

**(2011) 06 CAL CK 0069**

**Calcutta High Court**

**Case No:** ACA No. 1 of 2001

The Council of the Institute of  
Chartered Accountants of India

APPELLANT

Vs

Shri Dilip Kumar De

RESPONDENT

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**Date of Decision:** June 16, 2011

**Acts Referred:**

- Chartered Accountants Act, 1949 - Section 21, 21(2), 21(4), 21(5), 21(6)
- Companies Act, 1956 - Section 2(30), 226(3)

**Citation:** AIR 2011 Cal 233 : (2011) 3 CHN 249

**Hon'ble Judges:** Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

**Bench:** Division Bench

**Advocate:** Saptangshu Basu, Agnibesh Sengupta and Rajkumar Basu, for the Appellant; N.K. Poddar, Amicus Curie, for the Respondent

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**Judgement**

Bhaskar Bhattacharya, J.

This is a reference u/s 21 of the Chartered Accountants Act, 1949 ("Act").

2. The facts giving rise to presentation of the present reference may be summed up thus:

a) In a complaint verified on 9th February, 1994 the Registrar of Company, West Bengal, made the following allegations against D.K. De, Partner of M/s. Dey Dutta Lunawat & Co., Chartered Accountants, Calcutta, the Respondent in these proceedings:

The Respondent undertook the audit of M/s. Sunbeam Trading Company Pvt. Ltd. for the period ended 31.3.1989 with the full knowledge that his partner Shri K.C. Lunawat is a director in the said Company and as per Section 226(3)(c) of the Companies Act, 1956 he being a partner/of an officer [which includes a Director u/s 2(30) of said Act] was not qualified for appointment as auditor of the said Company.

The Respondent has made a statement in his audit report about the true and fair view of the state of affairs of the Company without disclosing his own and his Partner Shri K.C. Lunawat's interest in the said Company. As per the annual return made up to 24.9.1990 of the said Company duly signed by Shri K.C. Lunawat as a Director and filed with the Registrar of Companies, West Bengal, the Respondent and his said partner held 28,400 and 41,800 equity shares respectively out of a total of 95,940 subscribed equity shares of the aforesaid Company. Therefore, the Respondent has committed professional misconduct in terms of Clause (4) of part I of the Second Schedule to the Chartered Accountants Act, 1949, by expressing his opinion on the financial statements of the business of the Company for the period ended 31.3.1989 in which he and his partner had a substantial interest.

b) The Council at its meeting held on 5th and 6th December, 1996 was prima facie of the opinion that the Respondent was guilty of professional and other misconduct and thus, decided to refer the matter to the Disciplinary Committee for enquiry. Accordingly, the Disciplinary Committee conducted an enquiry in the matter and submitted its report dated December 28, 1998.

c) By the said report, the Committee opined that the Respondent was guilty of professional misconduct within the meaning of Clause 4 of Part I of Second Schedule to the Act read with Sections 21 and 22 of the Act.

d) The aforesaid report was considered by the Council at its meeting held between 19th August and 20th August, 1999 at New Delhi. The Council observed from the report of the Committee that the Respondent had accepted the position of auditor though his partner was an officer-director and there was also substantial interest of his relatives in the audited company and no disclosure whatsoever was made by the Respondent in his audit report. It further appears that the Respondent had pleaded guilty of professional misconduct and had requested for a lenient view as the complaint is filed after 41/2 years and he was suffering from cancer the fact which was duly supported by a medical certificate to that effect.

e) The Council decided to accept the report of the Disciplinary Committee holding the Respondent guilty of professional misconduct within the meaning of Clause 4 of Part I of the Second schedule to the Act read with Sections 21 and 22 of the Act.

f) However, in deciding the punishment to be recommended to this Court, in view of submissions made by the Respondent about his suffering from serious ailment of cancer, the Council decided to recommend to the High Court that the proceedings against the Respondent might be filed.

3. The said finding along with recommendation of the Council has, accordingly, been placed before us for passing necessary order in terms of Section 21(6) of the Act.

4. Mr. Saptangshu Basu, the learned Senior Advocate appearing on behalf of the Council, submitted before us that there is no dispute that the Respondent is guilty

as found by the Council as would appear from the fact that in course of hearing he admitted such guilt. Mr. Basu, however, submits that having regard to the illness the Respondent was suffering from, the Council having taken a lenient view of filing of the proceeding, this Court should accept the said recommendation.

