

(1999) 03 CAL CK 0004**Calcutta High Court****Case No:** A.C.A. No. 1 of 1998

Institute of Chartered
Accountants

APPELLANT

Vs

Indrajit Roy

RESPONDENT**Date of Decision:** March 19, 1999**Acts Referred:**

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

Citation: 2 CWN 587**Hon'ble Judges:** Satyabrata Sinha, Acting C.J.; Debi Prasad Sircar, J**Bench:** Division Bench**Advocate:** ; Hirak Kumar Mitra, Raj Ratna Sen and Tarun Aich, for the Respondent

Judgement

Satyabrata Sinha, J.

This reference has been made u/s 21 of the Chartered Accountants Act, 1949 (hereinafter referred to and called for the sake of brevity as "the Act") for directing imposition of a punishment of reprimand to the respondent No. 1 herein. The 1st respondent is a member of the Institute of Chartered Accountants. A compliant was made by Sri C. R. Das. Regional Director, Company Law Board, Calcutta, a copy whereof is contained in Annexure "A" to the application, the relevant portion whereof reads thus:

"Opening and Closing Stock of tea, as well as turnover of tea are not correctly reflected in the Profit & Loss Accounts and/or Notes on Accounts for the years 1982, and 1983 and 1984--Failure on the part of Auditors to bring out these material discrepancies in his reports on the relevant years" Accounts--violation of section 21(5) and section 22 of the Chartered Accountants Act, 1949 under clauses (7) and (8) of the Second Schedule-Part I read with regulation 12 of the Chartered Accountants Regulations, 1988.

Material details to these effects have already found place in the Show Cause notice dated 1.1.1990 to the Auditors, and so also, in the relevant extracts of the Inspection Report, as annexed."

A Show-Cause Notice dated 1.1.1990 was issued to the Auditors, M/s. A. C. Roy & Company of which the 1st respondent was a partner, pursuant whereto an inspection was made and a report submitted on 23.3.1989. It was, inter alia, held :

"10.1(b). It is noticed from Note No. 6 of Notes on Accounts forming part of the Annual Accounts for the year ended 31st December, 1982 that the turnover of the Company was Rs. 19,01,297.59 during the year 1982 whereas in the Profit and Loss Account for the said period the turnover (sales) of tea has been shown to the extent of Rs. 2,84,438.25. The difference (in figures of Rs. 19,01,297.59 minus Rs. 2,84,438.25) of Rs. 16,16,859.34 has been shown as stock of tea of Season 1982 on estimated value in the Profit & Loss Account for the year ended 31st December, 1982 when there was no stock of tea of Season 1982 consequent on sale of entire saleable tea of 1,81,270 kgs. produced during the year ended 31st December, 1982. This fact of sale of entire quantum of tea produced during 1982 Season during the year ended 31st December, 1982 itself is also supported by the following remarks contained in Para,1(e) of the Auditors Report dated 18th May, 1985 annexed to the Annual Accounts for 1982:

1(e) Tea of Seasons 1978, 1980 and 1.981 have been shown as stock on estimated value as the account sale of the invoices of those teas were not available but the advances against those invoices have been received.

Further, in the light of Notes No. 3 and 6 of Notes on Accounts forming part of the Annual Accounts for the year ended 31st December, 1982, the closing stock of tea can be only 1,68,225 kgs. and not 2,95,296 kgs. as stated in Note No. 3(f). Thus the entire position of tea, including sale and closing stock, as reflected in the Profit & Loss Account and Notes on Accounts forming part of the Annual Accounts for the year ended 31st December, 1982 are misleading. The Directors of the Company have thus withheld the true and fair view of the state of affairs of the Company as on 31st December, 1982 and thereby made themselves liable for penal action under Sub-section (7) of Section 211 of the Act. for violation of the said Section 211.

The Company ad its Directors were requested to show cause why prosecution under Sub-section (7) of Section 211 shall not be instituted against the Directors of the Company for violation of the provisions of Section 211 of the Act, vide the Inspecting Officer's letter dated 14th February, 1989. The reply of the Company/ Directors has not been received as yet.

