

**BEFORE THE DISCIPLINARY COMMITTEE OF THE INSTITUTE OF COMPANY
SECRETARIES OF INDIA**

DC: 74/2010

IN THE MATTER OF COMPLAINT OF PROFESSIONAL OR OTHER MISCONDUCT

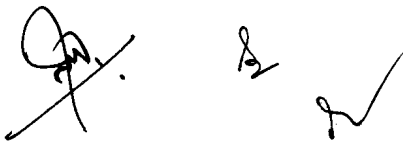
Shri Bheda Vipul Kumar Dayalal - **Complainant**

Vs

Shri Sudhir M Dave and another - **Respondents**

ORDER

1. The Institute had received a complaint dated 9th July, 2010 in Form - I from Shri Bheda Vipul Kumar Dahyalal (ACS-10327) (hereinafter referred to as the 'Complainant') against Shri Sudhir M Dave (ACS-17180) (hereinafter referred to as the 'Respondent No. 1') and Shri Chirag B Shah (FCS-5545) (hereinafter referred to as the 'Respondent No. 2')
2. The Complainant had submitted that on 8th April, 2009, he along with Shri R N Algotar and Shri Rajesh P Gangwal had promoted a company namely M/s. V S Cosmopharma Pvt. Ltd., (the company). He along with Shri R N Algotar and Shri Rajesh P Gangwal were named as the first directors of the company and had subscribed to the Memorandum of Association (MOA) of the company. The residential address of the Complainant was shown as the registered office of the company.
3. The Complainant had further submitted that on 23rd April, 2009, the Complainant, Shri R N Algotar and Shri Rajesh P Gangwal entered into MOU with one M/s. Sarthi Pharmaceuticals Ltd., Ahmedabad (the seller) to acquire their factory premises including land, building, plant, machinery, equipments, apparatuses, other fixed/movable assets lying at their factory premises etc., for Rs. 4,00,00,000/- and paid ₹22,50,000/- to M/s. Sarthi Pharmaceutcals Ltd. and ₹40,00,000/- to M/s. Janta Bank Ltd., Nadiad (under liquidation) on behalf of M/s. Sarthi Pharmaceuticals Ltd., Ahmedabad as the assets were charged to them from time to time.
4. The Complainant further submitted that the sellers were not cooperating for necessary documents/ papers/details/information



which were required for obtaining loan from the Bankers and hence the process got delayed. The sellers even did not bother to obtain permission to sell from the charge holders and therefore, the Complainant along with other directors contacted them directly and arranged for their permission on 7th August, 2009. Shri Rajesh P Gangwal resigned from the directorship of the company and Shri Rajiv Rakam Singh, additional director was appointed and Form 32 for the same was filed on 5th December, 2009. Meanwhile, the prices of the property shot up 3 - 4 times and Shri R N Algotar in connivance with the Liquidator of M/s. Janta Bank Ltd., Nadiad and sellers started activities to ensure that the properties are not sold to the company and they can reap the benefits.

5. A civil suit for specific performance was filed on 5th February, 2010 with the Principal Magistrate, Kalol. A public notice was also given in Gujarati language in "Gujarat Samachar" a leading daily circulating in Gujarat. On 10th May, 2010 a criminal complaint was also lodged by the Complainant against the directors of sellers, liquidator of M/s. Janta Bank Ltd., Nadiad, Shri R N Algotar and Shri Rajesh P Gangwal as they produced a deed of cancellation of the MOU of our Company with the sellers dated 9th December, 2009 which was signed by Shri R N Algotar and Shri Rajesh P Gangwal allegedly without Complainant's knowledge and showing that he had not invested anything in the company.
6. On 30th June, 2010, the Complainant received a letter from Shri R N Algotar that he has been removed from the directorship of the company. Thereafter, the Complainant visited on the website of the MCA and came to know that he and Shri Rajiv Rakam Singh have been removed from the directorship of the company under section 283(1) (g) and section 283 (1) (i) of the Companies Act, 1956.
7. The Complainant had further alleged that he and Shri Rajiv Rakam Singh neither received any of the notices for any of the meetings nor they have acknowledged the same. After detailed enquiry the Complainant came to know that the following illegal acts have been committed by Shri R N Algotar in connivance with the Respondent No. 1 and Respondent No. 2.
 1. Filing Form 32 for appointment of Shri Chirag B Shah (Respondent No. 2), who has been shown as appointed on the 3rd December, 2009, but the form was filed on 27th May, 2010. He has been a party to all the forged notices for calling three managed Board meetings on which basis we have been

