

**THE DISCIPLINARY COMMITTEE
THE INSTITUTE OF COMPANY SECRETARIES OF INDIA
IN THE MATTER OF COMPLAINT OF PROFESSIONAL OR OTHER MISCONDUCT
UNDER THE COMPANY SECRETARIES ACT, 1980**

ICSI/DC/118/2012

Order Reserved on: 18th July, 2018

Order Issued on: 07 DEC 2018

Shri Rajev M. Bhingarde

....Complainant

Vs.

Shri Hemant S. Shetye, FCS-2827, CP No.1483

....Respondent

Present:

Mrs. Meenakshi Gupta, Director (Discipline)

FINAL ORDER

1. A complaint dated 23rd January, 2012 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 Rajev M. Bhingarde ('the Complainant') against Shri Hemant S. Shetye, FCS-2827, CP No. 1483 ('the Respondent'). The Respondent filed his Written Statement to the Complaint and the Complainant filed his Rejoinder thereto.
2. In his complaint, the Complainant alleged that the Respondent has committed several acts of Professional and Other Misconduct by certifying the Compliance Certificates of M/s Kaizen Wheels Pvt. Ltd. for the years 2009-10 and 2010-11 under Section 383A of the Companies Act, 1956, without proper verification of facts and evidence. In support of his allegations, the Complainant stated as under:

(a) In Para 4 of the Compliance Certificate, the Respondent has wrongly stated that proper notices for Board meetings were given by the Company held during the year 2009-10. The Respondent has admitted that out of eight meetings held in the year, the Respondent has admitted that he had verified the proof of only three meetings held on 09.06.2009, 16.07.2009 and 10.12.2009. In regard to the other five meetings, the Respondent relied on the letter of the management confirming dispatch of notices.

(b) The Respondent failed to disclose in his Certificate that the allotment of 72,660 equity shares of Rs. 10/- each on 31st March, 2009, by the Company was illegal and beyond the



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authority of the Company as its Authorised Capital was only Rs. 5,00,000 as on that date.

- (c) The Respondent failed to report that the 1st AGM held by the Company on 1st January 2010, was illegal and void as it was held in complete disregard of Section 166 read with Section 210 of the Companies Act, 1956.
- (d) The Respondent, without proper verification of facts and evidence certified in Para 7 of his Compliance Certificate dated 10.09.2010, that one Extra-ordinary General Meeting was held during the year. The Respondent relied on the management's explanation and information instead of due verification.
- (e) The Respondent failed to report in his Compliance Certificate dated 05.09.2011 for the FY 2010-11 that the 2nd AGM of the Company held on 08.11.2010 was not in accordance with law as it ought to have been held on 30.09.2010.

3. The Respondent in his Written Statement dated 17.02.2012 denied the allegations and stated as:

- (a) Out of Eight meetings, the management of the Company had provided proof of dispatch of notices of the Board meetings held on 09.06.2009, 16.07.2009 and 10.12.2009. In regard to the other five meetings, the management had provided confirmation letter declaring that the notices of all board meetings were duly dispatched in terms of Section 286 of the Companies Act, 1956, and the Compliance Certificate was issued after taking prudent care.
- (b) As regards allotment of 72,660 Equity Share on 31.03.2009. it has been stated that the since the allotment was made on a date prior to the period of Compliance Certificate, that is, 01.04.2009 to 31.03.2010, therefore, no qualification was reported in the Compliance Certificate. In regard to signing of Form 2 relating to allotment shares made on 31.03.2009 and 16.07.2009, it has been stated that he was provided with certified copies of the Board meetings held on 31.03.2009 and 16.07.2009 and a certified copy of the audited Annual Accounts for the year 2009 duly signed by the two Directors and the Statutory Auditor, which were duly verified before signing the Compliance Certificate.
- (c) As regards holding of first AGM, it has been stated that holding of AGM beyond the statutory period provided in the Companies Act, 1956 cannot be terms as "illegal" or "void" as alleged by the Complainant. Since the compliances as to sending of notices and other requirements were duly followed,



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the holding of 1st AGM was valid. He has stated that he had duly verified the compliances of all the requirements of holding of AGM before certifying the Compliance Certificate.

(d) In regard to Para 7 of his Compliance Certificate relating to the Extra-ordinary General meeting, the Respondent has stated that he has ascertained that all the requirements had been duly fulfilled.

