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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHARTERED ACCOUNTANT REFERENCE NO.1 OF 2011

The Institute of Chartered Accountants of India, ICAI Bhawan, P.B. No.7100, I.P. Marg, New Delhi 110 002. … Petitioner

Versus

Shri Dharmendra Sumanchandra Kothari, FCA, Chartered Accountant, 1802, Kent Gardens, TPS III, Off Factory Lane, Opp. Jambli Gali, Boriwali – West, Mumbai – 400 092. …. Respondent

Mr. A.K. Saxena with Mr. Gautam S. Mehta, Advocate *for the Petitioner.*

CORAM: DHIRAJ SINGH THAKUR & VALMIKI SA MENEZES, JJ.

Reserved on : 19TH OCTOBER 2022

Pronounced on : 2ND DECEMBER 2022

JUDGMENT : (*Per Valmiki Sa Menezes, J.*)

1. This is a reference made to this Court under Section 21(5) of the Chartered Accountants Act, 1949 (for short, 'the said Act'), by the Institute of Chartered Accountants of India, New

Delhi, for necessary orders to be passed in terms of Section 21(6) of the Act.

2. It is the case of the petitioner that Shri Kailash Bhagwandas Bhatia, hereinafter referred to as “the complainant”, who was a Chartered Accountant, had audited the accounts of M/s. Prashant Enterprises and of M/s. K. Prashant Industries up to the year ending 31.03.2004 and had billed the said entities for fees for accountancy services rendered, which fees were still kept outstanding by the clients.

It is further the case of the complainant that the complainant received a letter dated 18.10.2004 from M/s. Joshi Nair & Associates, of which the respondent is a partner, for “No Objection Certificate” to enable them to act as Accountants to the same clients, to which the complainant had raised objections; despite these objections, the respondent had signed financial statements ending 31.03.2004 without seeking a No Objection Certificate from the complainant before accepting the audit of the above mentioned entities. The complainant, thereafter, wrote letters dated 18.05.2005 and 11.06.2005 to the respondent Chartered Accountant to confirm this fact and received no reply to this communications. It is thus alleged by the complainant, that the respondent accepted the said audit by undercutting of professional fees, this alleged act being one of professional misconduct falling within the meaning of clauses (8) and (12) of Part I of the First Schedule and of the Notification no.1-CA(7)/46/99/dated 28.10.1999, under clause (ii) of Part II of Second Schedule read with Sections 21 and 22 of the said Act.

3. On receiving the complaint, the petitioner sent a copy of the same under cover of letter dated 13.07.2006 to the respondent, calling upon the respondent to file his written statement to the allegations made in the complaint. The respondent presented his written statement on 20.09.2006, in answer to which the respondent submitted his rejoinder on 28.10.2006, followed by respondent's written comments on the rejoinder being filed on 23.11.2006. On considering the contents of the complaint, written statement and the rejoinder, the petitioner, in terms of Regulation 12(11) of the Chartered

Accountants Regulations 1988, in its meeting held in February 2008, arrived at a *prima facie* opinion that the respondent was guilty of professional and other misconduct, and referred the case to the Disciplinary Committee constituted under the provisions of the Act for conducting an inquiry.

4. The Disciplinary Committee inquired into the allegations of misconduct as stated in the complaint and considered the written statement of the respondent. During the course of the inquiry, the respondent admitted the first charge that he had accepted the audit assigenemnt without communicating to the previous auditor and obtaining his No Objection Certificate. The respondent, however, submitted that his intention was not malafide and this was the first time he made this mistake and that in future he would adhere to the Code of Ethics.

With respect to the second charge made by the Disciplinary Committee to the effect that he had accepted the assignment of auditing the said client's accounts despite having knowledge of the non-payment of undisputed fees, the respondent accepted that there was some outstanding fees payable by the client to the previous auditor / complainants, which amount was still payable. In this regard, it was the complainant's contention that since his audit fees were still outstanding, he had filed a civil suit for recovery of the same. The third charge levelled against the respondent was that the respondent was allegedly undercutting the fees charged by the complainant, thus the respondent was in contravention of clause (12) of Part I of the First Schedule of the said Act. On this charge, the respondent led evidence before the Disciplinary Committee and brought on record the financial statements of both the auditees and submitted that in the case of M/s. Prashant Enterprises, the respondent had charged ₹2,31,000/- (Rupees Two Lakhs Thirty One Thousand Only) as audit fees as against the fee of ₹2,16,000/- (Rupees Two Lakhs Sixteen Thousand Only) charged by the complainant, while with respect to M/s. K. Prashant Industries, the respondent had charged ₹27,000/- (Rupees Twenty Seven Thousand) as his fees while the complainant had charged the same amount to the said entity. Based upon this evidence, it was the respondent's contention that there was no undercutting of fees from his side in both cases.

