

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

ICSI/DC/272/2014

Order reserved on: 2nd December, 2016

Order issued on: 16th January, 2017

Mr. Vikram Bakshi

...Complainant

Vs

Mr. Rajesh Jha, FCS-6390, CP No. 5737

.... Respondent

Present:

Director (Discipline)

FINAL ORDER

1. A complaint dated 19th November, 2014 in Form 'I' was filed under Section 21 of the Company Secretaries Act, 1980 (the Act) 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 Shri Vikram Bakshi (hereinafter referred to as the 'Complainant') against Shri Rajesh Kumar Jha, FCS-6390 (CP No.5737) (hereinafter referred to as the 'Respondent').
2. The Complainant *inter-alia* alleged that the Respondent has certified Form 32 pertaining to change of designation of the Complainant from Managing Director to Director of M/s. Connaught Plaza Restaurants Pvt., Ltd., without exercising due diligence as the Respondent has not seen the requisite Board Minutes of any meeting approving/evidencing the non-re-appointment of the Complainant as the Managing Director of the Company which in fact has not been passed by the Board of the Company. The Complainant further stated that while certifying Form 32, the Respondent was required to have verified the Minutes of the meeting held for this purpose relating to non-appointment as Managing Director and should have attached the extract of the same along with the old agreement filed, since, the Minutes of the meeting held for this purpose have not been approved, it is not understood as to how he verified from the records and certified that he has verified and found them to be true and correct. The Complainant further stated that there are articles/ clauses inserted in the Articles of the Company via JVA which clearly indicates the finalization of minutes and the re-appointment of the Managing Director. Thus, it is not the case that once the draft minutes are ready, the same are bound to be finalized. The Complainant further stated that the Respondent was required to have ensured that the extracts of Minutes as per the requirement of Form- 32 are attached while filing the Form by the Respondent.
3. Pursuant to sub-rule (3) of Rule 8 of the Rules, a copy of the complaint was sent to the Respondent *vide* letter dated 21st November, 2014 calling upon him to submit the written statement. The Respondent submitted his written statement dated 11th December, 2014; wherein he denied the allegations levied against him and *inter-alia* stated that the whole-time Company Secretary of the company had presented before



Mjh

Malin

[Signature]

[Signature]

him the following documents for examination in relation to the said certification of e-Form 32 along with various information(s) related to said certification:

- i. Copy of an Agreement dated 11th October, 2011 relating to the appointment of Mr. Vikram Bakshi as Managing Director of the Company for a period of two years with effect from 18th July, 2011 that had expired on 17th July, 2013 by efflux of time.
 - ii. Notice calling meeting of the Board of Directors of the Company on Tuesday, 6th of August, 2013 at 10.00 A.M. at the Corporate Office of the Company at 13A, Jor Bagh Market, New Delhi-110003.
 - iii. Agenda of the said Board Meeting dated 6th August, 2013.
 - iv. Unsigned minutes of the said Board Meeting dated 6th August, 2013.
 - v. Board Resolution dated 29th September, 2008, authorising the Company Secretary to file the requisite forms, etc. from time to time.
 - vi. Verification / Certificate of Mr. Devinder Jain Company Secretary of the Company in e-form 32, authorised by the Board, vide its resolution no.2 dated 29th September, 2008, to file such forms with MCA. Mr. Jain had also confirmed that information given in form 32 is true to the best of his knowledge and belief.
4. Pursuant to sub-rule (4) of Rule 8 of the Rules, a copy of the written statement dated 11th December, 2014 was sent to the complainant *vide* letter dated 15th December, 2014 asking him to submit the rejoinder. A letter dated 2nd January, 2015 was received from the Complainant requesting for additional time to submit the Rejoinder and the same was granted *vide* letter dated 5th January, 2015. The Complainant submitted his rejoinder dated 19th January, 2015 wherein he reiterated his earlier submissions and made few additional submissions.
5. A letter dated 31st December, 2015 was received from the Complainant inquiring about the status of cases filed by him which was provided to him *vide* letter dated 5th January, 2016.
6. Pursuant to Rule 9 of the Rules, the Director (Discipline) after examination of the complaint, written statement, rejoinder and other material on record, formed her *prima-facie* opinion dated 21st July 2016 and placed the same before the Disciplinary Committee on 29th July, 2016. The Director (Discipline) in her *prima-facie* opinion held that the Respondent is *prima-facie* "Guilty" of Professional misconduct under Item (7) of Part-I of the Second Schedule of the Act as there was laxity on the part of the Respondent for certification of alleged Form 32 as it is evident that the Board Minutes of meeting approving/evidencing the non-re-election of the Complainant as the Managing Director of the Company were not approved / passed by the Board of the Company. The Director (Discipline) also apprised the Committee that there are disputes among the management of M/s. Connaught Plaza Restaurants Pvt.Ltd, and that the Complainant has filed complaints against Mr. Devinder Jain, the whole time Company Secretary of the company, in which one of the issue pertains to signing/ certification of Form 32 by Mr. Devinder Jain, whole time Company Secretary of the company. Further, the Complainant has also filed Writs before the Hon'ble High Court of Delhi against the ICSI.

