

\$~4

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 9317/2014 & CM APPL. 21108/2014**

RAJIV BHATNAGAR

..... Petitioner

Through: Mr Jayant Mehta, Advocate with
Mr Kotla Harshwardhan, Mr
Arshdeep Singh, Ms Mansi
Sood, Mr Hitesh Rai,
Advocates.

versus

THE DISCIPLINARY DIRECTORATE OF THE
INSTITUTE OF CHARTERED ACCOUNTANTS
OF INDIA (ICAI) & ORS

..... Respondents

Through: Mr Sandeep Sethi, Senior
Advocate with Ms Pooja M.
Saigal, Mr Advocates for R-1 &
2.
Mr Abhinav Mukerji, Mr
Siddharth Garg, Advocates
for R-3.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

24.07.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 10.02.2014 passed by the Disciplinary Committee of the Institute of Chartered Accountants of India (hereafter 'the Disciplinary Committee'). The petitioner also impugns an order dated 27.05.2014 passed by the Disciplinary Committee, rejecting his petition for

reviewing the order dated 10.02.2014. The said orders are, hereafter, referred to as “the impugned orders”.

2. Respondent no. 3 (CA Sanjeev Vohra) is a practicing Chartered Accountant and a member of the Institute of Chartered Accountants of India (hereafter ‘ICAI’). The impugned order dated 10.02.2014 was passed pursuant to proceedings initiated on a complaint filed by the petitioner against respondent no.3, with ICAI. By the impugned order dated 10.02.2014, the Disciplinary Committee had found respondent no.3 to be guilty of professional misconduct falling within Clause (8) of Part I of the First Schedule to the Chartered Accountants Act, 1949 (hereafter the ‘ICAI Act’); however, the Disciplinary Committee had absolved respondent no.3 of the charges of professional misconduct falling within Clauses 7 and 9 of Part I of the Second Schedule to the Act. By an order dated 21.08.2014, the Disciplinary Committee had imposed a punishment of reprimand on respondent no.3 on account of his misconduct, as found.

3. According to the petitioner, the decision of the Disciplinary Committee absolving respondent no.3 of professional misconduct under Clauses 7 and 9 of Part I of the Second Schedule to the Act is erroneous and, therefore, the petitioner filed a petition seeking review of the said decision. The Disciplinary Committee did not entertain the said review petition on the ground that there was no provision under the ICAI Act or the Rules and Regulations made thereunder, to do so.

4. It is contended on behalf of the petitioner that the impugned

order dated 10.02.2014, is *ex facie*, erroneous and fails the *Wednesbury* test, inasmuch as no reasonable person could have arrived at the said decision.

5. It is contended that the allegations made against respondent no.3 are clearly established from the record and the Disciplinary Committee had overlooked the same.

Factual Background

6. The controversy in the present case relates to the professional conduct of respondent no.3 in relation to a trust known as “Saraswati Educational Foundation Trust” (hereafter ‘the Trust’).

7. The petitioner states that the Trust was registered on 11.05.2001 with eight trustees acting as the Board of Trustees. The petitioner was one of the trustees.

8. It is stated that the petitioner had initiated and executed an agreement with a society known as “Delhi Public School Society” to establish a school known as “Delhi Public School, Jalandhar” as a franchisee.

9. It is stated that on 27.11.2001, M/s Bhandari Gupta and Associates, Chartered Accountants were appointed as auditors for Delhi Public School, Jalandhar. It is stated that on or about 03.03.2003, certain disputes arose between trustees which resulted in the Board of Trustees of the Trust passing a Resolution on the said date, removing Mr Vipin Mahajan and Ms Poonam Mahajan as trustees of the Trust. It is stated

that in their place two other persons, namely, Dr T.S. Kler and Dr Neelam Kler were appointed as trustees.