10. 1(c). It is revealed from Notes No. 3(d) and 6 of the Notes on Accounts forming part of the Annual Accounts for the year ended 31st December, 1983 that while the opening stock of tea was 2,95,296 kgs. worth Rs. 29,12,695-31 and the entire saleable tea of 1,61,503 kgs. produced during 1983 was sold during 1983 itself, Note

No. 3(f) thereof disclosed 38,976 kgs. as closing stock which is *prima facie* incorrect, especially when in the Profit and Loss Account for the said year the entire opening stock of tea (2,95,296 kgs. value Rs. 29,12,695-31) as also stock of tea of season 1983 (value Rs. 7,75,883-01) has been shown as closing stock, inclusion of 1983 season tea worth Rs. 7,75,883-01 as closing stock does also not appear to be correct since the entire saleable tea of 1,61,503 kgs. produced during (sic) year 1983 has been sold during the said year itself, leaving no balance as stock, as revealed from Notes No. 3(d) and 6 of the Notes on Accounts forming part of the Accounts for the year ended 31st December, 1983. This the Directors of the tea company have failed to disclose the true and fair view of the state of affairs of the Company in the Annual Accounts for 1983 and thereby made themselves liable for penal action under Sub-section (7) of Section 211 of the Act for violation of the said Section 211.

The Company and its Directors were requested to show cause why prosecution u/s 211 shall not be initiated against the Directors of the Company for violation of the aforesaid provisions of the Act vide the Inspecting Officer's letter dated 14th February, 1989. The reply of the Company/Directors has not been received as yet.

10.1(d) In Note No. 3(f) of the Notes forming part of the published accounts for the year ended 31st December, 1983 the closing stock of tea has been shown at 38,976 kgs. whereas in Note No: 3(e) of the Notes forming part of the published accounts for the year ended 31st December, 1984 the opening stock has been shown at 2,95,296 kgs. Again, when 2,95,296 kgs. as opening stock, 2,11,961 kgs. as saleable tea produced and 1,61,963 kgs. as sale, have been shown in Notes No. 3(e), 39(d) and 6(n) respectively of the Notes forming part of the Annual Accounts for the year ended 31st December, 1984, disclosure of closing stock for season 1984 at 82,577 kgs. in Note No. 3(f) of the said Notes on Accounts, instead of disclosing the total quantum of closing stock for the year ended 31st December, 1984, indicates nothing but failure on the part of the Directors to reflect the true and fair view of stock as contemplated in Section 211 read with part II, Schedule VI to the Companies Act, 1956. By not furnishing the true and fair view, in so far as the stock is concerned, in the Annual Accounts for 1984, the Directors of the Company have made themselves liable for penal action u/s 211(7) of the Act for violation of the said Section 211 read with Part II, Schedule VI to the Act.

The Company and its Directors were requested to show cause why prosecution u/s 211(7) of the Act shall not be launched against the Directors of the Company for violation of Section 211 read with Part II, Schedule VI to the Act vide the Inspecting Officer's letter dated 14th February, 1989. The reply of the Company and its Directors has not been received as yet."

2. The Disciplinary Committee of the petitioner herein thereafter issued show cause notice whereafter, in *inter alia* came to the following conclusion:

The Committee has considered the contentions of the respondent carefully. The Committee agrees with the respondent that the true and fair view of the figures shown in the Profit and Loss Account is not affected. However, the Committee feels that the respondent has failed to report errors committed, as discussed above, in the notes on accounts for consecutive three years i.e. 1982, 1983 and 1984. The respondent has also not been able to find out and report:

(i) the difference in basis of computing turnover in the notes on accounts which was based on despatches instead of account sales received; and.

(ii) the exclusion of unsold stock of crops of prior years in the quantities of stocks shown in the notes on accounts."

3. The 1st respondent allegedly admitted his mistake but stated that the same was merely a bonafide one. He filed his show-cause on 18.9.85 wherein it was, inter alia, stated:

The Committee has found that --

the respondent (i.e. myself) has failed

(1) to report the error committed,

(2) to find out and report --

(i) the difference in basis of computing turnover in the Notes on Accounts which was based on Accounts which was based on despatches instead of account sales received,

and

(ii) the exclusion of unsold stock of crops of prior years in the quantities of stocks shown in the Notes on Account.