The Disciplinary Committee in view of the Writ Petition(s) No. 5892/2016 & 5892/2016 filed by the Complainant before the Hon'ble High Court of Delhi against the ICSI directing the Institute (ICSI) to decide the Complaints for professional misconduct filed in a time bound manner; other pending complaints involving these parties and pendency of multiple litigation at various forums, asked the Director (Discipline) to re-examine the matter in totality under Rule 9 of the Rules and submit



her *prima-facie* opinion before the Disciplinary Committee along with a note indicating the issues involved in other complaints filed by the Complainant with the Institute, even if, they are prima facie not covered under the Second Schedule to the Act.

7. On 26th August, 2016 the Disciplinary Committee considered the *prima-facie* opinion dated 21st July, 2016 of the Director (Discipline) along with material on record. The Committee also noted the status of other three complaints filed by the Complainant against the Company Secretary in employment of the concerned company viz DC/273/2014, DC/267/2014 and DC/245/2014. The Disciplinary Committee again noted that the Complainant has filed a Writ Petition(s) No. 5892/2016 & 5892/2016 against the ICSI for not taking action against Mr. Rajesh Kumar Jha and Mr. Devinder Jain in the complainants filed by Mr. Vikram Bakshi (the Complainant). Since, the matter is pending before the Hon'ble Delhi High Court, as a matter of abundant caution, the Disciplinary Committee *vide* its Interim Order dated 19th September, 2016 remanded back the matter to the Director (Discipline) under Rule 9 of the Rules for further investigation. The Disciplinary Committee directed the Director (Discipline) to ask the parties to provide a complete list of all the pending proceedings related to the instant complaint and at all the forums beyond the ICSI, alongwith details of any orders passed by the said forums, if any, including the Court of Law, CLB/NCLT etc. The Disciplinary Committee further directed the Director (Discipline) to ask from the Respondent to place before the Disciplinary Committee any document or note on the circumstances that preceded/ succeeded or mandated him into taking the said actions that subsequently became the subject matter/ cause of action of a complaint against him. The Disciplinary Committee further directed the Director (Discipline) to seek the same at the earliest and place the same before the Disciplinary Committee as and when the matter is listed before the Disciplinary Committee.
8. The aforesaid Interim Order was communicated to the parties *vide* letter dated 3rd October, 2016 sent through Speed Post SRN No. ED456147087IN (Complainant) delivered on 5th October, 2016 at 14:51:00 Hrs. and SRN No. ED456147095IN (Respondent) delivered on 5th October, 2016 at 18:10:00 Hrs as per Speed post tracking records taken from official website of the India post i.e. www.inidapost.gov.in. The Complainant preferred not to send any additional information/ documents/ inputs. The Respondent, however, sent response dated 17th October, 2016 which was received on 18th October, 2016 by the Director Discipline.
9. Pursuant to the Disciplinary Committee's Interim Order dated 19th September, 2016, the Director (Discipline) on 2nd December, 2016 placed her *prima-facie* opinion along with further investigation report in the matter holding the Respondent 'guilty' of professional misconduct under item (7) of Part-I of the Second Schedule to the Company Secretaries Act, 1980 as there is negligence on the part of the Respondent for certification of alleged Form 32 as it is evident that the Board Minutes of meeting approving / evidencing the non-re-election of the Complainant as the Managing Director of the Company was not approved / passed by the Board of the Company and that the Respondent had relied upon the unsigned Minutes of the Board meeting of the Company for certification of the alleged Form 32 of the Company.
10. The Disciplinary Committee while examining the question related to alleged negligence and non-application of due diligence by the Respondent in certifying the said Form 32, wherein the status of the Complainant has undergone a change from Managing Director to Director, **found it pertinent to examine an agreement**



[Handwritten signatures in blue ink]

dated 11th October, 2011 signed between Connaught Plaza Restaurants Private Limited and Mr. Vikram Bakshi, and some of its critical clauses that are reproduced below:-

Clause (1)

“Under the Joint Venture Agreement between him, McDonald’s Corporation and McDonald’s India Private Limited dated 31.3.1995, as amended from time to time (the “JV Agreement”), the joint venture partners agreed to nominate and elect Mr. Bakshi as the sole Managing Director of the Company every two (2) years for a period of two (2) years and have been doing so every two years since the incorporation of the Company.”

Clause (2)

“At a meeting of the Board of Directors of the Company (hereinafter referred to as the “Board”) held on September 15, 2011 Mr. Bakshi was, subject to the approval of the shareholders, which was granted vide the resolution passed by the shareholders of the Company at the annual general meeting of the Company held on September 16, 2011, re-appointed as the Managing Director of the Company with effect from 18th July, 2011 for a period of two (2) years on the terms and conditions as hereinafter appearing pursuant to Article 35 of the Articles of Association of the Company and the JV Agreement and Mr. Bakshi has accepted his re-appointment as the Managing Director of the Company on such terms and conditions.”