10. The petitioner and his wife were trustees of the Trust at the material time and certain allegations were levelled against them regarding misuse of the funds of the Trust. On 11.08.2004, a show cause notice was issued to the petitioner and his wife. In the said show-cause notice, it was alleged that during the financial year 2002-03, there were transactions entered into with two entities belonging to the petitioner, where expenses were shown to have been incurred on behalf of the Delhi Public School. The invoices were booked in the name of the two concerns (M/s M.J. International and M/s M.J. Enterprises) and these concerns had in turn raised vouchers in the name of Delhi Public School without any supporting documentary evidence. It was alleged that the expenses were reimbursed against those vouchers. It was alleged that in this manner, funds had been siphoned off by the petitioner and his wife.

11. Next, it was alleged that a sum of ₹10,00,000/- had been misappropriated by the petitioner and his wife by showing the same as loan processing expenses paid to various professionals. It was further alleged that a large amount was accounted for in the name of M/s M.J. Enterprises instead of the Trust. Next, it was alleged that the petitioner had fraudulently obtained reimbursement of payment of ₹17,000/- for the purchase of an expensive watch and the same had no connection with the functioning of the school. It is also alleged that the petitioner had fabricated a resolution so as to nominate his wife on the Board of Management of the Delhi Public School.

12. It is stated that on 17.08.2004, respondent no.3 had submitted a report, which substantiated the allegations made in the show cause notice. The petitioner contends that the said report was fabricated and malicious. He also alleged that respondent no.3 had entered into a conspiracy with other trustees to oust the petitioner and his wife. He also pointed out that the allegations made in the show cause notice (which was issued on 11.08.2004) were similar to the allegations made in the report submitted by respondent no.3.

13. On 20.08.2004, the Board of Trustees passed a resolution removing the petitioner and his wife as trustees of the Trust. It is alleged that this resolution was passed on the basis of the audit report submitted by respondent no.3. Respondent no.3 was appointed as an auditor on 26.08.2004. The petitioner disputes the same. One of the allegations raised by the petitioner is that the petitioner had submitted a back dated report. He reasons that respondent no.3 could not have issued a report on 17.08.2004, which was prior to his appointment as the auditor of the Trust.

14. The petitioner filed a complaint against respondent no.3 with the Directorate of Discipline of ICAI under Section 21 of the ICAI Act levelling several allegations against respondent no.3 to the following effect: (a) that respondent no.3 had entered into a criminal conspiracy with the trustees of the Trust to conceal their misdeeds and financial frauds; (b) that respondent no.3 had accepted an assignment of internal audit without following proper rules and without confirming that the internal audit had already been completed and the statutory audit was

being conducted by M/s Bhandari Gupta and Associates; (c) that respondent no.3 had issued an audit report by colluding with trustees to illegally remove the petitioner; (d) that respondent no.3 had taken up the assignment of acting as an auditor without seeking the consent of the earlier auditors of M/s Bhandari Gupta and Associates; and (e) that respondent no.3 had given a misleading and incorrect statement before the trial court.

15. The Director (Discipline) of ICAI formed a *prima facie* opinion that respondent no.3 was guilty of professional and/or other misconduct falling within the meaning of Second Schedule to the ICAI Act. The same was considered by the Disciplinary Committee of ICAI and it had decided to proceed further under Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

16. After examining the allegations, the Disciplinary Committee concluded that there were, essentially, three charges against respondent no.3. First related to his appointment; second related to conducting both internal audit as well as statutory audit; and third related to respondent no.3 accepting the assignment without communicating with the previous auditor.

17. It was alleged that respondent no.3 had been appointed at a meeting held on 26.08.2004 which was attended by Sh. Vipin Mahajan. The petitioner alleged that Sh. Mahajan had been removed as a trustee of the Trust at a meeting held on 03.03.2003 and, therefore, respondent

no.3's appointment as an auditor was irregular. The Disciplinary Committee examined the said contention and found that Sh. Vipin Mahajan was removed at a meeting purportedly held on 03.03.2003, which was shown to have been attended by only four trustees out of eight trustees. The Disciplinary Committee found that a quorum of 3/4th majority was required to remove a managing trustee and, therefore, the said resolution was invalid.

