

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

ICSI/DC/189/2013

Order Reserved On: 25th April, 2018

Order Issued On: 14th June 2018

Shri Kamal R Sharma

.....Complainant

Vs.

Shri Jayesh Kumar S Vyas,
FCS -5072 (CP No. 1790)

.....Respondent

Present

Mrs. Meenakshi Gupta, Director (Discipline)
Respondent along with his advocate

FINAL ORDER

1. A complaint in Form-I dated 31st May, 2013 was filed under Section 21 of the Company Secretaries Act, 1980 read with sub-rule (1) of Rule 3 of the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (the Rules) by Mr. Kamal R Sharma (hereinafter referred to as the 'Complainant') against Mr. Jayesh Kumar S Vyas, FCS -5072 (CP No.1790) (hereinafter referred to as the 'Respondent').
2. The Complainant in his complaint *inter-alia* alleged:
 - a. that the Respondent has made a material mis-statement in the Compliance Certificate dated 12th May, 2012 issued by him to M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., for the financial year ending on 31st March, 2011.
 - b. that the Respondent has also failed to issue the Compliance Certificate for the financial year ending on 31st March, 2012 to M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., in accordance with the rules framed by the Central government.
 - c. that the Respondent did not point out the fact of holding the meeting on 8th June, 2011 as invalid & subsequent meeting on 29th July, 2011 to ratify the business and that the Respondent did not report the chronology of events i.e. AGM followed by EGM



- ratification in the Compliance Certificate dated 12th May, 2012 issued by him with reference to AGM dated 8th June, 2012.
- d. that the Respondent in his Certificate dated 12th May, 2012 did not provide information to the effect that the constitution of the Board of Directors during the period under review, with reference to the AGM held on 8th June, 2012 and also failed to obtain sufficient information which was necessary for an expression of opinion.
 - e. that there has been a material departure from the Secretarial Practices and Sections 171 and 172 of the Companies Act, 1956.
3. The Respondent on the other hand denied the allegations levied against him and stated as under-
- a. that the Complainant was present at the Board Meeting of the company held on 25th May 2011, and requested to hold the 16th AGM on 8th June, 2011. Accordingly, the meeting was held and he not only participated but also acted as a scrutinizer thereat. He further stated that at this time, a matter was pending before the CLB and subsequent to the holding of the meeting, the Complainant raised issues for the first time, concerning shorter notice and hence, the Board in its meeting dated 2nd July 2011 decided to hold an EOGM to ratify the business transacted at the aforesaid AGM and the Complainant was present even at the Board meeting. Thereafter, on 29th July 2011, EOGM was held for ratifying the business transacted in the AGM and thus, on the date of his Compliance Certificate, the AGM was valid because (i) the same was attended and Complainant participated thereat and (ii) subsequent EOGM regularized the same and thus, no issues now can be raised. In any event, the Complainant was aware of these facts and hence, he now cannot raise any issues concerning the same. The Complainant could have challenged these issues before the Court/ CLB and waiver of this action also demonstrate that he has actually no grievance in this behalf.
 - b. that the Complainant was removed by the Shareholders by passing an Ordinary Resolution at EOGM held on 13th December, 2010 however, due to the interim injunction granted by the Honourable CLB vide its order dated 9th December, 2010, the implementation of the said resolution passed on 13th December, 2010 was stayed as a result Mr. K. R. Sharma, Complainant, continued to be the director of the company till 9th January, 2013, the date of withdrawal of petition filed by him.
 - c. that the company is a private company and by virtue of Section 170 of the Companies Act, 1956, the Provisions of Section 171 to 186



of the Act would not apply to it unless otherwise stated in the Articles of Association of the company.

4. The Complainant in his Rejoinder denied the averments of the Respondent and while reiterating the earlier submissions *inter-alia* stated that:
 - a. Howsoever unprofessional the working of the company may be, the Respondent should discharge his responsibility independently without favouring any party.
 - b. The role of the professional is limited to Certification & Compliance & not to involve himself into day to day affairs of the company and not to take sides. The Complainant further stated about Sections 171 to 186 of the Companies Act, 1956.

5. The Director Discipline in her *prima- facie* opinion dated 30th August, 2017 after examination of the complaint, written statement, rejoinder and other material on record, though exonerated the Respondent of most the allegations levied against him but held the Respondent *prima-facie* guilty of Professional Misconduct under Item (7) Part I of Second Schedule to the Company Secretaries Act, 1980 as the statement in clause (6) the compliance certificates, issued by the Respondent, dated 12th May, 2012 were contradictory to the facts and records of the company as Clause 18 of the Article of Association of the Company provide that 21 days notice will be necessary for holding the Annual General Meeting, but the Company had held its 16th Annual General Meeting on 8th June, 2011 for which the Company had issued Notice on 25th May, 2011 which is in contravention of the said Article.

6. The Disciplinary Committee at its meeting held on 17th October, 2017 after considering the *prima-facie* opinion dated 30th August, 2017 of the Director (Discipline) and all the facts and circumstances of the matter, had agreed with *prima-facie* opinion of the Director (Discipline) that the Respondent is 'Guilty' of Professional or other misconduct under Item (7) of Part - I of the Second Schedule to the Company Secretaries Act, 1980 that the Respondent has made a mis-statement in clause (6) of the Compliance Certificate issued by him dated 9th June, 2016 for M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., which is contradictory to the facts and records of the company. Accordingly, the Disciplinary Committee had decided to adjudicate the matter in accordance with Rule 18 of the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 read with the Company Secretaries Act, 1980, to finally conclude as to whether the Respondent is guilty or not in the matter.



