions of RBI and they are within authority.	
Irregularities	Minor irregularities to be rectified on the spot. Serious irregularities reported to H.O/Z.O.	
Reporting	Proper reporting and at proper interval. Reported on 10th of next month/quarter but	

	flash report can be submitted immediately. Normally, the audit report should be divided in three parts. The first part should deal with major irregularities. The second part should deal with minor irregularities which have not been attended during the course of audit. The last part should deal with compliance with earlier reports. Before submission of the report the auditor should discuss the important issues on which he wishes to report with the branch manager and concerned officers.

In the present facts of the case, the respondent – Concurrent Auditor, though under the obligation to unearth the fraud, failed to verify the concerned records and report the fraud committed by the Branch amounting to Rs.4.94 crores, and such a casual approach of the auditor would amount to negligence. Had he verified the records available with the branch, he could have detected the fraud, and reported the same to the concerned officials of the bank. But for reasons best known to him, he did not discharge his duties effectively as a prudent concurrent auditor should have. The respondent as a Concurrent Auditor was required to follow the guidelines issued by the Institute, and the Reserve Bank of India, from time to time. Thus, the acts attributed to him must be construed as wilful negligence.

Had the respondent been diligent in discharging his duties as the Concurrent Auditor keeping in mind the purpose and object of appointing a Concurrent Auditor i.e. to unearth the fraud etc, he would have complained the conduct of the Branch Manager to the higher authorities, and would have asked the Branch Manager in writing to furnish the concerned registers and allow him access to the online accounting system in writing, but he conducted the concurrent audit as a mere ritual, and issued the Concurrent Audit report. His failure to take such steps, as to demand the concerned higher official to produce the registers pertaining to advances, deposits and securities, clearly shows that the respondent had completed concurrent audit, for the months of April and May, as a mere ritual without following the necessary guidelines issued by the Institute, and the Reserve Bank of India, before commencement of concurrent audit. The respondent, being a professional auditor was expected to know the guidelines issued by the Reserve Bank of India and the Institute for the proper conduct of concurrent audit. But in utter violation and disregard of the guidelines issued by the Reserve Bank of India and the Institute, the respondent completed the concurrent audit, and failed to unearth the fraud committed by the officials of the Branch, which resulted in a huge loss to the Bank i.e. an amount of Rs.4.94 crores i.e. the advance of Rs.4.94 crores made without obtaining any security. For the failure of the branch to obtain the signature on the F.D.R. by the depositors creating security for the loan advanced to M/s.Galaxy Industries, the advance of Rs.4.94 crores became an unsecured loan which became sticky making it difficult for the branch to recover the said amount. Even, according to the respondent, there was an interpolation in the registers. It is not known whether the alleged interpolation was detected during concurrent audit and whether it was reported to the concerned officials by the respondent. If there was an interpolation, he could have noted and reported these violations, but conveniently he avoided to report the same. The respondent stated that, subsequently when he went to the Branch in the month of November, 2001, he found the same, but such an explanation is not plausible; and on the strength of such an explanation it is difficult to exonerate the respondent from the misconduct, since such deliberate omission on his part led to serious consequences i.e. colossal loss to Bank.

In "**Alexander v. Cambridge Credit Corporation**[19]" the test of common sense was applied to find out whether the relevant act or omission was a cause. "Common sense" is, however, an uncertain guide. One person's common sense may be another's nonsense. In "**Leeds Estate Building and Investment Company v. Shepherd**[20]" and "**In Re The Westminster Road Construction & Engineering Co Ltd**[21]" the issue of inflated profit figures in the audited accounts, and payment of tax on the inflated profit figures fell for consideration, and it was held that the auditors were liable to the company towards dividends, cost of recovering the excess tax, and any tax not recovered.

"**In Re London General Bank (No. 2)**[22]" a similar question regarding the auditor's liability came up for consideration, and the Court concluded that, although it was not the duty of the Auditors of a company appointed under the Companies Act, 1879 to consider whether its business was prudently or imprudently conducted, it was their duty to consider and report to the shareholders whether the balance-sheet exhibited a correct view of the state of the company's affairs, and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company, and must take reasonable care that what they certify as to the company's financial position is true. And except in very special cases it is their duty to place

[19] (1987) 9 NSWLR 310
[20] (1887) 36 Ch.D. 787
[21] (1932) Acct LR 38
[22] (1895) 2 Ch. 673

before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it.