18. The Court also noted that the said dispute had been agitated in a Civil Suit (*Civil Suit No. 266/2004* captioned "*Rajiv Bhatnagar and Mrs Rasika Bhatnagar v. Saraswati Education Foundation*"). The Court had noted that the Trust could invalidate the resolution in question and in fact had done so by passing a resolution dated 11.08.2004, whereby annulling the resolution removing Mr Vipin Mahajan and Ms Poonam Mahajan. The Disciplinary Committee concluded that Vipin Mahajan was eligible to act as a trustee at the time of appointment of respondent no.3.

19. The Disciplinary Committee also did not find any merit in the allegation that the petitioner had conducted any tax audit or statutory audit. Before the Disciplinary Committee, it was contended on behalf of the petitioner that an internal auditor cannot be appointed as a tax auditor and respondent no.3 had acted in violation of the said Rules. The Disciplinary Committee noted that respondent no.3 had signed Form 10B which is required under Section 12A(b) of the Income Tax Act, 1961 and had "*not conducted the tax audit or statutory audit*".

20. Insofar as the allegation that the petitioner had not communicated with the previous auditor is concerned, the Disciplinary Committee found merit in the said allegation and has imposed the punishment that it thought fit; it has reprimanded respondent no.3.

Submissions

21. Mr Jayant Mehta, learned counsel appearing for the petitioner had earnestly contended that the decision of the Disciplinary Committee holding that Mr Vipin Mahajan was entitled to act as a trustee on 26.08.2004 and participate in passing of a resolution appointing respondent no.3 as an auditor, is *ex facie* erroneous. He contended that the Disciplinary Committee had erred in appreciating that an appeal had been filed against the decision of the Civil Judge (Senior Division), Jalandhar rendered in the Civil Suit No. 266 of 2004; and, thus, the decision that the Trust was competent to set aside the earlier resolution and restore Vipin Mahajan and Poonam Mahajan as trustees was erroneous and had not attained finality.

22. Second, he submitted that the Disciplinary Committee had erred in not appreciating that it was respondent no.3's own case that he had been acting as an internal auditor prior to his appointment as a statutory auditor on 26.08.2004. He submitted that paragraph 290.173 of the Code of Ethics provides that the statutory auditor of an entity cannot be its internal auditor. He submitted that there can be no dispute that respondent no.3 had flouted the Code of Ethics and was, thus, guilty of professional misconduct.

Discussion and Conclusion

23. The contention that the Disciplinary Committee had erred in not appreciating that the decision of the Civil Judge (Senior Division), Jalandhar rendered in Civil Suit No. 266/2004 was subject matter of appeal and, therefore, could not be relied upon, is unmerited. The Disciplinary Committee was not concerned with the internal disputes between various trustees. The scope of examination before the Disciplinary Committee was limited to examining whether respondent no.3 had misconducted himself by accepting an appointment on 26.08.2004, which was made pursuant to a resolution of the Board of Trustees wherein Mr Vipin Mahajan participated as a trustee.

24. Plainly, respondent no.3 was not required to take a view on the validity of the resolution dated 11.08.2004, passed by the Board of Trustees, annulling the earlier resolution removing Vipin Mahajan as a trustee. Therefore, notwithstanding the disputes between the trustees, respondent no.3 could not have been held to have misconducted himself on that ground.

25. Having stated the above, this Court is also of the view that there is no flaw in the conclusion of the Disciplinary Committee in rejecting the said allegation. The Disciplinary Committee had noticed that the resolution dated 03.03.2003 was passed at a meeting which was attended by only four trustees. It had noticed that this number was short of the 3/4th majority required as per Rules and Regulations. Mr Jayant Mehta did not produce any material to show that this decision was

perverse or unreasonable.

26. This Court had also pointedly asked whether the decision rendered by the Civil Judge (Senior Division), Jalandhar in Civil Suit No. 266/2004, upholding the resolution to the trust annulling the removal of Vipin Mahajan and Poonam Mahajan, had been stayed by any superior Court. Mr Mehta had responded in the negative. Plainly, the Disciplinary Committee cannot be faulted for relying on a judicial determination which has not been stayed by a superior court.