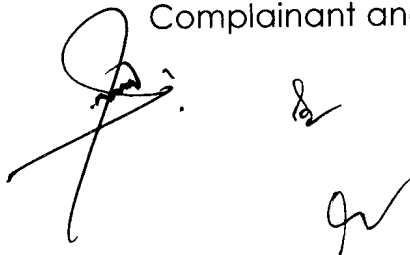


- alleged to be removed from the directorship of the company fraudulently.
2. Filing Form 23 for passing the Special resolution for shifting of the Registered Office. None of the notices were acknowledged by the Complainant and Shri Rajiv Rakam Singh for the same, despite being the shareholder of the company by way of subscription to the MOA.
 3. Filing Form 18 for shifting of the registered office of the company illegally. All these acts are unilateral and against the provisions of the Companies Act, 1956.
 4. Filing Form 32 for appointment of the other directors of the company as a part of fraudulent, *malafide* and ulterior motive to adjudge the Complainants financial stake and future.
 5. Filing Form 20B on 6th July, 2010 showing that the Complainant does not hold any of the shares in the Company even though he had invested more than ₹16,00,000/-. This Form has been filed even after the letters in writing sent through mails to Shri Sudhir M Dave on 26th June, 2010, the 1st July, 2010 and 2nd July, 2010 informing that there is connivance for fraudulent acts.
8. All the above acts have been done by Shri R N Algotar in connivance with the Respondent No. 1 & 2 as an after thoughtful and revengeful exercise of the Complainant's filing criminal complaint on 10th May, 2010.
9. Defence of Shri Sudhir M Dave (Respondent No. 1)

The Respondent No. 1 at the outset has denied all the allegations, averments and statements made in the complaint and have stated that the complaint is made on flimsy grounds and without referring to or citing any acts/conduct which could be considered as professional misconduct. The Complainant has suppressed material facts from the Hon'ble Forum.

The Complainant had not clearly mentioned as to under which specific schedule/clause/part the complaint is made. The complaint is purportedly filed for alleged "connivance for false certification of the forms and planning to take undue advantage of the Companies Act, 1956." The said allegations do not fall under any of the schedule/clause/part of the Company Secretaries Act, 1980 (the Act) and therefore, the complaint is not maintainable.

The complaint largely deals with the disputes between the Complainant and the other directors of M/s. V S Cosmopharma Pvt.



Ltd. These disputes could not be the ground for filing a complaint for professional misconduct.

The Complainant had wrongly stated that he was removed from the Directorship of M/s. V S Cosmopharma Pvt. Ltd. He has vacated the office under section 283(1) (g) and (i) of the Companies Act, 1956 which is automatic vacation. The said automatic vacation has been registered by the ROC, Gujarat based on the documentary evidence produced by the company.

The Complainant had filed a petition under section 397 and 398 of the Companies Act, 1956 before the Company Law Board (CLB), Mumbai. The Complainant has also implicated him as one of the Respondents' in the said petition and has simultaneously filed the present complaint. It is also stated and submitted that one of the prayers in the said petition is as under:

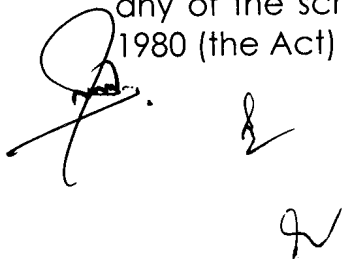
18(f). To declare that Respondents 6 and 7 have illegally colluded with Respondent 2 and aided and abetted Respondent no. 2 in his committing the illegalities complained of in this petition and direct the Institute of Company Secretaries of India to initiate necessary disciplinary action against them in accordance with law.