4. The Respondent, in the Written Statement dated 17th February, 2012, has also stated that the Complaint is an act of harassment by the Complainant even after being aware of the fact that the matter is under consideration with the Hon'ble CLB, Western Region, Mumbai. The Respondent submitted that the Form 5 and Form 23 were certified by other professional, except Form 20B which was certified by the Respondent as on 23.02.2010. However, during the course of compliance audit for the year 2009-2010, he sought explanation from the Management in regard to Board Meeting dates specified on 17.06.2009 in form 5 and 23, and the management replied that it was mistake committed by the earlier professional and no such board meeting was held on that date. Relying on the above facts, compliance certificate for the year 2009-2010 was signed not specifying 17.6.2009 as Board Meeting.
5. The Complainant in his Rejoinder dated 31st March, 2012, has *inter-alia* stated that the Respondent has himself admitted that he has verified the proof of dispatch of only three meetings out of the total eight Board Meetings stated by him in Compliance Certificate for F.Y. 2009-10. That by his own admission, the Respondent failed to verify the proof of dispatch of all the eight notices and merely relied on the management confirmation letter for the rest of the notices.
6. The Complainant has further stated that the Respondent failed to note and report that he had wrongly attested Form No. 2 relating to allotment of shares purported to be made on 31st March, 2009 and did not make any disclosure of the same in Compliance Certificate, 2010.
7. In *Prima-facie* opinion dated 9th January, 2013, the Director (Discipline), on examination of the Complaint, the Written Statement, the Rejoinder and other material on record, stated that there was laxity on the part of the Respondent as he failed to verify the proofs of dispatch of notices of all the eight meetings of the Board of Directors of M/s Kaizen Wheels Pvt. Ltd. Also he mentioned the date as 26.5.2010 instead of 31.03.2009. Also the Board of Directors of the Company in its meeting held on 10.12.2009 had authorised any Director to sign Form 23AC, Form 23ACA and Form 20B. However, while preparing e-form 20B, the date was inadvertently mentioned as 20.12.2009 instead of 10.12.2009. Further, the Respondent has failed to notice the variation in the paid up capital and authorised capital wherein the Authorised Capital was lesser than the Paid-up Capital. The Director (Discipline) was of the



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view that the Respondent was *prima facie* guilty of professional misconduct under clause (7) of Part I of the Second Schedule to the Act.

8. The Disciplinary Committee in its 37th Meeting held on 17th January, 2013, considered the *prima-facie* opinion dated 9th January, 2013 of the Director (Discipline) and directed the Director (Discipline) to further investigate the complaint and submit a report.
9. Pursuant to the directions of the Disciplinary Committee, the Director (Discipline) asked the Complainant as well as the Respondent to provide the status of the Company Petition No. 90/397-398 of 2010 filed by the Complainant before the Company Law Board, Mumbai Bench. The Respondent, vide his letter dated 10.2.2015, forwarded a copy of the Order dated 14th/16th April, 2014, passed by the Company Law Board, Mumbai Bench, in the aforesaid Company Petition No. 90/397-398 of 2010. A perusal of the aforesaid Order of the Company Law Board, Mumbai Bench, reveals that the CLB has *inter-alia* declared the Resolution passed in the Board meetings of the Company held on 31.03.2018 and thereafter till date, in so far as they relate to allotment of further shares, as *non-est*, illegal, void and ineffective. The allotment of shares during the aforesaid period has been cancelled.
10. The Director (Discipline), in her further investigation Report dated 29th September, 2017, reiterated her *prima-facie* the opinion that the Respondent is "Guilty" of Professional Misconduct under Item (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980, for not exercising due diligence in conduct of his professional duties as the Respondent has issued Compliance Certificate and certified Form 2 of the Company by merely relying on the information provided by the management instead of verifying the necessary records of the Company personally.
11. The Disciplinary Committee in its meeting held on 17th October, 2017 considered the further Investigation Report dated 29th September, 2017 of Director (Discipline) and agreed with the *prima-facie* opinion of the Director (Discipline) that the Respondent is "Guilty" of Professional Misconduct under Item (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980, for not exercising due diligence in the conduct of his professional duties as the Respondent has issued Compliance Certificates for the years 2009-10 and 2010-11 and certified Form 2 in relation to allotment of shares on 31st March, 2009, of M/s Kaizen Wheels Private Limited by merely relying on the information provided by the management instead of verifying the necessary records of the Company personally.
12. The Disciplinary Committee 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



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finally conclude as to whether the Respondent is guilty or not in the matter.

