

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA NO. 20593 of 2023

**Mr. Amlan Jyoti Roychowdhury
Vs.
The State of West Bengal & Ors.**

For the petitioner	:	Mr. Sugata Shankar Roy
For the State	:	Mr. Jayanta Samanta, Mr. Debapriya Chatterjee
For the respondent no. 13 in person	:	Mr. Santanu Sengupta
Hearing concluded on	:	19.03.2024
Judgment on	:	02.04.2024

Sabyasachi Bhattacharyya, J:-

1. The present writ petition, though filed by the petitioner, also ventilates grievances of the respondent no. 13. Although not a petitioner, by applying the principles of Order XLI Rule 22 and Order XLI Rule 33 of the Code of Civil Procedure which are applicable in view of the void in the Rules regarding writ petitions in such field, the issues raised by the respondent no. 13 and the action taken against the respondent no. 13 are also being dealt with.
2. The petitioner is a Chartered Account and submits that his antecedents are impeccable. For such purpose, the petitioner cites his previous engagement in globally renowned audit firm and other institutes. The petitioner was appointed as a Chief Financial Officer

(CFO) with the respondent no. 10-Company. In the present writ petition the petitioner has challenged a purported enquiry report dated May 23, 2017 and an order dated November 29, 2016, indicting the petitioner of financial irregularities while in service of the said Company. It is argued that the petitioner was acting as a professional, although designated as Chief Financial Officer(CFO), since TDS was deducted from his income under Section 194J of the Income Tax Act. Hence, the petitioner was a consultant and not a direct employee of the Company.

3. It is argued that after the petitioner came in, he detected several gross irregularities in the previous accounts of the Company and took remedial steps which probably drew the ire of several sections of the company officials.
4. The first ground of challenge to the impugned enquiry and the impugned order is that the Enquiry Committee was constituted by the Principal Secretary and included two members of the same Board of Directors (BOD), which BOD was responsible for the financial transactions of the Company during the relevant period. It is submitted that respondent No.13, the Managing Director whose credentials are also beyond doubt, was also made a scapegoat.
5. It is argued by Learned Counsel for the petitioner as well as by the respondent No. 13, appearing in person, that although the other Directors were at the helm of affairs and a part of the decisions taken by the Company, thus having equal liability with the respondent No. 13 and much more than the petitioner, those Directors were made a

part of the Enquiry Committee, thus sitting in judgment over their own acts. Hence, such composition of the Committee is itself vitiated as the two members of the BOD who were part of the committee would have conflict of interest with the petitioner and the respondent No. 13, to cover up their own involvement.

6. It is next contended that no notice of enquiry was given either to the petitioner or to the respondent No. 13, thereby violating the principles of natural justice, in particular the doctrine of *Audi Alteram Partem*.
7. Learned Counsel for the petitioner thirdly argues that the BOD was the primarily responsible body for the actions of the company which are the premise of the allegations against the petitioner.
8. In order to elaborate the duties of the Directors of a Company, learned counsel for the petitioner cites Section 134(5)(c) and Section 166 of the Companies Act, 2013.
9. That apart, it is argued that under sub-section (3)(j) and (h) of Section 143, the statutory auditor had serious responsibilities with regard to the financial transactions of the Company. Under sub-section (6) of Section 143, the Comptroller and Auditor General also had certain responsibilities, as had the concerned auditor firm under sub-section (12) of the same Section. Since respondent No. 10 is a Government Company, all accounts are approved by the BOD, against whom no allegations have been preferred but the respondent No.13 has been selectively embroiled.
10. Learned counsel next reiterates that the petitioner, although CFO by name, was merely a professional rendering services as an independent

adviser and could not have been treated to be an employee, being subject to the decision of a Committee constituted by the Principal Secretary of the Government of West Bengal.

- 11.** Thirdly, it is argued that no affidavit-in-opposition has been filed by the respondent Nos. 10 to 12 who are the Company, its Chairman and the Company Secretary-cum-Administrative Officer-on-Special Duty and authorized representative of the Company, thus creating the raising adverse inference against the respondents, since the primary contesting respondents have admitted the allegations made in the writ petition by applying the doctrine of non traverse. The said respondents were the best persons to bring out the proper factual picture before this Court but having abstained to do so, adverse inference should be drawn against them.
- 12.** Learned counsel for the petitioner contends that the chronology of events is also suspect. It is seen from the annexure at page 8 of the affidavit-in-opposition used by the respondent-Authorities that the Enquiry Committee was formed only on November 29, 2016, which is after the decision to file a First Information Report (FIR) against the petitioner, taken on October 25, 2016 (page 11 of the same affidavit-in-opposition). Hence, the decision to implicate the petitioner preceded even the formation of the Enquiry Committee, whose report was supposed to be the basis of the decision.
- 13.** From page 9 of the affidavit-in-opposition, it is evident that the relevant file in respect of respondent 13, which is one of the key components of the allegations against the petitioner as well, is lost.

Even the said document an unsigned, hand-written interpolation of the date. In the affidavit-in-opposition itself, the date has been inserted subsequently by hand. The above aspects of the matter clearly indicate that the Enquiry Report as well as the order indicting the petitioner and the respondent No. 13, are vitiated by arbitrariness and *mala fides*.