These actually constitute a single error which has occurred only in a part of the Notes on Accounts, and such error has been admitted and I have expressed regret for the same. But as submitted in the earlier paragraphs, the error has not materially affected the Profit & Loss Account or the Balance Sheet for any of the years 1982, 1983 and 1984 as admitted by the complainant and also accepted by the Committee. Therefore, the Charges of "gross negligence" under clauses (7)(8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 has not been established and the report of the Committee, it is submitted, is not correct in its findings that I am guilty under the aforementioned clauses. Further, the clause (8) deals with failure to obtain sufficient information to warrant the expression of an opinion. There has no such failure on that point on my part

In any case, it is submitted, as the issue raised by the complainant Mr. C. R. Das, Regional Director, Company Law Board, Calcutta in his complainant, viz. the opening and closing stocks of tea as well as the turnover of tea have not correctly reflected in

the Profit and Loss Account for the years 1982, 1983 and 1984 is found to have been wrongly raised by the complainant, no further charge may be said to survive in this case."

4. The Committee, however, upon consideration of the said fact held:

"On consideration of the report of the Disciplinary Committee, the written representations of the parties and the oral submissions made by the respondent and his authorised representative, the Council accepted the report of the Disciplinary Committee and found that the respondent was guilty of professional misconduct within the meaning of Sections 21 and 22 of the Chartered Accountants Act 1949 read with clauses (7) & (8) of Part I of the Second Schedule to the above Act.

It was also decided to recommended to the High Court that the respondent be reprimanded."

5. The learned Counsel appearing on behalf of the petitioner, *inter alia*, submitted that keeping in view the fact that the 1st respondent has admitted his guilt, this court may pass an order in terms of Sub-section (5) of Section 21 of the aforementioned Act. Reliance in this connection has been placed on an unreported decision of the Madhya Pradesh High Court in *The Council of Institute of Chartered Accountants of India vs. P. C. Madan & 2 Ors.* (Miscellaneous Civil Case No. 15 of 1963) disposed of on 11th April, 1963.

6. Mr. Hirak Mitra, the learned Counsel appearing on behalf of the respondent, however, submitted that the basic fact of the matter is not in dispute. The learned Counsel pointed out that audit was made in respect of the years 1982, 1983 and 1984 some times in the year 1985 at a time. In the Balance Sheet, the learned Counsel has pointed out the total tea produced and total saleable tea as also the opening stock and closing stock had been correctly stated as would appear from following statement:

"2,24,125 kgs.		1,83,072 kgs.
2,19,375 kgs.	Total Saleable	1,81,299 kgs.
	Tea	
80,111 kgs.	Opening Stock	1,68,225 kgs.
1,68,225 kgs.	Closing Stock	2,95,296 kgs.

7. The learned Counsel contends, however, had kept in the turnover of the Company wherein the amount in the total saleable tea had been reproduced in the following manner :

2,19,375 kgs.
27,22,164.00

Quantity 1,81,290 kgs.
Value Rs. 19.01.297.59."

8. The said mistake, the learned counsel contends, has been carried over during the subsequent years 1983 and 1984. Mr. Mitra would urge that all basic facts having been stated, there was absolutely no reason as to why any person would be misguided thereby. According to the 1st respondent, the Balance Sheet read as a whole would clearly point out a bona fide error. Mr. Mitra submits that keeping in view the provisions of the said Act, there cannot be any doubt whatsoever that for the purpose of imposition of a punishment the requisite requirement is a gross neglect which is its turn implies any ill motive on the part of the member concerned and not a bonafide mistake which does not cast any prejudice to any other person. Reliance in this connection has been placed on S. Ganesan Vs. A.K. Joscelyne, , Union of India (UOI) Vs. R.N. Rajam Iyer and Another, and Charles worth on Negligence.

9. As indicated hereinbefore, in the instant case the Disciplinary Committee has agreed with the fact that the true and fair view had not been affected. Merely commission of an error on the part of the 1st respondent has been found.

