

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

ICSI/DC/304/2015

Order Reserved on: 24th April, 2018

Order issued on: 15 MAY 2019

Shri Nitin Mohanlal Lunkad

.....Complainant

Vs.

Shri Mahesh Anant Athavale, FCS- 2412 (CP No.1488)

.....Respondent

CORAM:

Shri Ranjeet Pandey, Presiding Officer

Shri Nagendra Rao D, Member

Shri B Narasimhan, Member

Mrs. Meenakshi Datta Ghosh, Member

PRESENT:

Mrs. Meenakshi Gupta, Director (Discipline)

Shri Gaurav Tandon, Assistant Director

None for Complainant

Shri Hrishikesh Wagh, Practising Company Secretary along with Shri P M Athavale, Advocate appeared on behalf of the Respondent

FINAL - O R D E R

1. A Complaint dated 13th May, 2015 in Form 'I' was filed by Shri Nitin Mohanlal Lunkad (hereinafter referred to as 'the Complainant') against Shri Mahesh Anant Athavale, FCS-2412 (CP No 1488) (hereinafter referred to as 'the Respondent') 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').
2. The Complainant inter-alia alleged that the Respondent had wrongly certified form 21A and contents of the Annual Returns of M/s. Poona Club Ltd (PCL) for the year ended 31st March 2005 to 31st March, 2010 without proper examination of the documents of the company. The Complainant alleged the following illegalities in the said Annual Returns filed by the Respondent:-

- (i) As per letters attached to relevant Form 21A for the Financial Year 2004-05 to Financial Year 2009-10, M/s. PCL had admitted that the company did not have a



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system by which the accurate number of members could be given in Annual Return as on the date of AGM.

- (ii) The list of members mentioning their name, address and details of changes therein were not attached to respective Annual Returns. M/s. PCL ought to have attached all the mandatory details in this regard and the Respondent was bound to ensure the compliance of the same in consonance with law.
- (iii) The number of members as mentioned in the Annual Returns from 2005 to 2010 was about 4000+, whereas Article 3 of the Articles of Association mentions that maximum 1000 members can be admitted as members of the company. The company cannot have members more than as restricted by the Articles of Association unless the Articles are suitably amended.
- (iv) M/s. PCL has reported that it had taken secured loans for more than Rs. 2.31 cr up to Rs. 8.31 cr in the year ended 31st March, 2013. Though the letter attached to said respective Form 21A had shown the amount of indebtedness, M/s. PCL had neither taken nor permitted to take any secured loans by the members during the period. The said letter attached to Annual return stated that M/s. PCL cannot give the required amount of indebtedness of the company as it has no system of accounting to report the same in mid of the year. For any secured loan, a company need to register a charge in prescribed form with the ROC (i.e. MCA). However, the search of records of the ROC does not show any charge created by M/s. PCL for the reasons best known to them.
- (v) M/s. PCL had failed to maintain proper Register of Members.
- (vi) It is further pointed out that the Annual General Meeting for the financial year ended on 31st March 2005 was actually held on 30th September, 2005. However, the Form 21A of the Annual Return for the relevant year had mentioned the date of said AGM as of 30th September 2006 instead of 30th September 2005, which is wrongly certified by the Respondent.

3. The Respondent in his written statement(s) inter-alia denied all the allegations levelled upon him by the Complainant and stated as under:

- i. that he had a limited role in M/s. PCL as a consultant and he had discharged his duties strictly in accordance with the law and to the entire satisfaction of the management of the PCL (the Club). Had there been any deficiency on the part of the Respondent, PCL would have filed a complaint against the Respondent.
- ii. the Respondent further stated that in respect of Form 21A for the financial year ended 31st March, 2005 (AGM held on 30th September 2005), due to typographical mistake, the date of the AGM was wrongly mentioned as 30th September, 2006 instead of 30th September 2005.
- iii. that after realising the mistake in the date, a letter was written to the ROC in April 2010 asking for a remedy to correct the form. However, due to implementation of the MCA 21, revised Form 21A could not be filed as the system itself did not have any provision to accept such format at that time.
- iv. that the forms were duly filed by him and no damage had occurred to the Club or the Complainant.
- v. that he has correctly certified the amount of indebtedness in Forms 21A as provided by the Club through specific letter confirming amount of indebtedness and membership of the Club. The Respondent cannot be held responsible for