Similarly "**In Re Kingston Cotton Mills Co. (No. 2)**[23]", the Court held that, where an officer of a company has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible in an action, such breach of duty is a "misfeasance" for which he may be summarily proceeded against under the Companies Act, and it is not necessary that an action should be brought. The Auditors relied on certificates, wilfully false, given by J., one of the directors who was also the manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true values it would have appeared that there were no profits out of which dividend could be declared. If the Auditors had verified the books, and had added to the stock-in-trade, at the beginning of the year, the amounts purchased during the year, and deducted the amounts sold, they would have seen that the stock-in-trade at the end of the year was so large as to call for an explanation, but they did not do so. That, it being no part of the duty of the Auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid. An Auditor is not bound to be suspicious where

[23] (1896) 2 Ch. 279

there are no circumstances to arouse suspicion, and he is only bound to exercise a reasonable amount of care and skill. The real controversy was about the guilt of the Auditors due to breach of their duty to the company. To decide the question, it was necessary to consider what their duty was; whether they had performed, it and in what aspect they failed to perform it? The duties of the Auditor was considered by the Chancery Division in "**In Re London and General Bank (No.2)** (referred supra).

Relying on the above said judgments of the Chancery Division, the Supreme Court, in "**Institute of Chartered Accountants of India v. P.K.Mukherji**[24]", held:-

> "It is not possible for us to accept this argument. Respondent No. 1 owed a duty to all the subscribers of the Provident Fund who were in the position of beneficiaries. It is not correct to say that respondent No. 1 owed a duty only to the Company which had appointed him to perform the auditing. The contributors to the Provident Fund had a beneficial interest in the Fund and the primary object of auditing the Fund was to appraise them of the true financial position of the accounts and investments made from time to time. Respondent No. 1 therefore owed a duty to the contributors to the Provident Fund for making a true report to them of the financial position. In other words, the auditing was intended for protection of the beneficiaries and the Auditor was expected to examine the accounts maintained by the trustees with a view to inform the beneficiaries of the true financial position. The Auditor is, in such a case, under a clear duty towards the beneficiaries "to probe into the transactions" and to report on their true character. In our opinion, the legal position of the Auditor in the present case is similar to that of the Auditor under the Indian Companies Act, 1956. In such a case the audit is intended for the protection of the shareholders and the Auditor is expected to examine the accounts maintained by the Directors with a view to inform the shareholders of the true financial position of the Company. The Directors occupy a fiduciary position in relation to the shareholders and in auditing the accounts maintained by the Directors the Auditor acts in the

[24] AIR 1968 SC 1104

interest of the shareholders who are in the position of beneficiaries. In London Oil Storage Co. Ltd. v. Seear, Hasluck & Co., (Dicksee on Auditing., 17th Edn., p. 632.) Lord Alverstone stated as follows :

"He must exercise such reasonable care as would satisfy a man that the accounts are genuine, assuming that there is nothing to arouse his suspicion of honesty and if he does that he fulfils his duty; if his suspicion is aroused, his duty is to 'probe the thing to the bottom' and tell the directors of it and get what information he can."

It was therefore no defence for respondent No. 1 in this case to say that he had disclosed the irregularity to the Company by this letter dated May 25, 1955. On the contrary it was a breach of duty on his part not to have made a disclosure thereof to the beneficiaries of the Provident Fund in the statement of accounts for the year 1954 which he signed on June 30. 1955."

