

**THE DISCIPLINARY COMMITTEE
THE INSTITUTE OF COMPANY SECRETARIES OF INDIA
IN THE MATTER OF COMPLAINT OF PROFESSIONAL OR OTHER MISCONDUCT**

ICSI/ DC/147/2012

Date of hearing: 27th December, 2016

Date of Order: 16th January 2017

Mr. Rashmin Vadilal Shah

...Complainant

Vs.

Ms. Anita Vyas, FCS-3213 (CP No. 8807)

....Respondent

Present:

Director (Discipline)
Respondent in person

FINAL ORDER

1. A complaint dated 22nd June, 2012 (Annexure-I) in Form I was filed by Mr. Rashmin Vadilal Shah (hereinafter referred to as the 'Complainant') against Ms. Anita Vyas, FCS-3213 (CP No. 8807) hereinafter referred to as the 'Respondent') wherein the Complainant has alleged the following:-
 - (i) the Respondent has issued the Secretarial Compliance Report for the year 2010-2011 for M/s. Vimalachal Print and Pack Pvt. Ltd., and made subsequent amendment in the same without exercising due diligence.
 - (ii) the Complainant further alleged that the Respondent was appointed for issuing the Secretarial Compliance Report subsequent to the resignation of Mr. Ronak S. Shah, Practising Company Secretary without his knowledge and without her appointment in the Board meeting of the company.
 - (iii) that subsequent amendment in the Secretarial Compliance Report for the year 2010-2011 is vague, not up to the point, because the appointment of the Respondent is totally objectionable, bogus and violative of the provisions of the Companies Act, 1956 and therefore, the Compliance Certificate submitted by her is also without her valid appointment as per the provisions of the Companies Act, 1956.
 - (iv) that the Respondent has failed to verify prior approval of Central Government under section 314 of the Companies Act, 1956 in the case of managerial remuneration paid to Mr. Mimish Girish Shah and Mr.



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Harmish Girish Shah during the year 2010-2011. That the appointment of Mr. Mimish Girish Shah, FCA as a whole time director of the company w.e.f. May, 2008 is in contravention of the provisions of the Articles of Association of the company as well as the statutory provisions of the Companies Act, 1956. That the violation of section 217 of the Companies Act, 1956 as the Compliance Certificate was not attached with the Directors Report.

2. The Respondent in her written statement dated 3rd August, 2012 at the outset has denied all the averments made by the Complainant against her stated as under:-

- (i) she has admitted that though the company was a private limited company but by mistake, in clause 3 of the Compliance Certificate for the year 2010-11, she stated the company to be a public company.
- (ii) that she was not supposed to go into the validity of her appointment as she had received the letter of appointment from the Managing Director of the company.
- (iii) that the appointment and payment of remuneration of Mr. Mimish Shah and Mr. Harmish Shah was not made in the year 2010-11.
- (iv) the Compliance Certificate issued by her under Section 383A of the Companies Act, 1956 was for the financial year 2010-2011 and in terms of provisions of The Companies (Compliance Certificate) Rules, 2001, rule 3, the certificate was required to be given for the transactions only for the particular year for which certificate was to be issued and not for all the previous years.

The Director (Discipline) has formed prima-facie opinion wherein he has opined as under:-

- (i) that the allegations of the Complainant primarily fall against the company and its directors. The Respondent in this case received her appointment letter from the Managing Director of the company which she was not supposed to scrutinize for the validity unless something was suspicious. The Respondent's duty was to send a prior written communication to Shri Ronak S Shah, PCS before issuing the Compliance Certificate which she did in the instant case. Further, DCA circular No. 14/75/ (8)/12/314(1B)/75-CL-V dated 05.06.1975 was revised and clarified vide circular No. 4 of 1976 dated 11th February, 1976 clarifying that if Managing Director or whole time director of a private company receives remuneration as Managing Director and whole time director and does not receive any thing over and above, the remuneration received by him as Managing Director or whole time director, he will not be deemed to be holding an office