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- certifying the form on the basis of information and explanation received from the Club.
- vi. that the Complainant himself stated that the Club has admitted that it did not have any specific system to give a list of accurate number of members as on the date of the AGM. The Respondent further stated that along with the Annual Returns, a letter was attached which clarified the position of the Respondent in respect of the list of members and amount of indebtedness. This letter mentioned that in respect of Annual Return of "The Poona Club Limited" for the year 2005-06 to 2008-09 the details of the number of members and the amount of indebtedness are as on the date of year end and not as on the date of Annual General meeting. Similarly letters from the Club were also attached to these Annual returns.
 - vii. that the web-portal accepts e-forms with the maximum file size of 2.5 megabytes (MB) on its uploading portal. Considering this size constraint, it was not possible to upload the Form 21A with the details of all the 4,000 members of the Club and thus, in order to ensure proper compliance of the provisions of the Companies Act, 1956 a separate CD containing the list of all members of the Club was submitted with the ROC, Pune from time to time.
 - viii. that at the time of certification of Form 21A the Respondent personally verified the copies of the Minutes of the AGM, Register of members, other statutory registers, Letter mentioning Indebtedness and membership and other relevant documents and found those to be legitimate, thereafter, the E-Forms-21A were prepared, the letter of indebtedness and other mandatory details were attached. The CD containing the details of membership, Directors and changes therein was also filed with the Registrar of Companies.
4. The Director (Discipline) in the prima-facie opinion dated 11th December, 2015 after examination of the complaint, written statement, rejoinder and other material on record was prima facie of the opinion that the Respondent was prima-facie 'not guilty' of professional or any other misconduct under the Company Secretaries Act, 1980.
 5. The prima-facie opinion dated 11th December, 2015 of the Director (Discipline) was placed before the Board of Discipline on 13th October, 2016. The Board of Discipline after considering the prima-facie opinion of the Director (Discipline), advised the Director (Discipline) to further investigate the matter and call for further documents viz copy of the Annual Return along with its annexure for the relevant years under investigation and any other document deemed fit by the Director(Discipline) pursuant to Clause (c) of Sub-Rule (2) of Rule 9 of Rules read with Section 21A (4) of the Act
 6. As advised by the Board of Discipline, the Director Discipline asked the ROC, Pune vide letter dated 4th April, 2018 followed by reminders to clarify as to whether ROC has received letter(s) dated 5th January, 2010, 5th February, 2010, 16th March, 2010, 27th April, 2010 and 3rd November, 2010 along with a CD apparently containing the list of members of M/s. PCL subsequent to the filling of the Annual Return for the year ended 31st March, 2005 to 31st March, 2010. The ROC, Pune vide its letter dated 2nd August, 2018 intimated as per their records and the information given by the Inward/Outward Cell of ROC, there is no entry of above referred letter of the Respondent (along with a CD apparently containing the list of member of M/s. PCL subsequent for filling of the Annual



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Return for the year ended 31st March, 2011) of the Respondent, traceable in their Inward register.