In "**Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India**[25]" the Apex Court, while considering the misconduct of a clerk, drew a distinction between a misconduct committed by an employee and professional misconduct and held that, in case of professional misconduct, "***the person in the profession precisely knows what is expected of him.***"

The Chartered Accountant is a professional whose expertise in accountancy is acknowledged. He is a member of an expert body and of a premier institute in India. The monthly report issued by an Auditor has its own impact on the public at large, as it is largely on the basis of his report that the general public deposit money in the bank. Reckless monthly reports submitted by the concurrent Auditor resulted in colossal loss to the Bank. It was imperative that the utmost care and caution was exercised by him in issuing the monthly concurrent audit report, and the

[25] (2007) 12 SCC 210

objectivity, integrity, reliability and credibility of the information therein is ensured. Of late, several instances have come to light where, due to the erroneous/ambiguous advice tendered by Chartered Accountants, borrowal accounts have had to face quick mortality resulting in huge losses for banks and financial institutions. To ensure public faith and protect gullible small investors from being cheated of their life savings, the Institute should ensure that its members possess competence of a high order, their character is above board, and their integrity beyond reproach. Chartered Accountants are responsible to the public for their actions, as heavy reliance is placed on their credibility by the general public, Banks, financial institutions, governments etc. The Chartered Accountant's duty is not merely to his client, but extends to various segments of society, more particularly in the commercial field, on whose expertise, integrity and impartiality they rely on in taking various decisions.

Larger public interest would be served only if Chartered Accountants maintain high ethical standards apart from high standards of expertise in accountancy and related fields. In the rare instances where Auditors are found to lack integrity, objectivity, professional competence, and to have failed to exercise due care and caution in submitting the monthly concurrent audit reports, larger public interest would be served only if they are sternly dealt with. The monthly concurrent audit report issued by the concurrent auditor has, in this case, resulted in suppression of the fraud committed by officers of the bank.

Section 22 of the Act defines professional misconduct. According to it, the expression ***"professional misconduct"*** shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this Section shall be construed to limit or abridge in any way the power conferred or duty cast on the Council under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances. Thus, the definition of professional misconduct is wide.

The Second Schedule, read with Section 21 (5) and 22 of the Act, prescribes several acts which would fall within the ambit of professional misconduct. They are:

(1) ....
(2) ....
(3) ....
(4) ....
(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary to make the financial statement not misleading;
(6) fails to report a material mis-statement known to him to appear in a financial statement with which he is concerned in a professional capacity;
(7) is grossly negligent in the conduct of his professional duties;
(8) fails to obtain sufficient information to warrant the expression of an opinion or his exceptions are sufficiently material to negate the expression of an opinion;
(9) ....
(10)...............

Part II of the Second Schedule specifically refers to professional misconduct, in relation to members of the Institute, generally requiring action by a High Court. Thereunder a member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he contravenes any of the provisions of the Act or the regulations made thereunder; and is guilty of such other act or omission as may be specified by the Council in this behalf, by notification in the Gazette of India. The contravention, attributed to the respondent, is violation of Clause (7) of Part- I of Schedule II i.e. grossly negligent in the conduct of his professional duties.

Sri C.V. Rajeev Reddy, learned counsel for the Institute, would contend that issue of such certificate by the respondent directly attracts Clause (7) of Part I of the Second Schedule i.e. gross negligence of a member of the Institute in the conduct of his professional duties. He relied on several judgments of various High Courts, and the Supreme Court, in "**Deputy Secretary to the Government of India, Ministry of Finance (Department of Economic affairs), v. S.N.Das Gupta**[26]"; "**Council of the Institute of Chartered Accountants of India v. V.I.Oommen**[27]", "**Council of the Institute of Chartered Accountants of India v. Shri Gyan Prakash Agarwal**", (unreported judgment of the Delhi High Court in C.A. Reference No.1/2014 and CM No.3363/2014 dated 30.04.2015) and "**Chartered Accountants of India, Indraprastha Marg, New Delhi v. Shri S.Giridharan, Chartered Accountant**", (unreported judgment of High Court of Karnataka at Bengaluru in Civil Petition No.191 of 2012).

Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, would submit that mere negligence does not constitute misconduct to hold a member guilty under Section 21 (5) read with clause (7) of Part I of the Second Schedule, and it is only gross negligence in discharging his duties by a professional Chartered Accountant

[26] AIR 1956 Calcutta 414
[27] AIR 1996 AP 254

which attracts the penal clause; and, unless, the Court records a finding that the negligence held established amounts to gross negligence, the respondent is not liable for any punishment. He has also placed reliance on several judgments of various Courts.

