

(2013) 08 P&H CK 0870

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Reference No. 7 of 2012

Institute of Chartered
Accountants of India

APPELLANT

Vs

Vijay Kumar and Another

RESPONDENT

Date of Decision: Aug. 16, 2013

Acts Referred:

- Chartered Accountants Act, 1949 - Section 17, 21, 21(4), 21(5), 22

Citation: (2013) 219 TAXMAN 53

Hon'ble Judges: Satish Kumar Mittal, J; Mahavir S. Chauhan, J

Bench: Division Bench

Advocate: Arun Nehra, for the Appellant; R.S. Athwal, for the Respondent

Judgement

Mahavir S. Chauhan, J.

This reference u/s 21(5) of the Chartered Accountants Act, 1949, (No. XXXVIII of 1949) (hereinafter referred to as "the Act") is brought by the Institute of Chartered Accountants of India (hereinafter referred to as "the Institute"), seeking confirmation of proposed punishment of removal of name of respondent No. 1--Vijay Kumar from the register of members of the Institute for a period of three months. Case of the Institute proceeds on the premises that one Amarjit Kamboj, who was Auditor of M/s. Bacchus Enterprises Limited (hereinafter referred to as "the Company") and was replaced by respondent No. 1, made a complaint dated 08.10.2001 against respondent No. 1 levelling various allegations against him. The Council, constituted u/s 9 of the Act, in its meeting held on 21/22.01.2005, found respondent No. 1 prima facie guilty of professional and/or other misconduct and, accordingly, as envisaged by Section 21 of the Act, referred the matter to the Disciplinary Committee constituted u/s 17 of the Act.

2. Disciplinary Committee, vide its report dated 03.02.2008 held respondent No. 1 to be "not guilty under charge as mentioned in para 1.2.3, 1.2.4, 1.2.5 (to the extent

mentioned in para 23), 1.2.6 and 1.2.7", but found him guilty "under charges 1.2.1 and 1.2.2 of professional misconduct falling within the meaning of Clause (8) of Part I of the First Schedule read with Sections 21 and 22 of the Act", as also "guilty of charge as mentioned in para 1.2.5 (to the extent mentioned in para 23.1) of professional misconduct falling within the meaning of Clauses (7), (8) and (9) of Part I of the Second Schedule read with Sections 21 and 22 of the Act."

3. The Council, in its meeting held on 4th, 5th and 6th of August, 2010, considered the report of the Disciplinary Committee and noticed that the Disciplinary Committee had held respondent No. 1:--

a) Not guilty of professional misconduct with respect to charges as mentioned in para 1.2.3, 1.2.4, 1.2.5 (to the extent mentioned in para 23), 1.2.6 and 1.2.7 of the Report.

b) guilty of professional misconduct with respect to charges as mentioned in paras 1.2.1 and 1.2.2 of the Report falling within the meaning of Clause (8) of Part I of the First Schedule read with Sections 21 and 22 of the Chartered Accountants Act, 1949.

c) guilty of professional misconduct with respect to charge as mentioned in para 1.2.5 (to the extent mentioned in para 23.1) of the Report falling within the meaning of Clause (7), (8) and (9) of Part I of the Second Schedule read with Sections 21 and 22 of the Chartered Accountants Act, 1949.

4. The Council then decided to afford an opportunity of hearing u/s 21(4) of the Act, to respondent No. 1 before passing orders against him as regards charges at Serial No. (b) above while in respect of charge at Serial No. (c) above, it decided to recommend to this Court that name of respondent No. 1 be removed from the Register of Members for a period of three months. This is how the instant reference has been made by the Institute in terms of sub-section (5) of Section 21 of the Act.

5. In response to the notice, respondent No. 1 has put in appearance through his counsel, Shri R.S. Athwal, Advocate, but has chosen to argue the matter without filing a reply.