13. A copy of the *prima-facie* opinion dated 29th September, 2017 of the Director (Discipline) was sent to the parties *vide* letter(s) dated 18th December, 2017 asking them to submit their Written Statement and the Rejoinder, respectively.
14. The Respondent, *vide* letter dated 11th January, 2018 submitted his Written Statement to the *prima-facie* opinion of the Director (Discipline) wherein he has reiterated the submissions already made by him in his Written Statement.
15. No rejoinder to the Written Statement to *prima-facie* opinion has been received from the Complainant.
16. The parties *vide* letter dated 4th July, 2018 were called to appear before the Disciplinary Committee on 18th July, 2018 at New Delhi. The Respondent. The Respondent appeared in person and made oral submissions. None appeared on behalf of the Complainant. The Respondent reiterated the submissions already made in his Written Statement to the Complaint and Written Statement to the *Prima-facie opinion* of the Director (Discipline). With reference to the allegation regarding non verification of dispatch of notices of the Board meetings for the financial year 2009-10, the Respondent admitted that he had verified the proof of dispatch of only three notices for the Board meetings held on 9th June, 2009, 16th July, 2009 and 10th December, 2009 and for other meetings he had only relied on the information provided by the management that the notices were duly dispatched but did not physically check the proof of dispatch.
17. Before the Disciplinary Committee, the Respondent pleaded guilty for non-exercising due diligence in issuance of Compliance Certificate for the year 2009-2010 with reference to the issue of proper notices to the Directors for Board Meetings of the company. However, he further pleaded not guilty for the other alleged acts, to have been committed by him in the conduct of his professional duties, since:
 - (i) He has exercised due diligence in certification of Form 2 for allotment of shares on 31st March, 2009, on the basis of audited Balance Sheet duly signed by two Directors and audited by the statutory Auditor of the company; and also on the basis of details available in the master data of the Company on the MCA21 portal with respect to its authorised Share Capital of Rs. 50 lakhs.
 - (ii) He has adequately disclosed the fact in the Compliance Certificate that Annual General Meeting of the Company was convened on 1st January, 2010. He has further not commented upon its validity.
 - (iii) Further, the Company Law Board, Western Region *vide* para 17 of its Order dated 16th April, 2014 held as under:



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"The Ld. Counsel further submitted that on 1/01/2010, the Company held its first AGM by the Petitioner did not prefer to attend the said meeting nor did he send any representations, therefore, the resolution for removal of the Petitioner from the directorship of the company was validly passed. The Ld. Counsel submitted that the interpretation sought to be given by the Petitioner to the provisions contained under Section 166, 167, 168 of the Act are absolutely improper. According to him the provisions contained under Section 166, 167 and 168 of the Act do not say that a meeting held by the Company itself beyond the time indicted will be void or voidable. The said provisions only provides penalty. It is, therefore, contended that the proceedings of the AGM held on 1/1/2010 and all the Resolutions passed thereat including the removal of the Petitioner as the Director of the Company, is valid."

- (iv) In view of the aforesaid findings of Company Law Board and rejection of the contentions of the petitioner, the Respondent has not committed any negligence in the conduct of his professional duties.

18. The Disciplinary Committee recorded the plea of the Respondent as guilty for not exercising due diligence in respect of notices for the meetings of Board of Directors.

19. Accordingly, the Repondent is guilty of professional or other misconduct under item (7) of part 1 of the second schedule to the Company Secretaries, Act, 1980, which reads as under:

"A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he -

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties."

20. Further, after considering the explanations submitted by the Respondent and all the facts and circumstances in the case, the Disciplinary Committee found the Respondent as not guilty for the other allegations.

21. At the request of the Respondent, the Disciplinary Committee decided to provide him an opportunity of being heard under Rule 19 (1) of the Rules on the same day i.e. on 18th July, 2018. At the instance of the Respondent, the punishment was also announced to him to save him from the effort and cost of making yet another visit to Delhi.

22. Accordingly, the Disciplinary Committee after considered all the material on record, the nature of issues involved and in the totality of the circumstances of the case and the Respondent pleaded guilty only to the charge of not exercising due diligence in respect of notices for the

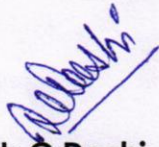


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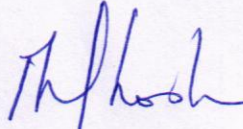
meeting of Board of Directors while issuing Compliance Certificate for the year 2009-2010, passes the following order under Section 21B (3) of the Company Secretaries Act, 1980 read with Rule 19 (1) of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007:

- (i) Fine of Rs. 10,000/- payable within 60 days from the date of issue of this final order; and

In the event of the Respondent not paying the sum of Rs. 10,000/- within the stipulated time, the name of the Respondent be removed from the Register of members of the Institute for a period of 30 days.



Ashish C Doshi
Member



Meenakshi Datta Ghosh
Member



Makarand Lele
Presiding Officer