5. None appeared on behalf of the Respondent or the Central Government in spite of service of notice of the reference.

6. In view of the importance of the point involved as to whether in spite of the finding that the Respondent is guilty of an offence specified in the Second Schedule to the Act, the law permits filing of the proceedings or dismissal of the complaint, we appointed Mr. Poddar, a Senior Advocate of this Court, as Amicus Curie for assisting us in arriving at our conclusion in answering this reference.

7. Therefore, the first question that arises for determination in this reference is whether there is scope of filing the proceedings against the Respondent as recommended by the Council after holding that the Respondent is guilty of an offence which comes within the purview of the Second Schedule to the Act.

8. To appreciate the aforesaid question the provision contained in Sections 21, 22 and 22A of the Act as it stood at the relevant time are quoted below:

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 members 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 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) Where it appears to the High Court that the transfer of any case pending before it to another High Court will promote the ends of justice or tend to the general convenience of the parties, it may so transfer the case, subject to such conditions, if any, as it thinks fit to impose, and the High Court to which such case is transferred shall deal with it as if the case had been forwarded to it by the Council.

Explanation I: - In this section "High Court" means the highest civil court of appeal, not including the Supreme Court, exercising jurisdiction in the area in which the person whose conduct is being inquired into carries on business, or has his principal place of business at the commencement of the inquiry:

Provided that where the cases relating to two or more members of the Institute have to be forwarded by the Council to different High Courts, the Central Government shall, having regard to the ends of justice and the general convenience of the parties, determine which of the High Courts to the exclusion of others shall hear the cases against all the members.

Explanation II: I - For the purpose of this section "member of the Institute" includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.

(8) For the purposes of any inquiry under this section, the Council and the Disciplinary Committee shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) the discovery and production of any document; and

(c) receiving evidence on affidavit.

22. Professional misconduct defined For the purposes of this Act, the expression "professional misconduct" shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Council under Sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

#### 22A. Appeals

(1) Any member of the Institute aggrieved by any order of the Council imposing on him any of the penalties referred to in Sub-section(4) of Section 21, may within thirty days of the date on which the order is communicated to him, prefer an appeal to the High Court:

Provided that the High Court may entertain any such appeal after the expiry of the said period of thirty days, if it is satisfied, that the member was prevented by sufficient cause from filing the appeal in time.

(2) The High Court may, on its own motion or otherwise, after calling for the records of any case, revise any order made by the Council under Sub-section (2) or Sub-section (4) of Section 21 and may -

(a) confirm, modify or set aside the order;

(b) impose any penalty or set aside, reduce, confirm, or enhance the penalty imposed by the order;

(c) remit the case to the Council for such further inquiry as the High Court considers proper in the circumstances of the case; or

(d) pass such other order as the High Court thinks fit:

Provided that no order of the Council shall be modified or set aside unless the Council has been given an opportunity of being heard and no order imposing or enhancing a penalty shall be passed unless the person concerned has also been given an opportunity of being heard.

Explanation: -- In this section "High Court" and "member of the Institute" have the same meanings as in Section 21.

(Emphasis supplied by us)

9. After hearing the learned Counsel for the Institute and Mr. Poddar, the learned Amicus Curie, we find that under the provisions of the Act, various types of professional misconducts mentioned in the Act have been classified under the two Schedules annexed to the Act. The first schedule deals with misconducts of lesser degree than those mentioned in the Second schedule which indicates those of graver nature.

10. Under the provisions of the Act, there are several stages of the enquiry relating to the misconduct of the members of the Institute. At the first stage, whenever on receipt of information by, or of a complaint made to it, the Council is, prima facie of the view that any member of the Institute has been guilty of any professional or other misconduct, a duty has been cast upon the Council to 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, on conclusion of enquiry, report the result of its inquiry to the Council. If on the other hand, the Council, on receipt of the information or complaint, referred to above, finds that such information or complaint even prima facie does not make out a case of misconduct, it is not even required to refer the matter to the Disciplinary Committee and shall drop the matter at the very first stage.

11. If on receipt of such report from the Disciplinary Committee, 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. Thus, even after a prima facie view from the information or the complaint that misconduct was committed, on enquiry by the Disciplinary Committee and on basis of its report, the Council may ultimately come to the conclusion that the concerned member is not guilty of any misconduct and in such a case, it has the power to drop the proceedings or dismiss the complaint. Therefore, even at this stage, if the Council finds that a member is not guilty, it has absolute power of dropping the proceedings.