That the Petition is pending before the CLB, Mumbai Bench and therefore, the complaint may not be dealt with by the ICSI till the final decision in the Petition No. 58 of 2010.

10. Defence of Shri Chirag B Shah (Respondent No. 2)

The Respondent No. 2 at the outset had denied all the allegations, averments and statements made in the complaint and have stated that the complaint is made on flimsy grounds and without referring to or citing any acts/conduct which could be considered as professional misconduct. The Complainant has suppressed material facts to the hon'ble forum.

The Complainant had not clearly mentioned as to under which specific schedule/clause/part the complaint is made. The complaint is purportedly filed for alleged "connivance for false certification of the forms and planning to take undue advantage of the Companies Act, 1956." The said allegations do not fall under any of the schedule/clause/part of the Company Secretaries Act, 1980 (the Act) and therefore, the complaint is not maintainable.

The block contains several handwritten marks. On the left, there is a large, stylized signature that appears to be 'Chirag B Shah'. To its right, there are smaller initials or marks, including a vertical line with a hook at the top and a squiggle below it. At the bottom center, there is another squiggle that looks like the letter 'W'.

He had further submitted that he was appointed as a professional director on the Board of M/s. V S Cosmopharma Pvt. Ltd. and resigned from the Board of the company on 2nd June, 2010 due to his pre-occupation. The Complainant has wrongly stated that he was removed from the directorship of M/s. V S Cosmopharma Pvt. Ltd. He has vacated the office under section 283(1) (g) and (i) of the Companies Act, 1956 which is automatic vacation. The said automatic vacation has been registered by the ROC, Gujarat based on the documentary evidence produced by the company.

The complaint largely deals with the disputes between the Complainant and the other directors of M/s. V S Cosmopharma Pvt. Ltd. These disputes could not be ground for filing a complaint for professional or other misconduct.

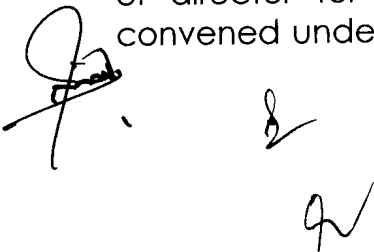
The Complainant had filed a petition under section 397 and 398 of the Companies Act, 1956 before the CLB, Mumbai. The Complainant has also implicated him as one of the Respondent in the said petition and has simultaneously filed the present complaint. It is also stated and submitted that one of the prayers in the said petition is as under:

18(f). To declare that Respondents 6 and 7 have illegally colluded with Respondent 2 and aided and abetted Respondent 2 in his committing the illegalities complained of in this petition and direct the Institute of Company Secretaries of India to initiate necessary disciplinary action against them in accordance with law.

That the Petition is pending before the CLB, Mumbai Bench and therefore, the complaint may not be dealt with by the ICSI till the final decision in the Petition No. 58 of 2010.

11. Rejoinder to the written statement of Shri Sudhir M Dave (Respondent No. 1). The Complainant has stated as under:

The Complainant had stated that he has to mention the alleged misconduct and not the schedules and sections. The Complainant had further alleged that the details mentioned in the notices accompanying the Forms filed itself are corroborative of the allegations of misconduct. There cannot be simultaneous removal of director for alleged absence from 3 consecutive meetings convened under notices allegedly sent under certificate of posting

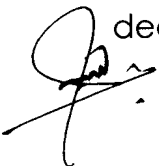
Handwritten signatures and initials in black ink, including a large signature on the left and several smaller initials or marks below it.

and also for non-declaration of interest. The shares allotted to a founder member/director cannot be shown against a new comer director (whose appointment itself is by forgery) in gross violation of Section 41 of the Companies Act, 1956 and even before the approval of the Audited Accounts of the Company. Particularly when it is alleged that the Complainant did not pay for the shares allotted to him as subscriber to the Memorandum of Association.

It was the duty of the Practicing Company Secretary to see as to whether any correspondence existed in the company's records calling upon him to pay towards the shares, whether the Complainant has spent any money in company's work as per Audited Accounts, whether the same yardstick has been followed in respect of other founder directors, etc. Similarly, when the shares belonging to another founder member are shown as transferred to Shri R N Algotar who has hijacked the company and who has brought in Respondent No. 1 as Practicing Company Secretary, it was the duty of the PCS to see as to whether there has been share transfer deed duly executed, the minutes of the Board meeting in which the transfer was approved, etc.