7. Accordingly, a copy of the *prima-facie* opinion of the Director (Discipline) was also sent to the parties asking them to submit the written statement and rejoinder, respectively.
8. The Respondent submitted his written statement dated 22nd January, 2018 to the *prima-facie* opinion of the Director (Discipline). The Respondent while denying the charges against him has once again reiterated his earlier submissions along with certain other submissions to substantiate his defence. The Respondent further emphasised that there was no misstatement in his Compliance Certificate issued by him dated 12th May, 2012 for M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., Further, the Respondent inter-alia stated that the only observation made by the Director (Discipline), is that since Clause 18 of the Article of Association prescribes a minimum 21 days notice for convening an AGM, and in light of the same, he is guilty of professional misconduct, because, he has stated in Clause 6 of the Compliance Certificate dated 12th May, 2012, that the AGM for financial year ended on 31st March, 2011 was held on 8th June, 2011 after giving due notice to the members of the company.
9. The Respondent further stated that the terms "not less than" cannot be hyper technically construed. He further stated that the term "due notice" can also not be hyper technically construed. The term due notice ought to mean. That adequate notice has been given by the company, in a manner not prejudicial to the interest of either the company, or its members. In the instant case, the date fixed for the meeting was as per the choice, convenience and desire of all concerned, including the Complainant himself, who not only attended the meeting, but participated in such meeting as a scrutinizer. Therefore, as per the Respondent the meeting was duly convened as all requested for a particular date, all participated and in a Private Company of this nature, where all the shareholders present make a request for a particular date which is agreed upon and accepted by all, it would be too harsh to hold that meeting was not duly convened. Further, in view of the subsequent objections so raised, the resolutions passed at the said AGM were subsequently ratified by the resolution passed in the EOGM dated 29.07.2011. In the said meeting it was categorically recorded that the shorter notice has not vitiated the proceedings. The Respondent has cited certain judgments with regard to the minimum notice period for convening AGM's.
10. The parties vide letter dated 10th April, 2018 were called upon to appear before the Disciplinary Committee on 25th April 2018 at New Delhi. The Complainant vide his letter dated 12th April, 2018 inter-alia stated to take his earlier submissions on record and on basis of which an appropriate order may be passed.



11. On 25th April 2018, the Respondent along with the advocate appeared before the Disciplinary Committee. The Advocate for the Respondent submitted that there was no misstatement in his Compliance Certificate issued by him dated 12th May, 2012 for M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., He cited certain judgments with regard to the notice period for convening AGM's. He laid emphasis on a matter titled Surajmull Nagarmul Vs Shew Bhagwan Jalan, in Suit No 1104 of 1963 vide its judgement dated 20.11.1970, the Hon'ble Calcutta High Court inter-alia observed that the length of the notice, contents, manner of service and explanatory statement, have been enacted for the benefit of the share-holders of the company to enable them to participate properly and effectively at the meetings of the company. These provisions cast no obligation on the share-holders and impose duties only on the company to ensure that the share-holders get proper notice and reasonable opportunity to participate effectively, if they so desire, at the meetings of the company. As these provisions are all for the benefit of the share-holders, they may, if so desire, waive the non-performance of any of these statutory regulations, the non performance by the company of any of these regulations may not invalidate the meeting and its proceedings. Further, as per the advocate for the Respondent the consent referred to in Section 171(2) of the Companies Act, 1956 need not necessarily be obtained before calling any meeting and the consent may be obtained both before of after the calling of the meeting and also at the meeting called. This consent need not be express or in writing and may be implied and inferred from the conduct of the members

12. **The Disciplinary Committee considered the material on record and all facts and circumstances of the cases and the following contentions of Respondent;**

- a) that, the date fixed for the alleged AGM was as per the choice, convenience and desire of all concerned, including the Complainant himself, who had not only attended the AGM, but participated in such meeting as a scrutinizer.
- b) the resolutions passed at the said AGM were subsequently ratified by the resolution passed in the EOGM dated 29.07.2011 wherein it was categorically recorded that the shorter notice has not vitiated the proceedings of the AGM.
- c) There is no need to have prior approval for shorter notice as was held by the Hon'ble Calcutta High Court Surajmull Nagarmul Vs Shew Bhagwan Jalan, in Suit No 1104 of 1963 vide its judgement dated 20.11.1970.



The Disciplinary Committee agreed with the contentions of the Respondent and found that there is no misstatement in Compliance Certificate dated 12th May, 2012 issued by him to M/s. Gujarat Liqui Pharmacaps Pvt. Ltd., and holds the Respondent not Guilty of Professional or other misconduct under the Company Secretaries Act, 1980 for the acts and/or omissions alleged by the Complainant in his complaint.

Ashish C Doshi
Member

Santosh Kumar Agrawala
Member

Meenakshi Datta Ghosh
Member

Makarand Lele
Presiding Officer