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- or place of profit in the company and therefore will not require any approval under section 314 of the Companies Act, 1956.
- (ii) in this case, Mr. Harmish Girish Shah and Mr. Mimish Girish Shah apparently have been paid remuneration as Managing Director and whole time director and therefore, section 314 of the Companies Act, 1956 will not be applicable to the said company. Further, it is the responsibility of the company to attach the compliance certificate with the Directors' Report and not that of the PCS.
- (iii) however, the Respondent has casually gone through the documents and without due diligence she has issued the Compliance Certificate for the year 2010-11 in respect of M/s. Vimalachal Print and Pack Pvt. Ltd., and therefore, she is prima-facie 'Guilty' of professional misconduct under clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 as she has issued the compliance certificate for the year 2010-2011 and subsequently carried out amendments in the same and there is no provision in the Companies Act, 1956 for rectification of the Secretarial Compliance Report already issued. Further, the Respondent has admitted that though the company was a private limited company but by mistake she stated in the said compliance certificate that the company is a public company. This amendment she addressed to the Board of Directors of the company.
3. The Disciplinary Committee considered the prima-facie opinion dated 6th May, 2014 of the Director (Discipline) 2014 and the Committee agreed with the prima-facie opinion and decided to proceed further in the matter in accordance with the Company Secretaries Act, 1980 and the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007.
4. The prima-facie opinion of the Director (Discipline) was sent to the Respondent and the Complainant vide letters dated 25th July, 2014 to submit the written statement and the rejoinder respectively.
- The Respondent vide letter dated 6th August, 2014 submitted her written statement to the prima-facie opinion of the Director (Discipline) wherein the Respondent denied that any forged document was filed by her. The Respondent further stated that though the Company was a private limited Company, by mistake clause 3 of the Compliance Certificate stated that the Company was a public company. On realization of the unintentional clerical error has submitted an amendment to the Clause No 3 of the Compliance Certificate to the Board of directors vide letter dated 4th December 2011 and have received acknowledgment of the same. The Respondent further stated that the Complainant himself was a



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founder promoter director of the company and continued to be so till 10.02.2012. Records of the company reveals that he was removed from the directorship by the company by following the provisions of Section 284 of the Companies Act, 1956. Therefore, he may have a cause of grievance against the company and others. Incidentally the form no. 32 for his removal u/s. 284 of the Companies Act, 1956 was filed by the company and certified by him. Therefore the Complainant has picked up a cause of grievance personally against her also. The Respondent further stated that there are disputes between him and others in the company culminating into litigation at multifarious forum and levels.

5. The Complainant has submitted his rejoinder dated 6th October, 2014 wherein he has reiterated his earlier submissions and inter-alia stated that if the Respondent knew there were family disputes, then why she had accepted the appointment in the concerned matter. The Complainant further stated that the entire removal procedure initiated by all the erring directors of the company as well as certification of the Respondent was found to be a pre planned activity which they found from the records of the company that as a Director he got hourly notice of Board Meetings, Board Meeting called without providing any details and agenda, calling of General Meetings without attaching requisite documents, change in existing PCS before the expiry of his term and appointment of new PCS Mrs. Anita Kaushik Vyas FCS without considering the resignation by the Board of Directors of existing PCS and consequent approval of appointment of new PCS etc. The Complainant further stated that he had made this representation during the personal hearing of earlier complaint before all the members of Disciplinary Committee, but they have not considered anything in the matter which was not only strange but also goes against the natural justice because professional person is an independent person and must work under line of control drawn by the parent Institute and not work for the benefit of certain person. The Complainant further stated that he had gone through Appointment Letter duly issued by the Managing Director on behalf of the Company and found that in the said letter Managing Director did not mention any reference of either Board Meeting or General Meeting in which appointment of new PCS has been proposed by the Board and approved by the members of the Company at a General Meeting. Hence such purported activity beyond the powers of the Managing Director and will be ineffective even if agreed by all the members of the company. This rule is commonly known as "Doctrine of Ultra Vires". The Complainant further stated that he had received Annual Audited Account of the Company along with Secretarial Compliance Certificate duly issued by Mr. Sanjay Dayalji Kukadia for the Financial Year 2013-2014 in case of M/s. Vimalachal Print and Pack Private Limited and found that PCS at item No. 11 expressly stated that



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Company has obtained approvals from the member under section 314 of the Companies Act, 1956 Act at the Extra Ordinary General Meeting held on 18-09-2013 and no Central Government approvals was required.