27. The contention that the petitioner had committed misconduct by accepting the appointment as a statutory auditor, is also unpersuasive. First of all, it does not appear that any such allegation had been made in the complaint filed by the petitioner. The petitioner had alleged that respondent no.3 had submitted a back dated report in collusion with the trustees. In this regard, it was explained by respondent no.3 that he had conducted an internal audit and had found certain irregularities which were reported. He claimed that, thereafter, he was appointed as a statutory auditor. It is material to note that a Trust is not a company and, therefore, the expression “statutory auditor” cannot be construed as an appointment as contemplated under Section 224 of the Companies Act, 1956 (as was in force at the material time).

28. Undeniably, a statutory auditor of an entity cannot be its internal auditor. The rationale being that he cannot be called upon to give an independent and objective opinion on the accounts if he has not been a part of the internal audit system. Paragraph 290.173 of the Code of

Ethics indicates the same and is set out below:-

“290.173 A statutory auditor of an entity cannot be its internal auditor as it will not be possible for him to give an independent and objective opinion.”

29. It is relevant to mention that an audit report of a company is required to be in a specified form. At the material time, the same was stipulated under Companies (Auditor's Report) Order, 2003 [Now under the Companies Auditor Report Order (CARO) Rules, 2016].

30. However, there was no material in the present case to substantiate that respondent no.3 had given any report or was placed in a position where he was called upon to comment on his own work. Respondent no. 3 was simply appointed as an auditor to audit the accounts of the Trust although, the same was termed as a statutory auditor. Mr Mehta was pointedly asked whether there was any material to indicate the scope of audit to be performed by respondent no.3. However, he was unable to show any document to indicate the same.

31. Although, it was alleged that respondent no. 3 had submitted a statutory report, the petitioner had not produced any material on record to establish the same. Mr Mehta had referred to the opinion of the Director, Discipline of ICAI to contend that two reports were submitted by respondent no.3. However, this is precisely the allegation that was examined by the Disciplinary Committee and it was found that the petitioner had merely signed Form 10B under the Income Tax Rules. And, this was required for the trust to claim benefit of Section 12A(b)

of the Income Tax Act, 1961.

32. In view of the above, this Court is unable to accept that the decision of the Disciplinary Committee of ICAI is erroneous or warrants any interference by this Court.

33. At this stage, it is material to note that considerable judicial time was taken up by the petitioner in canvassing that it was unethical on the part of respondent no.3 to have conducted an internal audit and yet have accepted the appointment as a statutory auditor. In this regard, Mr Sethi, the learned counsel appearing for the respondents had pointed out that the previous auditor appointed by the Board of Trustees (M/s Bhandari Gupta and Associates) had also been appointed to conduct the internal audit as well. Concededly, the petitioner was a party to such appointment. In this view, the petitioner is in no position to contend that the same amounts to misconduct.

34. At this stage, it is relevant to note that the proceeding against a member of ICAI are in the nature of disciplinary proceedings. The object is to ensure that professional standards are maintained and Chartered Accountants maintain the professional standards, and conduct themselves in a manner, so as not to bring disrepute to the profession. Such proceedings cannot be viewed with the prism of a private *lis* between the Complainant and the Chartered Accountant. The complainant, essentially, acts as a realtor that provides information to the ICAI regarding misconduct. This is also the rationale for not providing a remedy of an appeal to a complainant under Section 22G of

the ICAI Act, against a decision of the ICAI absolving the member of the allegation of any misconduct. In terms of Section 22G of the ICAI Act, the remedy of appeal is only available to a member of ICAI against any decision of the Board of Discipline or Disciplinary Committee imposing any penalty. It is not available to the Complainant/ informant.

35. It is well settled that the scope of interference with the decision of any authority under Article 226 of the Constitution of India is limited. Although, it was contended on behalf of the petitioner that the decision of the Disciplinary Committee was perverse and unreasonable, so as to fail the *wednesbury* test (that is, no reasonable person could arrive at such a decision), this Court finds the said contention to be wholly bereft of any merit.

36. In view of the above, the present petition is dismissed with costs quantified at ₹25,000/- to be deposited with Delhi High Court Legal Services Committee within a period of two weeks from today.

37. The pending application is disposed of.

VIBHU BAKHRU, J

JULY 24, 2019
RK