

## Professional Misconduct- for not exercising due diligence by the Company Secretaries in Practice

**“Professional and Other Misconduct”:** The expression “professional and other misconduct” as defined in Section 22 of the Company Secretaries Act, 1980 shall be deemed to include any act or omission provided 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 Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances. There are two Schedules to the Company Secretaries Act, 1980 viz. First Schedule and Second Schedule.

Acts or omissions of Professional Misconduct which are specifically applicable to Company Secretaries in Practice:

- (i) Part I of the Second Schedule to the Company Secretaries Act, 1980 contains 10 clauses on acts or omissions of professional misconduct which are applicable to Company Secretaries in Practice.

### CASE STUDY:

1. A complaint of professional and other misconduct has been filed wherein the Complainant has *inter-alia* stated that he purchased 2400000 shares at face value of Rs. 10 per share of a company in the year 2016 and has duly paid the consideration for the same. The auditor of the company for the financial year 2016-17 has signed the audit report of the said year which shows that the Complainant holds 2400000 shares of the company, which is equivalent to 10% of the total paid up capital. The name of the Complainant was mentioned at serial number 7 and also in the notes annexed to and forming part of the financial statement for the year ended 31<sup>st</sup> March 2017 reflects details of shareholders holding more than 5% of the aggregate share capital of the company. In the form AOC-4, for the financial year 2016-17 filed with MCA portal in November, 2017. In the said form, the name of the Complainant was shown as a shareholder of 2400000 shares of the company. Further, in one disclosure of Key Managerial Personnel and Directors and remuneration to Key Managerial Personnel and Directors, it is very clearly mentioned that the Complainant holds 2400000 shares of the company.
2. The Complainant has *inter-alia* alleged that the Respondent has certified and filed form MGT-7 of the company for the financial year 2016-17 on January, 2018, wherein, the Respondent has deliberately removed the name of the Complainant from the shareholding of the company. The Complainant further stated that later, a forged form AOC-4 was filed, wherein the name of the Complainant was deleted from the list of shareholders without the knowledge and his consent and without obtaining prior permission from the Hon’ble NCLT, which is mandatory under Section 131 of the Companies Act, 2013.
3. The Complainant has further alleged that how the Respondent was aware that a revised form AOC-4 will be filed in future and based on future form AOC-4, the Respondent prepared form MGT-7 which contains information similar to the information mentioned in forged AOC-4 signed on January, 2018 (wrongly mentioned as January, 2017) and uploaded in January, 2018 (wrongly mentioned as January, 2017). The Complainant further alleged that the Respondent in form MGT-8 has mentioned at point No. 18 that the company does not require to obtain any approval or permission from Tribunal; despite knowing the fact that for any revisions in the financial statements and Boards’ Report of the company, prior approval of the Hon’ble NCLT is mandatory.
4. The Respondent has denied the allegations and submitted that the Complainant has filed the complaint with unclean hands and with *Malafide* intentions. The company informed that the Complainant has initiated various proceedings before the various forums in relation to the purported right of ownership of 2400000 shares of the company. Ownership of the Complainant was in dispute and the issue is *sub-judice* before the Hon’ble Court wherein, the Complainant has filed one commercial suit. The Complainant has also filed an appeal under the provisions of Section 59 of the Companies Act, 2013 in relation to purported 2400000 shares of the company before the NCLT, which is still pending.
5. The Respondent has submitted that the form AOC-4 filed on November, 2017 with ROC, contained typographical error in relation to shareholding of the said company. The said clerical error was acknowledged by the Board and further an affidavit issued by two Directors of the company is in the knowledge of the Complainant. The Respondent has prepared form MGT-7 and certified the same by relying upon the Board Resolution and affidavit filed by two Directors. The Respondent has perused the reply of the affidavit filed by the company before the NCLT and stated that based on said reply, question of showing shareholding of the Complainant does not arise. Since there was no revision in the financial statement of the company, the question of following the procedure set out in Section 131 of the Companies Act, 2013 does not arise. The details in form MGT-8 were correctly stated accordingly.
6. The Complainant has initiated multiple legal proceedings against the company under the provisions of applicable laws seeking different remedies. The legal remedy

prayed in the complaint is different from the other legal proceedings which are pending before different courts. The Complainant upon getting the delivery of the share certificates in physical form, had submitted the original documents with form SH-4 and corresponding documents to the company in July, 2016 with request to transfer the same. The company took the delivery from the Complainant and acknowledged the transfer of aforesaid shares. The Complainant has become holder of 2400000 shares of the company, and this got reflected in the fourth audit report of the company for the FY 2016-17, wherein the extract of Annual Return for the year ended 31<sup>st</sup> March, 2017 at point (ii) – shareholders promoters, in list, at point No. 7, the name of the Complainant is shown as holding of 2400000 shares i.e. 10% of the total shares of the company. Also, the reason shown is ‘transfer’ and the date of said transfer is mentioned as October, 2016. It is clearly established that as per official records of the company, the Complainant is a shareholder of the company holding 2400000 shares. The Notes to and forming part of financial statements as on 31<sup>st</sup> March, 2017 shows the details of the shareholders holding more than five percent of aggregate share capital of the company, wherein the name of the Complainant appeared as shareholder of 2400000 shares i.e. 10% of the total paid up share capital of the company. The Complainant is shown as Director of the company at serial No. 4 in the Directors’ report dated May, 2017 duly signed by two Directors of the company. The financial statement of the company for FY 2016-17 was duly audited and executed by Statutory Auditors of the company. In form AOC-4 (XBRL) for the FY 2016-17 at serial number No. 7 of the details of shareholders, the name of the Complainant is also mentioned. There is no provision in the Companies Act, 2013, wherein the company is allowed to make changes to file financial statements where prior approval of the Hon’ble NCLT is not required. The Complainant was never informed by the company and its directors about removal of his name from the register of members of the company. The Complainant submitted that due to illegal, unprofessional and unethical activities of the opposite party, the Complainant is in a very miserable condition where he is neither even getting his money returned nor able to sell his shares in the secondary market. There was no typographical error. It was a criminal conspiracy and the Respondent had complete knowledge of the same. The Complainant has stated that the commercial civil suit and the appeal are pending before Hon’ble NCLT for adjudication

7. The Respondent has contended of having relied upon list of shareholders certified by the management, form MGT-9 attached with the report of the Board of Directors and Register of Members before certifying the form MGT-7 of the company. The Respondent has submitted that there are some mistakes while issuing form MGT-8 for the year 2016-17 of the company and while certifying form MGT-7 for the financial year 2016-17 of the company though the mistake was not intentional. The Disciplinary Committee has observed that the Respondent has certified form MGT-7 and

issued form MGT-8 of the company for the FY 2016-17. The Respondent has requested to take lenient view for the errors which are more clerical/typographical in nature, while certifying the said forms MGT-7 and MGT-8 of the company.

8. The Disciplinary Committee after all the facts and circumstances of the case, held the Respondent ‘Guilty’ of Professional Misconduct under Clause (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980 for not exercising due diligence before certifying forms MGT-7 and MGT-8 of the company for the FY 2016-17. The Disciplinary Committee passed an order of Reprimand and imposed a Fine of Rs. 5000/- against the Respondent.

*As per Clause (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980, a member of the Institute in practice shall be deemed to be guilty of Professional Misconduct, if he does not exercise due diligence, or is grossly negligent in the conduct of his professional duties.*



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