As seen from Clause (7) of Part I of Schedule II read with Section 21 (5) and 22 of the Act, mere negligence by itself would not constitute misconduct, as the word negligence is prefixed with the word "gross". What is gross negligence is a question required to be decided by us.

The Act does not define gross negligence, but it is defined in Black's Law Dictionary as follows:

Gross Negligence:

> "1.A lack of slight diligence or care. 2. A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages. Also termed reckless negligence; wanton negligence; willful negligence; willful and wanton negligence; hazardous negligence, magna neglegentia. 3. See criminal negligence.
>
> "Negligence is gross if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take." H.L.A.Hart, "Negligence, Mens Rea and Criminal Responsibility," in Punishment and Responsibility 136, 149 (1968).
>
> "Gross Negligence. As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous..... have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof..... But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind."

Similarly, in Law Lexicon by P.Ramanatha Aiyar the word gross negligence is defined as follows:

> Gross negligence, sometimes called 'wilful blindness' is the same thing as 'negligence', with the additional of a vituperative epithet.
>
> The term "gross neglect" means and involves a failure on the part of a person to take such reasonable precautions against the risk of an innocent person being deceived in the circumstances of the particular case.
>
> Gross negligence means some culpable default, not arising merely from want of foresight or mistake of judgment.
>
> Negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to the consequences of an act.

For an act of 'negligence' to constitute 'gross negligence', it must be in reckless disregard of a legal duty and of the consequences to another party, or wilful or voluntary or wanton omission. Negligence is the failure to take reasonable care as an ordinary prudent man, depending upon the circumstances of the case, would take.

In "**Forder v. Great Western Railway Company**[28]" the expression "wilful misconduct" has been defined as follows:

> "Wilful misconduct" in an owner's risk note is thus summarized by Johnson J in "Graham v. Belfast and Northen Counties Ry [(1901) 2 I.R. 13]" "Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences................"

[28] (1905) 2 KB 532

The word "gross negligence", as defined in "**Forder v. Great Western Railway Company**" (referred supra), is negligence which is far beyond any negligence or culpable negligence.

Sri E.V.V.S.Ravi Kumar, Learned counsel for the respondent, would contend that the act of the respondent, at best, amounts to negligence, but not gross negligence. He would draw attention of this court to **Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India**. (referred supra), wherein the Supreme Court examined the word "misconduct" in paragraph No.28 relying on the judgment of Calcutta High Court in "**Probodh Kumar Bhowmick v. University of Calcutta**[29]" as follows:

> "Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct and indiscipline, which, however, wide enough to include wrongful omission or commission whether done or omitted to be done intentionally or unintentionally. It means, 'improper behaviour; intentional wrong doing on deliberate violation of a rule of standard or behaviour."

In "**The Institute of Chartered Accountants of India v. V.K. Madhava Rao**[30]" an identical question came up for consideration, and a Division Bench of this Court held that a statement, in the respondent's letter, that he <u>had examined the books of accounts</u>, was certainly a deliberate mis-statement which was admitted by him in paragraph No. 7 of his written statement. In those circumstances, the Division Bench agreed that the Accountant was grossly negligent as he did not have sufficient

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[29] (1994) 2 Cal L J 456
[30] AIR 1956 Hyd 205

material to give such certificate, and had failed to obtain sufficient information.

In the above judgment, the charge against the accountant was that he had blindly certified the sales of the Deccan Chronicle without checking the books of accounts knowing fully well that the certificate was required for boosting up advertisement insertions. When persons intend to insert advertisements in newspapers, one of considerations, which weigh with them, in selecting a newspaper, is to enquire what its circulation or sales is, and advertise in a paper which has a wide circulation. But, based on the statement of the accountant, advertisements were invited, which was false on the face of the record. Therefore, the Chartered Accountant was found guilty of misconduct i.e. gross negligence in issuing the certificate as he had failed to take the elementary precaution of checking the facts contained in the accounts. He was deemed guilty of gross negligence, because the duty he owed was to all those who were likely to act to their detriment upon the strength of that statement, and whom he should have had in contemplation at the time when he made the statement. The principles laid down in the above judgment, in fact, supports the contention urged on behalf of the Institute.

Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, contends that failure to rise to the expected level of efficiency, in discharging professional duties, cannot be regarded as misconduct, treating such failure as gross negligence in the discharge of his duty; at best, it is mere failure to detect fraud; in the facts of the present case, failure of the respondent to verify the book maintained in the bank, particularly loans against securities is not mere failure to rise to the expected level of efficiency in the discharge of his professional duties; it does not amount to gross negligence; and is merely a bonafide mistake or error. In support of his contention, he placed reliance on the judgment of the Calcutta High Court in "**Council of the Institute of Chartered Accountants of India v. Somnath Basu**[31]". In the said judgment, the Calcutta High Court held that failure to rise to the expected level of efficiency in discharging professional duties cannot be regarded as misconduct treating such failure as a negligent act in the conduct of professional duties.

The judgment of the Madhya Pradesh, in "**Council of the Institute of Chartered Accountants of India v. C.H.Padliya**", (referred supra) is merely of persuasive value and does not constitute a precedent binding on this court. In **"Institute of Chartered Accountants of India v. S.K. Jain**[32]" the Division Bench of the Delhi High Court, while dealing with misconduct under Section 22 of the Act, held as follows:

> ""Professional misconduct" has been defined in Section 22 of the Act. Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. <u>Misconduct implies failure to act honestly and reasonable either according to the ordinary and normal standard, or according to the standard of a particular profession.</u> Authenticity and sanctity is attached to certification done by a Chartered Accountant. Hallmark of the profession is the expertise possessed by its members, in the matters of accountancy and auditing amongst others. Correctness is a matter of rule in a certificate issued by a Chartered Accountant. He is supposed to have tested correctness of the figures certified. If he puts his signature, without proper verification, in any certificate, it certainly is a serious matter. Such conduct does not befit a Chartered Accountant, and is unbecoming of him. In such

[31] AIR 2007 Cal 29
[32] 2000 (56) DRJ 671

> a case, he fails to do what is the minimum required to be done by him. He does something in the pursuit of his profession which is not only unethical, but also disgraceful or dishonourable."

In "**Council of Institute of Chartered Accountants of India v. B. Ram Goel**[33]" the Delhi High Court defined the expression 'professional misconduct' as follows:

> ""Professional misconduct" has been defined in Section 22 of the Act. Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. Misconduct implies failure to act honestly and reasonably either according to the ordinary and natural standard, or according to the standard of a particular profession. Chartered Accountants' profession occupies a place of pride amongst various professions of the world. That makes observance of the professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, or is unethical, it is misconduct-warranting consequences indicated in the Statute. An Auditor holds a position of trust. That is why disclosure of information has been made a ground for imputing misconduct. By betrayal of the trust, the conduct becomes one which is unbecoming of the professional."

In the aforesaid judgment, the Delhi High Court relied on **Pandurang Dattatraya Khandekar v. The Bar Council of Maharashtra, Bombay** (referred supra) and held that the misconduct alleged against the Chartered Accountant was established, and imposed on him the punishment of reprimand.

In "**State of Punjab v. Ram Singh Ex.Constable**[34]" the Supreme Court relied upon the definition of "misconduct" as defined in Black's Law Dictionary, 6th Edition at page 999 and P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987 at page No.821, which are as follows:

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[33] 2000 (57) DRJ 27
[34] (1992) 4 SCC 54

"Misconduct has been defined in Black's Law Dictionary, Sixth Edition at page 999 thus:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.

Misconduct in office has been defined as:

Any unlawful behaviour by a public officer in relation to the duties of his office, wilful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.

P. Ramanatha Aiyar's the Law Lexicon, Reprint Edition 1987 at p. 821 'misconduct' defines thus:

The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance,. misconduct means a transgression of some established and definite rule of action, where no discretion if left, except what necessity may demand and carelessness, negligence and unskillfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

In the aforesaid decision, the Supreme Court held that the conduct of a constable possessing a service revolver, found to be heavily drunk while roaming in the market on duty, and to have abused the medical officer at the time of medical examination, would amount to conduct unbecoming of a constable, and that meant that he was unsuitable to discharge his duties as a police constable.