14. Learned counsel for the respondent authorities argues that the same issues as raised in the present writ petition are at present subjudice before a competent criminal court on the basis of the FIR lodged against the petitioner. As such, it is argued that the writ petition ought not to be entertained, thereby usurping the jurisdiction of the criminal court.
15. Learned counsel for the respondents-authorities supports the allegations made against the petitioner and the respondent No. 13 and argues that mere technical irregularities or defects cannot vitiate the entire action against the petitioner. Since the respondent No. 13 and the petitioner were prime suspects, the presence of two other Directors in the enquiry committee does not vitiate the entire process of investigation and enquiry. In fact, the Enquiry Report is elaborate and takes into consideration all aspects of the matter. Thus, there ought not to be any interference with the same by the court.
16. Heard learned counsel for the parties. The first question which arises is whether the composition of the Expert Committee is itself a sufficient ground for setting aside its report. The petitioner's arguments in that regard are extremely convincing. A composite

reading of Section 166 of the Companies Act, 2013 lays down the duties of a company's Directors including exercise of due care, skill and diligence, acting in good faith for the company's benefit, considering the interests of all stakeholders, etc.

- 17.** Section 134 of the said Act deals with financial statements, Board's report, etc. Sub-section (5) (c) of the said Section contemplates in the Director's Responsibility Statement the fact that the Directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of the Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.
- 18.** Thus, evidently, the other Directors than respondent no. 13 also had a major role to play in the financial transactions of the company and cannot be absolved altogether from such obligations without a proper enquiry being undertaken against all Directors. Hence, it is palpably absurd that two of the Directors, despite being members of the BOD, were part of the committee, despite having clear conflict of interest with the subject-matter of the enquiry. It is well-settled that one cannot be the judge of one's own cause. Such principle has been flouted blatantly by accommodating the said two Directors within the composition of the Enquiry Committee. There is no reason why the said two Directors would not try to cover up their own involvement, if any, by making respondent No. 13 and the petitioner scapegoats. Thus, the Enquiry Report and the consequential steps should be set aside on such score alone.

- 19.** The cardinal natural law doctrine of *Audi Alteram Partem* has also been flouted since no prior notice of enquiry was given to the petitioner or respondent no. 13. In fact, unless the petitioner was given a right to defend himself by giving a proper show cause notice, the enquiry would be illusory and fruitless, being the unilateral view of the Enquiry Committee, at least two of whom who had vested interests in the results of the same.
- 20.** Thirdly, we cannot brush aside the fact that there are palpable discrepancies in the chronology of events. If the Enquiry Committee itself was constituted on November 29, 2016, as admitted by the respondents, it defies logic as to how the decision to file FIR was taken prior to that on October 25, 2016, since such a decision could only be the culmination of an Enquiry Report indicting the petitioner.
- 21.** The file in respect of respondent no. 13, which is crucial to the allegation levelled against the petitioner as well, was admittedly lost and the date of the same is interpolated not only in the affidavit annexing the same but also in the document itself, annexed at page 9 of the affidavit-in-opposition.
- 22.** Thus, there is sufficient reason to suspect foul play in the matter. At page 40 of the affidavit-in-reply of the respondent no.13, a decision has been annexed which goes on to show that the Company itself asked the respondent no. 13 to continue but the Government did not agree to the same. Such expression of interest of the company in the respondent no.13, during a roughly contemporaneous period as the alleged irregularities, belies the very basis of the allegations now

levelled against the respondent no. 13 and consequentially the alleged complicity of the petitioner as well. The question of an attempt to cover up the deficiencies of other Directors and others involved cannot, thus, be ruled out.

- 23.** Another component of the matter ought not to be overlooked completely. Since the petitioner was a professional, his TDS being deducted at source, it is at least debatable as to whether he was an 'employee' of company as such. However, in view of the above observations on the other issues, the said question need not be resolved in the present proceedings.
- 24.** Lastly, the respondents' defence that similar allegations are sub judice in a criminal case, due to which the writ petition ought not to be entertained, cannot itself be entertained by this Court. The very root of the allegations against the petitioner has been challenged which, if vitiated, would derail the criminal proceedings as a collateral consequence. However, the enquiry report and the order indicting the petitioner both carry civil consequences of severe nature as well, affecting the goodwill of the petitioner and the respondent no.13 and casting a stigma against them forever, which would be akin to civil death in their professional fields.
- 25.** Moreover, since the premise of the impugned action taken by a committee which includes interested members is tainted by unfairness and *mala fides*, procedural irregularity and injustice, which occupies a much higher rung of violation of the fundamental rights to equality before the law, access to justice and fair play than a criminal

indictment, this Court has ample jurisdiction under Article 226 of the Constitution of India to enter into the issues involved.

- 26.** There has been gross violation of the principle of *audi alteram partem* and due process of law as well, which are essential components of natural justice. Moreover, there is an element of *mala fides* in singling out the petitioner and respondent no.13 while appointing two other Directors of the Board as members of the Enquiry Committee sitting in judgment over the very actions of the company when the said Directors were also a part of the decision-making process. Thus, there was procedural irregularity in constitution of the Committee as well, which also vitiates the impugned actions.
- 27.** In such view of the matter, WPA No. 20593 of 2023 is allowed on contest, thereby setting aside the impugned order no.330-E (Vig) dated November 29, 2016 passed by the respondent no. 2 and issued by respondent no.4 as well as quashing the impugned Enquiry Report dated May 23, 2017. The Enquiry Committee formed against the petitioner is also hereby dissolved. All consequential action taken against the petitioner as well as the respondent no. 13 are also hereby expunged, set aside and reversed. Due steps shall be taken by the respondents to reverse all consequential actions, if taken pursuant to the impugned action against the petitioner and respondent no.13.
- 28.** However, nothing in this order shall preclude the respondents-authorities from initiating de novo action in accordance with law in respect of the alleged financial irregularities by constituting a proper enquiry committee excluding all interested parties who were at the

helm of affairs of the company during the relevant period, following due process of law.

29. There will be no order as to costs.
30. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)