12. However, if on receipt of such report from the Disciplinary Committee, the Council finds that the member of the Institute is guilty of any professional or other misconduct, a duty is cast upon it to record a finding accordingly and to proceed further as laid down in Sub-sections (4) and (5) of Section 21 depending upon the following circumstances:

A) Where the finding is that the 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 regarding the proposed punishment and may thereafter make any of the following orders, namely:

i) reprimand the member;

ii) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit.

If the Council passes any of the aforesaid two orders in the above circumstances, there is no necessity of referring the matter to the High Court for approval.

However, if the Council proposes an order that the name of the members ought to be removed from the Register for a period exceeding five years or permanently, it shall not make any such order but shall forward the case to the High Court with its recommendations thereon.

B) Where the misconduct in respect of which the Council has found any member of the Institute is guilty of misconduct referred to in Second Schedule, which are graver in nature, the Council is not competent to pass any penal order but will simply forward the case to the High Court with its recommendations thereon.

13. On receipt of any case of recommendation of higher penalty than reprimand or removal not exceeding five years, as provided under Sub-section (4) of Section 21 or in respect of the cases of proved misconducts specified in the Second Schedule as provided in Sub-section (5) of Section 21, 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:

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

(f) reprimand the member;

(g) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;

(h) refer the case to the Council for further inquiry and report.

14. From the above scheme for disposal of cases relating to misconduct, it is apparent that even in cases of misconducts of lesser degree specified in the First Schedule to the Act, once a member is found to be guilty by the Council based on enquiry by the Disciplinary Committee, the law does not authorize the Council to totally exonerate such person and at least a penalty in the form of "reprimand" must be imposed as provided in Sub-section (4) of Section 21 of the Act. If the member is found to be not guilty on enquiry even in cases of misconducts specified in Second Schedule to the Act, law does not require approval of such finding by High Court and the Council itself is authorized to drop the proceedings or dismiss the complaint on such finding. But when a member has been found to be guilty of the graver misconducts mentioned in Second Schedule, it is absurd to suggest that the Council may decide even not to recommend the minimum punishment of reprimand provided for the misconducts mentioned in the first schedule. The scheme of the Act

has permitted dropping of proceedings or dismissal of complaint only on a finding that the member is not guilty and not otherwise.

15. Mr. Poddar, in this connection placed before us a decision of the Division Bench of Kerala High Court in the case of *The Council of the Institute of the Chartered Accountants of India v. Mani S. Abraham* being C.M. Reference Case No. 23 of 1992 disposed of on January 17, 2000 where the Disciplinary Committee found that the Respondent was in disturbed mind and no mala fides were involved. It was recorded further that no mens rea was established. In such a situation, the Division Bench decided to drop the proceedings. In our opinion, the said decision, first, cannot be said to have laid down as a proposition of law that even in cases where the misconduct is proved there is no necessity of giving even a minimum punishment of reprimand and secondly, in the said decision, the scheme of the Act, as quoted above, permitting the dismissal of complaint or dropping of proceedings only on finding that the member was not guilty, was not considered. Consequently, we are unable to accept the said decision as a precedent on the point we are dealing with.

16. Thus, we are unable to accept the contention of Mr. Basu or Mr. Poddar, the learned Senior Advocates, appearing for the Institute and as Amicus Curie respectively, that even in cases of the misconduct referred to in the Second Schedule which contains graver misconducts than those specified in the First Schedule, the Council is entitled to recommend dropping of proceedings after the member is found to be guilty by the Council itself.

17. In our opinion, the order referred to in Clause (a) of Sub-section (6) of Section 21 can be passed only if the finding of guilt recorded by the Council is set aside by the High Court.

18. On consideration of the materials on record, we find that the finding of guilt recorded by the Council is quite justified and we find no reason to upset such a finding. It appears that the Council was influenced by the fact that the member was suffering from cancer and such fact led it recommend filing proceedings even after finding him guilty.

19. In such circumstances, we remand the matter back to the Council for considering the case of punishment after giving the member an opportunity of being heard in the light of the misconduct committed by him. While taking such decision, the Council will not be influenced by any of our observations regarding the gravity of the misconduct made in this order. Let such decision be taken within three months from the date of communication of this order.

20. We record appreciation of the service rendered by Mr. Poddar as Amicus Curie to assist us in arriving at the conclusion.

21. In the facts and circumstances, there will be, however, no order as to costs.

I agree-



Sambuddha Chakrabarti, J.