

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

ICSI/DC/395/2017

Order Reserved on: 21st February, 2019

Order issued on: 24 APR 2019

The Institute of Company
Secretaries of India

.....Complainant

Vs.

Shri Abhimanyu Upadhyaya
(FCS-5921, CP No. 4729)

..... 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 R D Makheeja, Advocate for Complainant
Shri Vikash Kumar Srivastava, Deputy Director
Respondent in person

FINAL ORDER

1. The Institute of Company Secretaries of India, a statutory body constituted under the Company Secretaries Act, 1980, ('the Complainant') filed a complaint dated 23rd May, 2017, in Form-'I' 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'), against Shri Abhimanyu Upadhyaya, FCS-5921 (hereinafter referred to as 'the Respondent'). In his complaint, the Complainant alleged that the Respondent has committed professional and other misconduct under Item (7) of Part I of Second Schedule and also Item (2) of Part IV of First Schedule to the Company Secretaries Act, 1980, while verifying and certifying Form 20B and Form 23AC of the following Five (5) Group Companies for the financial years ending 31st March, 2011 and 31st March, 2012:

- i) Reliable Finance Corp. Pvt. Ltd.



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- ii) Star Infovision Pvt. Ltd.
- iii) Utsav Securities Pvt. Ltd.
- iv) VA Realcon Pvt. Ltd.
- v) Yuvraj Exports Pvt. Ltd.

2. It has been alleged in the complaint that in Form 20B relating to the aforesaid five (5) Companies, it was clearly mentioned that Ms. Parul Bhargava was the Company Secretary in all the aforesaid five (5) Companies for a short period of seven (7) to ten (10) days. Similarly, for the financial year ending 31st March, 2012, one Ms. Varsha Sharma has been shown as Company Secretary in the aforesaid five (5) Companies for a short period of about seven (7) days. The aforesaid two (2) Company Secretaries, namely, Ms. Parul Bhargava and Ms. Varsha Sharma worked as whole-time Company Secretaries in the aforesaid five (5) Group Companies for a short duration of seven (7) to ten (10) days thereby circumventing the provisions of Section 383A of the Companies Act, 1956, read with the Companies (Appointment & Qualification of Secretaries) Rules, 1988, which inter-alia provides that the Companies having specified paid-up capital (of Rs. five (5) Crores or more) should employ a Whole-Time Company Secretary who is a member of the Institute. In order to circumvent the aforesaid provisions, the aforementioned five (5) Group Companies would employ one person for a short duration of seven (7) to ten (10) days to project as if they had complied with the legal provisions mentioned above.

3. It was within the knowledge of the Respondent while verifying and signing the Form-20B and Form 23AC of the five Group Companies mentioned above that there is circumvention of Section 383A of the Companies Act, 1956, read with the Companies (Appointment & Qualification of Secretaries) Rules, 1988, yet he glossed over this circumvention of law and verified and signed the Forms by not pointing out infringement of the aforesaid provisions of law thereby abetting and conniving with the Companies and other persons in circumventing the legal provisions. The Respondent failed to exercise due diligence of the standard required of him and thereby brought disrepute to the profession and the Institute by conniving and abetting with the default. The Council of the Institute in its meeting held on 27th March, 2017, considered the act of Shri Abhimanyu Upadhyaya, Respondent, as unethical and illegal and thus formed an opinion that the respondent had brought disrepute to the profession and the Institute in terms of Item (2) of Part IV of First Schedule to the Company Secretaries Act, 1980. The Council made the aforesaid observations while considering three (3) complaints of professional or other misconduct filed by the Ministry of Corporate Affairs against the members of the Institute for circumventing law against Ms. Varsha Sharma, ACS-29966, Shri Anjani Kumar, ACS-21360 (CP No. 8830) and Shri Debasis Dixit, FCS-7218 (CP No. 7871).

4. The Respondent in his written statement dated 20th June, 2017 has denied the allegations levelled against him and has *inter-alia* stated that, at the time of certifying the Form-23AC and Form-20B of the five (5) group Companies in relation to the Balance Sheet and Annual Return, he had seen the signatory view of the Directors and Company Secretary of the respective companies on MCA Portal, wherein the Company Secretary details were not reflected and therefore, details of the Company Secretaries appointment and cessation in Form 20B were not shown. The Respondent further stated that he could not verify the names of the Company Secretary alleged to have been appointed or ceased during the years. The



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Respondent further stated that at the time of certification, he placed complete reliance on the verification by the Directors concerned who had signed the Forms-23AC, 23ACA and 20B and subsequently verification of particulars contained in such Forms from the records made available by the Company. Due care was taken to verify the contents of the Annual Return. Admittedly, no inspection of the records from the Website of the MCA was carried out by the respondent as there was no iota of doubt about the alleged circumstances. The Respondent has claimed that he is not in any default as the other professional Company Secretaries who worked for short period in contravention of Section 383A of the Companies Act, have committed professional misconduct.