5. On considering the evidence of the complainant and respondent produced before it, the Disciplinary Committee was of the considered opinion that the respondent was guilty of professional misconduct falling within the meaning of clause (8) of Part I of the First Schedule and of the Notification No.1-CA(7)/46/99/ dated 28.10.1999 and under clause (ii) of Part II of Second Schedule read with Sections 21 and 22 of the said Act. The Disciplinary Committee, however, found the respondent not guilty of professional misconduct falling within the meaning of clause (12) of Part I of the First Schedule of the said Act with respect to charges no.2 & 3.

6. The report of the Disciplinary Committee dated 02.02.2009, containing its findings and its assessment of the evidence before it, was forwarded to the petitioner, who vide letter dated 28.08.2009, sent a copy of the same to the complainant and respondent calling upon them to send their written representations with respect to the said report, which would be considered by the petitioner Council before recommending any action against the respondent.

7. Accordingly, the complainant submitted his written representation on 22.12.2009 while the respondent filed his written submissions on 19.03.2010. The record of the disciplinary proceedings, the report of the Disciplinary Committee and the representations of the complainant and respondent were all considered by the petitioner Council in its meeting held on 25^{th} and 27^{th} March 2010. Though the complainant and the respondent were notified to remain present and make oral submissions at the said meeting, the complainant, nor his authorised representative took the opportunity of making submissions; however, the respondent along with his Counsel appeared before the Council and made their oral submissions, pursuant to which the Council decided to accept the report of the Disciplinary Committee and held the respondent to be guilty of professional misconduct falling within the meaning of clause (8) of Part I of the First Schedule to the said Act. It also held the respondent guilty under the Notification No.1-

CA(7)/46/99/dated 28.10.1999, under clause (ii) of Part II of Second Schedule read with Sections 21 and 22 of the said Act. The Council held the respondent not guilty of professional misconduct falling within the meaning of clause (8) Part I of the First Schedule of the said Act. The Council decided to take action against the respondent under Section 21(4) of the Act separately, but however, in respect of its finding that the respondent was guilty of misconduct under Notification No.1-CA(7)/46/99/dated 28.10.1999, under clause (ii) of Part II of Second Schedule read with Sections 21 and 22 of the said Act, it decided to recommend to the High Court that the respondent be reprimanded. Hence, the Reference to this Court.

8. We have taken note of the fact that the said Act had been amended by the Chartered Accountants (Amendment) Act, 2006 whereby various provisions of the Act have been amended and new provisions inserted with respect to the mechanism for taking disciplinary action for misconduct under the Act. The amendments were brought into effect from 17.11.2006. We further take note that under Section 21(D) of the

Amendment Act, all complaints/disciplinary proceedings pending before the Council or where any inquiry was initiated by the Disciplinary Committee or any reference made or any appeal was filed to the High Court prior to commencement of the Amendment Act of 2006, shall continue to be governed by the provisions of the Act as if the Act had not been amended by the Chartered Accountants (Amendment) Act, 2006.

The present complaint relates to the period prior to the amendment of the Act and is thus being dealt with under the provisions of the said Act in terms of its unamended form.

9. We have considered the relevant provisions of Section 21 of the said Act, which reads as under:

> *"**21. Procedure in inquiries relating to misconduct of members of Institute**—*
>
> *(1) Where on receipt of information by, or of a complaint made to, it, the Council is prima facie of opinion that any member of the Institute has been guilty of any professional*

or other misconduct, the Council shall refer the case to the Disciplinary Committee, and the Disciplinary Committee shall thereupon hold such inquiry and in such manner as may be prescribed, and shall report the result of its inquiry to the Council.