7. The Director (Discipline) after considering the aforesaid letter dated 2nd August, 2018 from ROC and the material on record, in her Further Investigation Report observed it is apparent that the Respondent had not certified the e-Form(s) properly as the complete set of attachment have neither been uploaded by the Respondent nor the letters dated 5th January, 2010, 5th February, 2010, 16th March, 2010, 27th April, 2010 and 3rd November, 2010 along with a CD apparently containing the list of member of M/s. PCL subsequent for filing of the Annual Return for year ended 31st March 2005 to 31st March, 2010 have separately been sent by the Respondent to the ROC, Pune since these letters are not traceable in the ROC record. The Director(Discipline) further opined that the Respondent has stated that the PCL has provided specific letter confirming amount of indebtedness and membership of the PCL on the basis of which, he has certified the e-Form 21A rather than actually verifying the record of the company. Therefore, the Respondent is prima-face 'Guilty' under Item (7) of Part-I and under Item (3) of Part II of the Second Schedule to the Company Secretaries Act, 1980.
8. Further the Investigation Report of the Director (Discipline) along with the material on record was placed before the Disciplinary Committee on 12th September, 2018 and the Disciplinary Committee after considering the same 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. A copy of the Further Investigation Report of the Director (Discipline) along with the material on record was sent to the parties asking to submit their written statement and rejoinder respectively.
9. The Respondent submitted his written statement to the Further Investigation Report of the Director (Discipline) wherein he mainly reiterated his earlier submissions. However, no rejoinder was received from the Complainant. Thereafter, the parties were called upon to appear before the Disciplinary Committee on 24th April, 2019.
10. On 24th April, 2019, the Disciplinary Committee noted that the Complainant vide his letter dated 21st April, 2019 expressed his inability to be present before the Committee due to his preoccupation and made his written submissions in writing reiterating what he has already stated in the various communications already exchanged. Shri Hrishikesh Wagh, PCS representing the Respondent along with Shri P M Athavale, Advocate appeared before the Disciplinary Committee and made his submissions in detail.
11. The Disciplinary Committee after considering the written submissions of the Complainant, submissions made by the Respondent, prima-facie opinion of Director (Discipline); Further Investigation Report of the Director (Discipline); the material on record and after examining the totality of facts and circumstances in this matter, observed that the Respondent has rebutted the allegations levelled by the Complainant with regard



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to certifying the alleged form(s) 21A (Annual Return) for the year ended 31st March, 2005 to 31st March, 2010 in respect of M/s. Poona Club Ltd. and observed as under:-

- 11.1. As far as allegations of not attaching the list of members with respective Form 21A for filing Annual Returns, the Respondent has stated that the web portal of MCA accepts e-forms with the maximum file size of 2.5 MB on its portal. Due to size constraint; the detail of 4000 members could not be uploaded on the website and subsequently, a separate CD containing the list of all members of the club was submitted to the ROC, Pune time to time which can be accepted as appropriate defense. The ROC in its letter dated 2nd August, 2018 has stated that the entries of the letters allegedly sent to the ROC is not traceable in the inward register. However, ROC has not specifically denied to have received the same.
- 11.2. The other allegation of the Complainant is that the company cannot have members more than 1000 as stated in the Article 3 of the Article of Association of the company for which the Respondent has clarified that as per Article 3 of the AOA of the company "For the purpose of registration the Club is declared to consist of 1000 members but any General Body Meeting may from time to time increase this number". Therefore, that there is no restriction on increasing the number of members.
- 11.3. It is further pointed out that the Annual General Meeting for the financial year ended on 31st March 2005 was actually held on 30th September, 2005. However, the Form 21A of the Annual Return for the relevant year had mentioned the date of said AGM as of 30th September 2006 instead of 30th September 2005, which is wrongly certified by the Respondent. With regard to this allegation, the Respondent has stated that in respect of Form 21A for the financial year ended 31st March, 2005 (AGM held on 30th September 2005), due to typographical mistake, the date of the AGM was wrongly mentioned as 30th September, 2006 instead of 30th September 2005. And after realising the mistake in the date, a letter was written to the ROC in April 2010 asking for a remedy to correct the form. However, due to implementation of the MCA 21, revised Form 21A could not be filed as the system itself did not have any provision to accept such format at that time. Hence, the Respondent has negated the allegation.
- 11.4. The Respondent has stated that he certified the amount of indebtedness in Forms 21A as provided by the Club through specific letter confirming amount of indebtedness and membership of the Club. The Respondent cannot be held responsible for certifying the form on the basis of information and explanation provided by the Club. Moreover, the Respondent has attached the said letter of the M/s PCL with each of the forms, hence the Respondent has negated the allegation.

12. After hearing the submissions made and records provided in support of the submissions made, the Disciplinary Committee held that the Respondent is 'Not guilty' of professional



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or other misconduct under the Company Secretaries Act, 1980 for the allegations made in the complaint against him.

Accordingly, the Complaint stands disposed off.



Member


Member




Member


Presiding Officer


AD(GT)