10. Item Nos. 7 and 8 of the Second Schedule appended to the said Act read thus :

"A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he--

(1) ***

(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."

11. Specific professional misconduct in a case under the chartered accountants in practice requiring action by a High Court. A bare perusal of the aforementioned provisions clearly goes to show that a legal fiction has been created in relation to the purported misconduct on the part of a Chartered Accountant. Clause (7) in no unmistakable term shows that gross negligence would be deemed to be a misconduct. Clause (8) specifies a misconduct to include a failure to obtain sufficient information to warrant expression of an opinion or his exceptions are sufficiently material to negate the expression of an opinion. The only fault found as against the 1st respondent by the Disciplinary Committee, as noticed hereinbefore, was that he has committed a mistake in stating the quantity of saleable tea as the total turn over of the Company.

12. A Profit & Loss Account has to be read as a whole and it should not be read in isolation. A person looking at one figure of the turnover although might have been misled but the mistake committed by the 1st respondent herein could have been

easily detected if the entire Profit & Loss Account was read in its entirety. There cannot be any doubt whatsoever that in terms of the provisions of the Companies Act, 1956 a Balance Sheet has to be prepared and a verification form in respect thereof as is appended in clause 2 of Part-II of VIth Schedule thereto, requires that the Profit and Loss Account : (1) shall be so made out as clearly to disclose the result of the working of the Company during the period covered by the account, and (2) shall disclose every material feature including credits or receipts and debits or expenses in respect of nonrecurring transactions or transactions of an exceptional nature.

13. A negligence by itself in terms of the provision of the said Act would not come within the purview of clause (7) thereof.

14. In [S. Ganesan Vs. A.K. Joscelyne](#), it has clearly been held that omission by itself cannot be said to constitute a misconduct. In the Code of Conduct, 1988 Edn. at page 64 it is stated:

"Professional misconduct is a term of fairly wide import, but generally speaking, it implies fairly serious cases of misconduct of gross negligence. Negligence per se would not amount to gross negligence."

15. In [Union of India \(UOI\) Vs. R.N. Rajam Iyer and Another](#), it has been held:

Therefore, the finding that the first respondent was grossly negligent in the performance of duties as an auditor of the Company in not reporting to the share-holders the fact that remuneration was paid to the managing agents who were not holding office, has no meaning in the circumstances of the case, for, it cannot be said that the respondent either willfully shut his eyes or purposely abstained from knowing whether the managing agents" agreement was in force or not at the time of audit. It cannot be said that he "deliberately refrained from making inquiries the results of which he might not care to have"--1951-2 Trav LR 284, 289. Nor can it be said, as observed by Lord Goddard, Chief Justice in Taylor vs. Kenyon 1952-2 AER 726. that he refrained from getting information which he did not want to get Nor did he adopt an attitude of mental indifference aptly described as I don't care attitude". In the King (Kennedy) vs. Browne, 1907-2 K B 505. Lord O'Brien Chief Justice, while considering the word "negligence" made the following observation:

"The word "negligence" is associated in the section with the word "misconduct" and involves, I think, some element of moral culpability.....Mere imprudence is not enough, want of Judgment is not enough, grave error of Judgment is not enough."

At the worst, the respondent may be guilty of an excusable error of judgment, and the error is not very serious in its consequences. The audit took place in the year 1952. The Registrar of Companies called upon the auditor on 1-8-1957 to explain the alleged irregularity in regard to the payment of remuneration and the information

was laid by the Deputy Secretary to the Government of India to the Secretary of the Institute of Chartered Accountants of India and the end of the year 1957, and the termination of the proceedings against the auditor was in the month of September, 1959. It shows that there was inordinate delay on the part of the authorities in bringing home the guilt on the auditor. While dealing with a case under the Chartered Accountants Act, 1949 Rajamannar C.J. and Venkatarama Iyer, J. in the [Commr. of Income Tax, Madras Vs. G.M. Dandekar of M.K. Dandekar and Co., Chartered Accountants, Madras,](#) have observed :

"..... We think it is necessary to comment on the inordinate delay in the institution of these proceedings.....It is essential that charges of this kind should be made with promptitude.--

16. In Charles worth on Negligence, in paragraphs 19 and 20 at page 20, the learned Author has stated:

"19. Definition. The following definition may therefore be suggested : Negligence is a tort, which is the breach of a duty to take care imposed by common or statute law, resulting in damage to the complainant.