(2) If on receipt of such report the Council finds that the member of the Institute is not guilty of any professional or other misconduct, it shall record its finding accordingly and direct that the proceedings shall be filed or the complaint shall be dismissed, as the case may be.

(3) If on receipt of such report the Council finds that the member of the Institute is guilty of any professional or other misconduct, it shall record a finding accordingly and shall proceed in the manner laid down in the succeeding sub-sections.

(4) Where the finding is that a member of the Institute has been guilty of a professional misconduct specified in the First Schedule, the Council shall afford to the member an opportunity of being heard before orders are passed against him on the case, and may thereafter make any of the following orders, namely:-

(a) reprimand the member;
(b) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit:

Provided that where it appears to the Council that the case is one in which the name of the member ought to be removed from the Register for a period exceeding five years or permanently, it shall not make any order referred to in clause (a) or clause (b), but shall forward the case to the High Court with its recommendations thereon.

(5) Where the misconduct in respect of which the Council has found any member of the Institute guilty is misconduct other than any such misconduct as is referred to in sub-section (4), it shall forward the case to the High Court with its recommendations thereon.

(6) 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:-

(a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;

(b) reprimand the member;
(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;
(d) refer the case to the Council for further inquiry and report.

(7) …
(8) …"

10. In terms of the provision of Section 21 and the Regulations framed under the Act, we find that the Council has acted in accordance with the procedure laid down under the Scheme of the unamended provisions of the said Act, in that it has, after considering the contents of the complaint and a written statement filed by the respondent, come to a *prima facie* opinion that the respondent has committed an act of misconduct, as laid down in sub-section (1) of Section 21. On coming to the *prima facie* opinion of professional misconduct, the Council has referred the case to the Disciplinary Committee, which has held the inquiry in terms of that provision. The Disciplinary Committee has, on consideration of the material before it by the complainant and respondent, arrived at findings which are contained in its inquiry report, which it has submitted in terms of sub-section (2) of Section 21 to the Council. The Council, on consideration of the report of the Disciplinary Committee, the record of the disciplinary proceedings and after deliberation on the submissions of the parties before it, has accepted the findings of the Disciplinary Committee as contained in its report and has held the respondent guilty of professional misconduct falling within the provision of clause (8) Part I of the First Schedule and guilty of misconduct under Notification No.1-CA(7)/46/99/dated 28.10.1999, under clause (ii) of Part II of Second Schedule read with Sections 21 and 22 of the said Act; it has held the respondent not guilty of professional misconduct falling within the meaning of clause (12) Part I of the First Schedule of the Act and accordingly referred the matter to this Court for its orders.

11. We have considered the submissions of Shri A.K. Saxena, learned counsel for the applicant/petitioner. The respondent and the complainant in the matter, though served have not put in their appearance. The learned Counsel Shri Saxena took us through the record of the disciplinary proceedings, the complaint and through the written statement filed by the parties before the Council. With the assistance of the learned Counsel, we have also perused the record, the disciplinary proceedings and the deliberations before the Council held in its meeting conducted on 25th and 27th March 2010.

12. On considering this record, we are of the opinion that the Disciplinary Committee has followed the procedure as laid down under the said Act and adhered to the principles of natural justice. It has considered the evidence of the complainant and the respondent before it and arrived at findings which are based upon the evidence before it. The findings do not suffer from any perversity or non-consideration of material before the Disciplinary Committee. On going through the Minutes of the meeting of the Council we find that the Council has, after hearing the complainant and the respondent, and on deliberating over the report of the Disciplinary Committee, accepted the report of the Disciplinary Committee and recommended reprimand of the respondent on the first two charges. On the same considerations, it has held the respondent not guilty of professional misconduct on the third charge. We find no error in the procedure followed by the Council. We also find that the Council has followed the mandate of the provisions of Section 21 whilst considering disciplinary action against the respondent.

13. We are therefore of the opinion that an order of reprimand of the respondent will serve the ends of justice and would be one proportionate to the acts of misconduct of which the respondent has been held guilty.

14. The application referred under sub-section (6) of Section 21 of the said Act is disposed of in the above terms.

VALMIKI SA MENEZES, J. **DHIRAJ SINGH THAKUR, J.**

SNEHA ABHAY DIXIT Digitally signed by SNEHA ABHAY DIXIT Date: 2022.12.02 17:51:11 +0530