6. We have heard learned counsel for the parties and have perused the record in depth.

7. Mr. Arun Nehra, Advocate, learned counsel appearing on behalf of the Institute has argued that the Council having accepted report of the Disciplinary Committee as regards the misconduct at Serial No. (b) referred to above, an opportunity of hearing is being afforded to respondent No. 1 in terms of sub-section 4 of Section 21 of the Act but as regards the misconduct at serial No. (c) above, it has proposed a punishment of removal of name of respondent No. 1 from the Register of Members for a period of three months and this proposed punishment is required to be confirmed by this Court. According to him, the misconduct of respondent No. 1, which is of serious nature, has been proved in an inquiry conducted by the

Disciplinary Committee and findings recorded by the Disciplinary Committee have been accepted by the Council.

8. However, on behalf of respondent No. 1 it is pointed out by Shri R.S. Athwal, Advocate that the findings recorded by the Disciplinary Committee are based on no evidence and have been accepted by the Council without application of mind. The learned counsel also points out that the matter, in fact, was compromised between the parties before the Company Law Board and, in view of the findings of the Board, the complaint under reference does not survive.

9. Nothing more has been urged on either side.

10. As noticed hereinbefore, respondent No. 1 has been found guilty on two counts mentioned at Serial Nos. (b) and (c) in the extract of the minutes of the meeting of the Council held from 4 to 6th of August, 2010. The misconduct at Serial No. (b) is not the subject matter of the instant reference. Charge 1.2.5, of which respondent No. 1 has been found guilty by the Disciplinary Committee and the Council, reads as under:--

1.2.5 The auditors report for the year ending 31st March, 1998 and 31st March, 1999 is a ditto copy of each other with each word, line, stanza, comma and full stop and the language adopted in the report being the same. Even the type and style of printing is the same. Even the number of paragraph covered in both the reports is the same number of paragraph reporting only on 12 matters of the Manufacturing and other Companies (Auditors Report) Order, 1988. The place of signing of both the reports is "Ludhiana" whereas Shri Vijay Kumar does not have any office in Ludhiana.

11. The Disciplinary Committee dealt with this charge in two parts. The first part is dealt in para 23 and it has been held that respondent No. 1 is not guilty of this part of the stated misconduct. As regards the second part, para 23.1 of report of the Disciplinary Committee reads as under:--

23.1 Further, as regard the sub-charge in the para 1.2.5 that the Respondent failed to give the Auditors report as required by the Companies Act, 1956, the Committee noted that the Auditors' Report should be in the prescribed manner as per the MAOCARO, 1988 of the Companies Act, 1956 and every Auditor is required to comment on all the matter included in the said report. Further, if a matter is not applicable to a Company then an Auditor is required to comment that this matter is not applicable to this Company. But the Committee noted that the Respondent in his Audit Report for the year 1997-98 neither commented on all the matter nor did he mention that certain matter are not applicable to the Company. Thus, the committee is of the view that the Respondent failed to give his Audit Report as required by the Companies Act, 1956. Thus, the Respondent is grossly negligent in his duty as the Auditor of the Company. Therefore, the Respondent is guilty of professional misconduct falling within the meaning of Clause (7), (8) and (9) of Part I

of Second Schedule to the Chartered Accountants Act, 1949.

12. Before proceeding further it may be stated that provisions of Section 21 of the Act being penal in nature, it is necessary that misconduct of a member of the Institute is established with certainty if not beyond reasonable doubt, before such a member is penalized under this Section. However, record of the case shows that proof of misconduct of the respondent No. 1 with certainty apart, there is no evidence to substantiate it.

13. A perusal of the record shows that the Company, whose Audit Report is stated to have been prepared by respondent No. 1 contrary to the prescribed norms, has not made any complaint against respondent No. 1. One of the Directors of the Company, namely, Vipin Gupta, appeared before the Disciplinary Committee as a witness but he did not state a word about the aforesaid Audit Report. He also did not say what damage or prejudice has been caused to the Company on account of that report. Amarjit Kamboj, the complainant, in our opinion had no locus standi to make a complaint in this respect.