Clause (A) on page no. 2 of the Agreement clearly records that,-

“The Company hereby appoints, and Mr. Bakshi hereby accepts his re-appointment to hold the office of the Managing Director of the Company, with effect from 18th July, 2011 for a period of two (2) years, subject to his employment being terminable in terms of and pursuant to the provisions of the JV agreement and this Agreement.”

The conditions are thereafter enumerated in the agreement. Further on page 6 of the agreement in clause (K), the question of renewal/ continuation of Mr. Vikram Bakshi as Managing Director of the company becomes clear which is reproduced as below:-

Clause (K)

“This agreement shall be effective with effect from 18th July, 2011 and shall remain in effect until 17th July, 2013 unless terminated in accordance with the terms thereof. Unless terminated in accordance with the terms hereof, this Agreement shall be renewed for further term of two years in accordance with the terms of the JV Agreement as amended from time to time.”

11. Even a cursory reading of this agreement dated 11th October, 2011 clearly reveals that the agreement is required to be renewed at the completion of two years ending on 17th July, 2013. Nothing has been brought on record by the Complainant to show that the renewal of this agreement had been undertaken which would have mandated his continuance as Managing Director for a term beyond 17th July, 2013. Additionally, in light of no evidence of such continuation, the Complainant would logically have ceased to have retained



his position as Managing Director from 18th July, 2013 onwards. In such circumstances he would continue to be a Director of the company as there is no such evidence on record to show his removal as a Director of the Company.

12. The merits and demerits with regard to the dispute between the two parties have been agitated on various forums. The proceedings of the Disciplinary Committee of the ICSI is limited only to the specific issues of alleged negligence by the Respondent while certifying form 32 which effected the change of status of the complainant from Managing Director to Director of the said Company.
13. The Company Secretary of the company is under obligation under the Companies Act, 1956 to bring to the notice of Registrar of Companies, any change in the status of the Directors of a company. In this case, the agreement dated 11th October, 2011 makes it clear that as on 17th July, 2013 the Complainant would have ceased to be the Managing Director in the absence of any fresh evidence of reappointment presented before him, such as, an extension of the agreement dated 11th October, 2011. The filing of the said Form 32 was in no way illegal, as it merely reflected a change in status of the Complainant, which had happened by the efflux of time. The Respondent herein is a PCS and has signed the alleged Form 32 on the basis of the following documents-
- i. Copy of an Agreement dated 11th October, 2011 relating to the appointment of Mr. Vikram Bakshi as Managing Director of the Company for a period of two years with effect from 18th July, 2011 that had expired on 17th July, 2013 by efflux of time.
 - ii. Notice calling meeting of the Board of Directors of the Company on Tuesday, 6th of August, 2013 at 10.00 A.M. at the Corporate Office of the Company at 13A, Jor Bagh Market, New Delhi-110003.
 - iii. Agenda of the said Board Meeting dated 6th August, 2013.
 - iv. Unsigned minutes of the said Board Meeting dated 6th August, 2013.
 - v. Board Resolution dated 29th September, 2008, authorising the Company Secretary to file the requisite forms, etc. from time to time.
 - vi. Verification / Certificate of Mr. Devinder Jain Company Secretary of the Company in e-form 32, authorised by the Board, vide its resolution no.2 dated 29th September, 2008, to file such forms with MCA. Mr. Jain had also confirmed that information given in form 32 is true to the best of his knowledge and belief.
14. Under sub-rule 2 (c) of Rule 9 of the Rules, the Disciplinary Committee does not agree with the *Prima-Facie* Opinion of the Director (Discipline); since the Director (Discipline) has placed reliance on the draft Minutes of the Board meeting as the main ground for pronouncing her opinion that the Respondent is 'guilty'.
15. In view of the observations made above, the Disciplinary Committee is of the firm opinion that the agreement dated 11th October, 2011 is the critical document. It is with regard to the terms of this agreement, the Disciplinary Committee disagrees with the *prima facie* opinion of the Director (Discipline) and closes the matter under sub-rule 2 (c) of Rule 9 of the Rules as the filing of the said Form 32 by the Respondent was in no way illegal, as it merely reflected a change in status of the Complainant from Managing Director to Director of M/s. Connaught Plaza Restaurants Pvt. Ltd., which had happened by the efflux of time as evident on bases of the records. More so, Mr.



[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

Devinder Jain, Company Secretary of the Company was, authorised by the Board, *vide* its resolution no.2 dated 29th September, 2008, to file e-forms on behalf of the company with the MCA and that Mr. Devinder Jain, Company Secretary had approached the Respondent for the alleged Form 32 and had also signed/ verified the said Form 32 for the change in the designation of the Complainant on behalf of the company.



Ahalada Rao V
Member



Santosh Kumar Agrawala
Member



Meenakshi Datta Ghosh
Member



Nalin Kohli
Presiding Officer