The Auditor holds a position of trust and it is his bounden duty to honour that trust by being candid with the stakeholders, and telling them frankly and fully everything with regard to the affairs of the Bank which has come to his knowledge and which it is material for the stakeholders to know; if an Auditor does not do what it is his duty to do, it is no defence for him to say in a disciplinary proceeding, started under the Chartered Accountants Act, that he had told the stakeholders that he had not done it. ***The lapse is constituted by his failure to perform a duty without which an audit is meaningless and it is not excused by giving information of the omission to the stake-holders.*** The reason is that the object of the Act is to ensure in public interest that those who practise the profession of Auditors shall perform, in their actual practice, at least the essential duties of an audit and shall bring to bear on their work attention to matters to which their duty requires them to pay attention, and the examination of accounts involves thorough and exhaustive testing of every account in the general ledger. If such negligence would cause no damage to anyone, such negligence cannot be termed as gross negligence within the definition of Section 22 of the Act.

The law declared in the above judgment cannot be applied to the facts of the present case since the respondent, in utter disregard of his professional duties, had failed to check/verify the accounts maintained by bank during the concurrent audit, which resulted in a loss to the bank to a tune of Rs.4.94 crores on account of such serious lapse on the part of respondent. As per the guidelines of Reserve Bank of India, the very purpose of concurrent audit was defeated, and it appears that the respondent extended his helping hand to fraudsters i.e. bank officials.

The word 'neglect' is defined both as a noun and as a verb in terms of failure or omission to discharge or perform a duty; but one cannot be charged with failure to perform a duty unless he knows, or ought to know, that there is a duty incumbent on him to be performed. However, the word may import something more than a mere omission, something more than a failure without fault; it may import an omission accompanied by some kind of culpability in the conduct of the person, and it embraces wilful as well as unintentional disregard of duty.

'Neglect of duty' means failure to perform or discharge a duty and covers positive official misdoing or official misconduct as well as negligence as held in "**Baburao Vishwanatah Mathpati. v. State of Maharashtra**[35]".

The view expressed by the Court, in the above judgment, is that, in order to find the person guilty of neglect of duty, it must be culpable or wilful. Here the respondent is a concurrent Auditor, on whom a duty or obligation was imposed to ensure that the monthly concurrent audit report submitted by him, regarding the correctness of audit, was based on a proper verification of the bank books of accounts, and after ascertaining that there was no suppression of any material fact by the bank officials regarding loans advanced against securities, and maintenance of securities. The respondent failed to discharge his statutory obligation or duty knowing the ill-consequences that would flow from such failure, and this certainly amounts to gross negligence.

In paragraph No.50 of the same judgment, the Division Bench of the High Court adverted to the meaning of 'gross negligence' to make a professional liable for misconduct. ***To fall within the ambit of misconduct under Section 22 of the Act, such negligence must be wilful, intentional, culpable or in flagrant disregard of duties***. Even if the definition in paragraph No.50 of the judgment is applied here,

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[35] AIR 1996 Bom 227

the respondent has acted in flagrant disregard of his duties as he has, without verifying the books of accounts and registers maintained by the bank, completed the concurrent audit. Such an act of the respondent would amount to gross negligence as held by the Division Bench of the Calcutta High Court (referred supra).

Sri E.V.V.S.Ravi Kumar, learned counsel for the respondent, has drawn our attention to "**The Council of Institute of Chartered Accountants of India v. Shrui K.Venkatacharyulu**[36]", wherein the Division Bench of this Court held that misconduct can be attributed to a Chartered Accountant mostly when he has resorted to certain acts knowing fully well that the same is contrary to law. An opinion formed by him, which ultimately turns out to be not correct, cannot be treated as an act of misconduct. The law laid down by the Division Bench of this Court is that, in order to find a person guilty of professional misconduct, he must resort to certain acts knowing fully well that the same is contrary to law.

As discussed in the earlier paragraphs, the respondent submitted monthly concurrent audit reports without verifying or checking the books of accounts, loans registers and securities. Submitting such report callously amount to gross negligence in the discharge of his professional duties as a concurrent auditor, and he is liable for punishment under Section 21 (5) read with clause (7) of part I of Schedule II.