5. The Complainant in its rejoinder dated 18th July, 2017 stated that the Form-20B relating to five (5) Group Companies mentioned in the complaint for the financial year ending 31st March, 2011, reflected that Ms. Parul Bhargava was the Company Secretary in all the aforesaid five (5) Companies for a short duration of seven (7) to ten (10) days. Similarly, for the financial year ending 31st March, 2012, one Ms. Varsha Sharma had been shown as the Company Secretary in the aforesaid five (5) Companies for short period of seven (7) to ten (10) days. The **modus operandi** adopted by the companies was thus within the full knowledge of the respondent that there was clear violation of the letter and spirit of Section 383A of the Companies Act, 1956, but still he did not point out this irregularity and was negligent in the performance of his professional duties. The fact that the same persons were Company Secretaries in the five (5) Group Companies mentioned above for short duration of seven (7) to ten (10) days should have made the Respondent sit up as this amounted to circumvention of the provisions of Section 383A of the Companies Act 1956, and the Rules. The Respondent did not exercise the due diligence of the standard required of him and is, therefore, guilty of the professional misconduct as stated in the complaint. The Respondent did not carry out the inspection of the records of the Company or Website of MCA before certifying the Forms. The Respondent was in the full knowledge of the circumvention of the law but he failed to point out the contravention. He did not exercise due diligence and also brought disrepute to the profession. He is, therefore, guilty of professional misconduct in terms of Item (7) of Part I of Second Schedule and also Item (2) of Part IV of First Schedule to the Company Secretaries Act, 1980. The Respondent has admitted that he did not verify the records of the Company or data available on the Website of MCA. It was within his knowledge, while certifying Forms 20B, 23AC and 23ACA of five (5) Group Companies, that the said Companies had appointed the same Company Secretaries in all the five (5) Companies for a short duration in order to circumvent the provisions of Section 383A of the Companies Act, 1956 read with the Companies (Appointment & Qualification of Secretaries) Rules, 1988, yet the Respondent glossed over the fact of contravention while verifying the Forms.

6. The Director (Discipline) after considering the material on record and taking into consideration all the facts and circumstances of the case, stated in her **prima-facie** opinion dated 26th August, 2017 stated that the respondent was guilty of professional and other misconduct in terms of item (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980, for being negligent in the performance of his professional duties and also in terms of Item (2) of Part IV of the First Schedule of the Act. The **prima-facie** opinion of the Director (Discipline) was considered by the Disciplinary Committee in its meeting held on 8th September, 2017.



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The Disciplinary Committee after considering the same and taking into account all the facts and circumstances of the case, agreed with the *prima-facie* opinion of the Director (Discipline). It was within the knowledge of the respondent, while certifying Forms 20B, 23AC and 23ACA of five (5) Group Companies, that the said Companies had appointed the same Company Secretaries in all the five (5) Companies for a short duration in order to circumvent the provisions of Section 383A of the Companies Act, 1956, read with the Companies (Appointment & Qualification of Secretaries) Rules, 1988 and was guilty under Item (2) of Part IV of the First Schedule to the Company Secretaries Act, 1980 for bringing disrepute to the Institute and profession in terms of Item (2) of Part IV of First Schedule to the Company Secretaries Act, 1980, by abetting and connived with the Company and other persons in circumventing the provisions of Section 383A of the Companies Act, 1956. Accordingly, the Disciplinary Committee decided to adjudicate the matter in accordance with Rule 18 of the Act, 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 directed to send to respondent for his written statement. The Respondent *vide* letter dated Nil received on 30th November, 2017 submitted his Written Statement stating that he had no role in the appointment or cessation of the Whole time Company Secretary in any of the six named companies at any point of time. He had only certified the forms relating of filing of balance sheet and annual returns for years 2011 and 2012 based on verifications done by respective Directors.

8. The Complainant, *vide* its letter dated 3rd January, 2018 has submitted his rejoinder. While reiterating its earlier submissions, the complainant once again stated that the respondent should have been vigilant enough to observe that same Company Secretary is signing simultaneously the same forms of Five Group Companies. It was, therefore, reiterated that the respondent did not exercise due diligence.

9. The parties, *vide* letter dated 8th February, 2019 were called upon to appear before the Disciplinary Committee for hearing on 21st February, 2019 at New Delhi. On 21st February, 2019, the parties appeared before Disciplinary Committee. The respondent was unable to provide any satisfactory explanations in respect of the allegations levelled against him. He admitted that he has adopted very callous and casual approach in discharge of his professional responsibility, and did not exercise required due diligence.

10. The Respondent on his own volition pleaded guilty under sub-rule (8) of Rule 18 of the Rules. The Disciplinary Committee recorded the plea of the respondent and decided to give the Respondent an opportunity to be heard before passing any order under sub-section (3) of Section 21B of the Act.

11. However, the Respondent in his written submissions dated 21st February, 2019 and also submitted in person before the Disciplinary Committee that he has already pleaded guilty and doesn't want to come again for hearing and requested to conclude the matter on the same day and even if it is necessary to hear, the opportunity of hearing may be given to him today itself under the relevant Rule on



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the quantum of punishment before passing order under Section 21B (3) of the Company Secretaries Act, 1980. Accordingly, at the request of the respondent an opportunity of hearing was given to the Respondent after a gap of one hour. During hearing, the respondent again pleaded guilty and requested that in the circumstances of the case the Disciplinary Committee may take a lenient view of the default of the respondent and may consider awarding a minimal punishment.

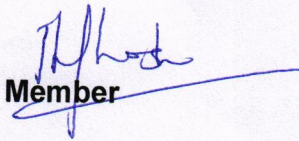
12. Accordingly, the Disciplinary Committee after hearing the Respondent and considering all the material on record; the nature of issues involved and in the totality of the circumstances of the case and taking into account that the Respondent had pleaded guilty of the charges and sought a lenient, passed the following order under Section 21B (3) of the Act read with Rule 19 (1) of the Rules: -

Fine of Rs. 30,000/- payable within 45 days from the date of receipt of this final order.

In case of failure of the Respondent to pay the fine of Rs. 30,000/- within the stipulated time period, his name shall be removed from the Register of Members of the ICSI for a period of 90 days, after 45 days from the date of receipt of this final order.



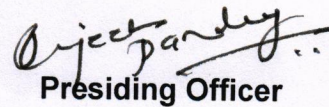
Member



Member



Member



Presiding Officer