14. The Disciplinary Committee while returning the aforesaid finding of guilt against respondent No. 1, has not referred to particular portions of the report, which according to the findings, were not in conformity with the prescribed norms. It has not pointed out, what matters were not commented upon and what was the effect of this omission. Similarly, it is not pointed out what matters were not applicable, which were omitted by respondent No. 1 and how and to what extent has it harmed the interests of the Company. It has also not been pointed out by whom and in what manner the Audit Report was proved.

15. Another very disturbing and amazing aspect of the matter is that respondent No. 1 is not shown to have been served a notice of hearing by the Disciplinary Committee. The entire proceedings have been carried out at his back. Rather, the Disciplinary Committee is found to be endeavouring to know address of respondent No. 1 during the course of enquiry as the complainant was repeatedly questioned about address of respondent No. 1.

16. Further the witnesses examined during the course of inquiry are found to have been cross-examined by the members of the Disciplinary Committee and by the complainant. Such a procedure is unknown to Indian jurisprudence and it in our opinion vitiates the entire proceedings of the Disciplinary Committee, being contrary to the settled principles of natural justice that one cannot be a judge and a prosecutor at the same time.

17. It also needs to be pointed out that the complainant, Amarjit Kamboj, undisputedly was biased against respondent No. 1, because of his having been replaced as Auditor of the aforesaid Company by respondent No. 1. Therefore, version put forth by said Amarjit Kamboj could not be accepted to be free from embellishment and could not be relied upon in the absence of independent

corroboration, which is conspicuously missing in the case in hand as the only other witness examined by the Disciplinary Committee, namely Vipin Gupta, Director of the Company, has not stated even a word against the complainant.

18. The complaint was made by Amarjit Kamboj on 08.10.2001. It took the Council about four years to hold respondent No. 1, prima facie, guilty as it was only on 21/22.01.2005 that such a finding was recorded by the Council. The Disciplinary Committee consumed more than three years in submitting its report, which was submitted on 03.02.2008. The Council took another period of more than two years to take final decision in its meeting held on 4th, 5th and 6th of August, 2010. Thus, respondent No. 1 has been made to face the agony of the penal proceedings for a sufficiently long period i.e. from 08.10.2001, onwards.

19. As aforesaid, the proceedings of the Disciplinary Committee are found to be based on no evidence and are even otherwise vitiated. The Council did not apply its mind to the facts and circumstance of the case, accepted the report of the Disciplinary Committee in a mechanical manner and has made this reference to this Court.

20. At one stage, the Disciplinary Committee is found to have observed that the proceedings could not continue in the absence of Registrar of Companies. However, the Registrar of Companies never participated in the proceedings.

21. Another circumstance that needs to be highlighted is that the Company went before the Companies Law Board and entered into a compromise with the auditors' company. Proceedings of the Company Law Board are available at page 273 of the paper book and it reads as under:--

In terms of the order dated 17/02/06 the Respondents having paid Rs. 9.10 Lacs in various Instalments and have today deposited pay order for Rs. 12.90 Lacs out of the balance of Rs. 22.00 Lacs to the petitioners.

Since full payment of Rs. 22.00 Lacs has been made. All the shares held by the petitioner group will vest in Sh. Vipin Gupta, the son of respondent with immediate effect and Company is authorized to ratify its register of members accordingly without any further order. Petitioner submit that there are complaints and suits and the same have been withdrawn as undertaking as part of the compromise recorded on 17/02/06.

As for the Complaint pending in the Institute of Chartered Accountants of India, in view of the settlement, nothing survives in the complaint. Petition is accordingly closed.

22. In view of the settlement referred to above, the complaint as regards the charge under reference, did not survive but the Disciplinary Committee for reasons best known to it, proceeded with the inquiry and avoided a reference to the settlement, referred to above. This renders approach of the Disciplinary Committee biased and,

therefore, unacceptable. In view of what has been stated and discussed above, the reference fails and is, therefore, rejected. We, accordingly, direct that the proceedings be filed.