Refuting the contentions of the learned counsel for the respondent, Sri C.V. Rajeev Reddy, learned counsel for the Institute, has placed reliance on four judgments viz., "**Deputy**

[36] MANU/AP/2140/2014

Secretary to the Government of India, Ministry of Finance (Department of Economic affairs), v. S.N.Das Gupta" (referred supra), "**Council of the Institute of Chartered Accountants of India v. V.I.Oommen and others**" (referred supra), "**Council of the Institute of Chartered Accountants of India v. Shri Gyan Prakash Agarwal**" (referred supra) and "**Chartered Accountants of India, Indraprastha Marg, New Delhi v. Shri S.Giridharan, Chartered Accountant**", (referred supra) to contend that the respondent's failure to take reasonable care, and his failure to discharge his professional duties, amounts to gross negligence and he is liable for punishment on being found guilty of misconduct as defined under Section 22 of the Act. The consistent view expressed by various courts in the above judgments is that failure to take reasonable care in discharging his professional duties amounts to misconduct.

The definition of Professional Misconduct, contained in Corpus Juris Secumdum at page No.740 (Vol.7), is as follows:

> "Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it."

Relying on the definition of "professional misconduct" as defined by Darling J., in "**A Solicitor ex p the Law Society, In re**[37]", the Supreme Court, in "**R.D.Saxena v. Balram Prasad Sharma**[38]", opined that an advocate must conduct himself at all times in a manner befitting his status as a member of a high and honourable profession. If he departs from such a standard, even in

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[37] (1912) 1 KB 302
[38] (2000) 7 Supreme Court Cases 264

the context of recovering his fees, and behaves in a manner which is not fair, reasonable and according to law, he would be liable to disciplinary action. Exploitation of poor litigants is nothing but a common man loosing faith in the institution of the judiciary.

Similarly, in "**Noratanmal Chouraria v. M.R.Murli**[39]", the Supreme Court considered the scope of professional misconduct, and concluded that improper behaviour, intentional wrongdoing or deliberate violation of a rule or standard of behaviour is nothing but transgression of a definite rule of action, which amounts to misconduct of a professional advocate.

In "**Baldev Singh Gandhi v. State of Punjab**[40]" the Apex Court examined the scope of misconduct and held that "misconduct" has not been defined in the Act. The word "misconduct" is the antithesis of the word "conduct". Thus, ordinarily, the expression "misconduct" means wrong or improper conduct, unlawful behaviour, misfeasance, wrong conduct and misdemeanour etc. There being different meanings of the definition of misconduct, the Court should consider the expression "misconduct" with reference to the subject and the context wherein the said expression occurs. Thus, from the principles laid down in the above judgment, misconduct has to be considered in the facts and circumstances of the case, and is not a principle of universal application.

In the facts and circumstances of the present case, the procedure evolved by the Institute to conduct enquiry into the allegations made against any member of the Institute were

[39] (2004) 5 Supreme Court Cases 689
[40] (2002) 3 Supreme Court Cases 667

followed, and several witnesses, including the respondent herein were examined.

For the various questions put to him, the respondent made certain admissions that he did not verify the registers, which he is expected to verify in accordance with the guidelines. One of the duty of the respondent was to verify the loans and advances and securities as per the guidelines of Reserve Bank of India, but the respondent did not verify the loans and advances register. The explanation offered by him is that other than the manual records, the computer print outs, supplementary statements and loan sanctioned statements, enabled him to verify the transactions, but he did not cross check the manual records with the material downloaded in the computer as he could not get the same, therefore, he could complete his work with manual records and no other cross check was available. He further stated that when he asked the Branch Manager to furnish other registers and provide proper assistance, the Branch Manager stated that there was shortage of staff, the system reports were not available, and the system man was on transfer. However, none of these statements are even reflected in the concurrent audit report. If, really, the Branch Manager did not provide him the opportunity to go through the computer systems available in the bank, and to cross check the manual records with the computer, the respondent could have informed the same to the higher authorities like the Regional Office of the Bank, Hyderabad, which was at a short distance from the Branch, but he simply submitted the concurrent audit report as if he had verified the required registers, which ultimately was proved to be false, in view of the report of General Manager (Inspections).