20. Essentials of actionable negligence. Accordingly the essential ingredients of actionable negligence are:

1. the existence of a duty to take care owing to the complainant by the defendant;
2. failure to attain that standard of care prescribed by the law;
3. damage suffered by the complainant, which is casually connected with the breach of duty to take care.

17. These essentials are to be considered in the following chapter in greater detail, but it must be appreciated that there is still no major measure of agreement on the limits of these elements, which becomes apparent from a study of the many and varied judicial opinions.

"Nevertheless, once these requirements are satisfied, the defendant in law will be held liable in negligence, whereupon it is then necessary to proceed to decide the extent of that damage, which is traceable to the defendant's negligence, and finally its value must be conrtd(sic) into a monetary estimation."

18. Although not very material, but it may be noticed that in relation to commission of a misconduct by an employee, a Division Bench of this Court in Dipankar Sengupta vs. United Bank of India, reported in 1998 (2) CLJ 204 , (in which one of us was a member) following the decision of the Apex Court in Union of India & Ors. vs. J. Ahmed, reported in [Union of India \(UOI\) and Others Vs. J. Ahmed,](#) , clearly held that negligence by itself is not a misconduct in the following terms :

"There cannot be any doubt whatsoever that the word "misconduct" is a generic term. However, in the instant case, the writ petitioners had not been charged with commission of any specific misconduct in terms of the Conduct Regulations. Be that as it may, the question which arises for consideration in these matters are as noticed hereinbefore is as to whether the writ petitioners can be said to have committed any misconduct on the basis of the findings of the Enquiry Officer. Having gone through the report of the Enquiry Officer and keeping in view the decisions of the Apex Court in Union of India vs. J. Ahmed (supra) and Virendra Prosad vs. Union of India (supra), we are of the opinion that in terms of the findings arrived at by the Enquiry Officer himself, the alleged procedural lapses and lack of supervision and/or failure on the part of one of the petitioners to pursue the matter cannot come within the purview of the word "misconduct"."

19. In P. C. Madan's case (supra) it has found as of fact that the Chartered Accountant concerned although completed the audit and signed the accounts but did not submit any separate notice till the making of complaint which was made after 5 months. The delay in submission of the report was found to be intentional and with a view to lower the Chairman's honour and prestige resulting in adversely affecting the position at the time of election of office bearers of Hitakari Mahavidyalaya in the month of September, 1981, and held :

"It is also true that there is nothing against the respondent so far as his general work is concerned. It may even be assumed that he generally displayed high degree of care and skill but, in our opinion, even if he fell short of his duties in this case alone, we cannot merely come to the conclusion that the omission is merely of a technical character. In our view, the essential part of his report was the separate notes. Any one going through his report would atleast assume that those notes were prepared and were ready at the time when the report was signed by him on 6-3-1961. It cannot be supposed that those notes were not in existence at that time and were supposed to be written at some later date on some facts which were still to be verified or ascertained. We, therefore, in the circumstances of this case, cannot escape the conclusion that his act, though it does not suffer from bad or vicious intention, was still an act of gross negligence."

20. The Madhya Pradesh High Court distinguished the decision in S. Ganesan (supra) and held:

"In our opinion, that case is not apposite here. The lapse on the part of respondent No. 1 may not be an act of dishonesty, yet seems clear to us that it was an act of negligence which betrayed the professional ethics and was likely to defeat the very object of audit by misleading anyone who read the foot note."

(Emphasis supplied)

21. For the reasons aforementioned this court is of the opinion that it is not a fit case where the alleged misconduct on the part of the 1st respondent herein demands

imposition of any punishment. The reference is disposed of accordingly. No order as to costs.

Debi Prasad Sircar-I, J.

I agree.