6. The parties vide letters dated 16th February 2016 were called upon to be appear before the Disciplinary Committee on 3rd March, 2016. The meeting of the Disciplinary Committee was postponed.
7. The parties vide letter dated 3rd November, 2016 were called upon to appear before the Disciplinary Committee on 19th November, 2016 at Ahmedabad.
8. The Complainant and the Respondent appeared in person before the Committee on 19th November, 2016. The Disciplinary Committee after considering the material on record, advised the Respondent to submit a copy of the Board resolution duly passed by the Board of Directors of M/s. Vimalachal Print and Pack Pvt. Ltd., pertaining to her appointment for issuance of the Compliance Certificate for the FY 2010-11 to the Company. The Respondent agreed to provide the same. The Disciplinary Committee decided to call upon both the parties to appear before it at the next date of hearing in this case, as may be decided by the Presiding Officer of the Disciplinary Committee.
9. On 19th November, 2016, the Complainant submitted a letter dated 19th November, 2016 with only one annexure of Regional Director Report to the Secretary of the Government of India dated 11.12.2013 and the Respondent has submitted her Written Statement dated 16th November, 2016, before the Disciplinary Committee.
10. The Respondent vide letter dated 4th December, 2016 further submitted that her appointment was necessitated by casual vacancy by resignation of Mr. Ronak Shah, PCS and Managing Director was empowered by the Board of Directors to fill up such vacancy. Respondent has submitted a copy of her engagement letter dated 15th July, 2011 and a copy of Resignation letter of Mr. Ronak Shah, PCS and his no objection to her appointment.
11. The parties vide letter dated 15th December, 2016 have been called upon to appear before the Disciplinary Committee on 27th December, 2016 at New Delhi.
12. The Complainant vide letter dated 17th December, 2016 informed that due to pre-occupation he could not attend the hearing on 27th December, 2016



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and requested to give next date of hearing and also to give atleast 3 weeks time between date of notice and date of hearing.

13. The respondent appeared before the Disciplinary Committee on 27th December 2016 and she has reiterated her defence as stated below:-

(a) that her appointment by the company to issue Compliance Certificate for the year 2010-11 was necessitated by casual vacancy caused by the resignation of Mr Ronak Shah, PCS and hence the Managing Director of the Company was empowered under the delegated powers by the Board of Directors to engage the services of any professional for Company Law matters which also include to fill up such vacancy.

(b) that the Board of Directors while approving the Annual Accounts on 23rd September 2011 has also approved the Director's Report and the Compliance Certificate being part of the Director's Report and hence her appointment was also deemed to have been approved by the Board of Directors and the Complainant being Director of the Company also attended the meeting.

(c) That the Company was mentioned as Public Company instead of private company inadvertently.

14. In light of the evidence as well as deposition of the respondent, and after considering the material available on record and the totality of the facts and circumstances, this Disciplinary Committee is of the opinion that the Respondent is not guilty of Professional misconduct under clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 "Not Guilty" as there was no negligence on the part of the respondent.

15. The Disciplinary Committee also accepts the points raised by the respondent that she was pronounced not guilty of professional or other misconduct vide order dated 28-04-2014 by the Disciplinary Committee of the Institute in another complaint bearing No. DC/166/2012 filed by the Respondent against her. She has highlighted that she had checked the Attendance Register but was not required to keep a copy of it in her custody and thus did not do so. She also spoke of the inconvenience caused to her in addition to the circumstances of facing a second round of proceedings despite having common issues involved which were resolved by the order dated 28-04-2014.

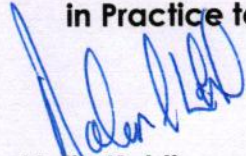
16. The Disciplinary Committee in light of this case, records its concern about the proceedings under the Company Secretaries Act, 1980 and Rules thereunder



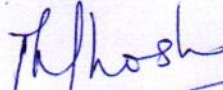
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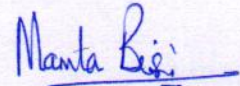
repeatedly being used by the Complainants against the Practising Company Secretaries during disputes that may arise between the Directors of the company / family members involved. Should such a practice be widely resorted to misuse the Disciplinary Proceedings against the PCS, it could lead to a situation where it may become an impediment for Company Secretary in Practice to even undertake bonafide actions without malafide intents.



Nalin Kohli
Member



Meenakshi Datta Ghosh
Member



Mamta Binani
Presiding Officer