The other witnesses, examined before the Committee, specifically testified that the respondent did not cross check loans and advances against securities, he did not even verify the concerned registers, though the purpose of concurrent audit is to unearth the fraud committed by the officers of the Bank. The respondent's failure to verify the records, cross check the manual records with the computer accounts, and in submitting the report without verification of the registers, amounts to dereliction of duty, and is gross negligence on his part. Since the very purpose of appointing him was to detect the frauds committed by the officials of the Bank, which resulted in a loss to the Bank to a tune of Rs.4.94 crores during the period April and May, 2001.

Added to the evidence available on record, in the correspondence by way of reply and written statement etc., the respondent admitted his failure to verify and check the registers to detect the fraud, if any, committed by the officers of the Bank, but this admission is a qualified admission. The reason for his failure is that the Branch Manager did not produce any other records except the records he verified as per the report, he did not verify the computer accounts because of lack of staff, and as the computer operator was on transfer. The failure of the respondent to do so, does not exonerate him of his liability since the very purpose of a concurrent audit was defeated because of his misdeeds or gross negligence in conducting the concurrent audit for the month of April and May, 2001. Though, an allegation is made against the respondent, regarding his failure to verify the records pertaining to March 2001, he was not the concurrent auditor for the month of March, 2001. Therefore, he cannot be said to be negligent in submitting the concurrent audit report for the said month. The admissions made in the written statement, reply etc, and the evidence available on record, clinchingly establish that the respondent is guilty of gross negligence in submitting the concurrent audit report for the months of May and April, 2001 in a most causal manner as if it was a mere ritual, without realising the purpose for which he was appointed as the concurrent auditor. Such conduct of the respondent amounts to deliberate failure to discharge his duty, which can be termed as gross negligence in discharging his duties, which resulted in a huge loss to the bank.

In view of the law declared by various courts referred to above, we shall now examine the specific acts or omissions attributed to the respondent which, we are satisfied, amounts to gross negligence on his part, making him liable to be punished for misconduct under Section 22 of the Act.

Sri C.V. Rajeev Reddy, learned counsel for the Institute, contended that an appropriate punishment, as recommended by the Council of the Institute, should be imposed and this Court, while exercising power under Section 21 (5) of the Act, should not take a lenient view against the concurrent auditor of the Bank who has neglected his duty to the detriment of the public at large. On the other hand, Sri E.V.V.S.Ravi Kumar, Learned Counsel for the respondent, would submit that the incident took place in the year 2001, almost 15 years has since elapsed, and therefore a lenient view should be taken.

The professional misconduct attributed to the respondent is grave and serious in nature which affects public confidence, and their faith in the integrity and impartiality of the Chartered

Accountants and the Institute of which they are members. A false monthly concurrent audit report submitted by the respondent has enabled the officers to suppress fraudulent transactions, which resulted in monetary loss to the public large i.e. the depositors of the bank. Taking a lenient view, or exonerating such professionals, would encourage others to indulge in similar acts, and completely erode the faith of the general public in the impartiality and integrity of the members of the Institute, and bring the Institute itself into disrepute.

The Council of the Institute has recommended removal of the name of the respondent from the Register of the Institute for a period of three (3) months i.e. suspending him from practicing as a Chartered Accountant for a period of three (3) months. The recommendation of the Institute, regarding the nature of the punishment, is not binding on this Court and, in exercise of the wide powers conferred on it by the Act, this Court can impose a different punishment. In a similar situation, the Division Bench of this Court, in **Council of the Institute of Chartered Accountants of India v. V.I.Oommen** (referred supra), imposed a higher punishment than the one recommended by the Institute.

In the light of the above discussion, after anxious consideration of the matter, we find it appropriate that the respondent herein should be suspended from practising as a Chartered Accountant for a period of three months from 01.01.2017 to 31.03.2017.

Accordingly, the referred case is disposed of directing the respondent's membership with the Institute of Chartered Accountants of India shall stand suspended from 01.01.2017 to

31.03.2017, and, consequently, during that period he shall not practice or function as a Chartered Accountant. There shall be no order for costs.

Miscellaneous petitions, if any, pending shall stand closed.

RAMESH RANGANATHAN, ACJ

JUSTICE M.SATYANARAYANA MURTHY

16.11.2016.
Ksp