The submissions of the Respondent No. 1 that the ROC, Gujarat has verified and taken the forms on record and hence they are correct are baseless as the ROC is only discharging ministerial duties and maintains records/forms filed by the companies for public knowledge and is never approving or verifying the veracity of contents of forms filed under the signature of the PCS under MCA-21 portal.

The transfer of shares to create false majority for Shri R N Algotar is without any document. The Complainant has alleged that the Respondent No. 1 has abetted, aided and also committed fraud and forgery. The statement that a professional cannot go into fishing expedition but is only to do an audit is eminently correct. The issue is whether such audit was done? When a PCS allegedly accepts Board and Extraordinary General Body meetings conducted on the basis of the notices under Certificate of Postings, certifies Form 32 for removal of directors based on alleged meetings conducted by convening such meetings by notices sent by certificate of posting, certifies annual return showing founder director's shares as allotted to another director who came a few months after formation of the company, certifies annual return showing transfer of shares without physical verification of transfer deed, board approval etc. A professional is definitely expected to



know which acts amounts to fraud and criminality. The sequence of dates and forms filed by the Complainant in support of my complaint will show that any layman not conversant with the intricacies of Company Law will get suspicious about the truth of contents of the Forms certified and filed by Respondent No. 1.

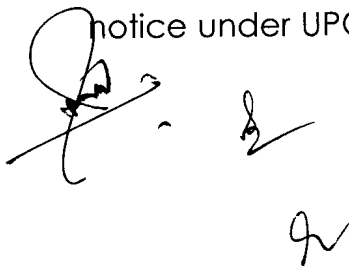
The Complainant submitted that the criminal complaint filed by him has nothing to do with his complaint against Shri Sudhir M Dave. Further, filing a petition under sections 397 / 398 of the Companies Act, 1956 cannot be a ground to make counter allegations against me or to say that the complaint may be kept in abeyance.

12. Rejoinder to the written statement of Shri Chirag B Shah (Respondent No. 2). The Complainant has stated as under:

The Complainant had stated that the conduct described by him in his complaint is adequate to rebut the denials by the Respondent No.2. There is no necessity to pinpoint the particular clause of schedule under section 21 of the Company Secretaries Act, 1980. The issue is whether the conduct falls within the phrase "professional misconduct" or not.

As per the fabricated records by the company and accessed from MCA website, the Respondent No. 2 was appointed to the Board of the company on the 3rd December, 2009 but Form 32 was filed on 27th May, 2010. The Respondent thereafter resigned from the Board on 2nd June, 2010 and Form 32 was filed on 15th June, 2010, for resignation. During this period the company had allegedly held an Extraordinary General Meeting on 26th May, 2010 for shifting of registered office. Four Board meetings were allegedly held by issue of notices under certificate of posting. In the fourth meeting held on 26th May, 2010, the Complainant was allegedly removed under Section 283(1) (g) and 283(1)(i) of the Companies Act, 1956. The professional director who also claims to be a PCS of repute claims to have participated in Board meetings convened by notices issued under certificate of posting in all these meetings.

As far as appointment and resignation and the events in between appointment and resignation shows the connivance of the Respondent No. 2 with other directors of the company. The Respondents have confessed to have attended all meetings without ever raising the illegality of convening meetings by issue of notice under UPC even when the removal of the Complainant from

The block contains several handwritten signatures and initials. On the left, there is a large, stylized signature. To its right, there are two smaller, simpler signatures. Below these, there are more initials, including a prominent 'G'.

directorship was allegedly proposed under Section 283(1)(g) and 283(1)(i) of the Companies Act, 1956.

The Complainant had alleged that the Respondent No. 2 has failed to exercise due diligence and is grossly negligent in the conduct of his professional duties and gave his stamp of approval to the fraud and forgery committed by other directors acting in the name of the company by becoming a director only for assisting and conniving with others who removed the Complainant from the directorship of the company.

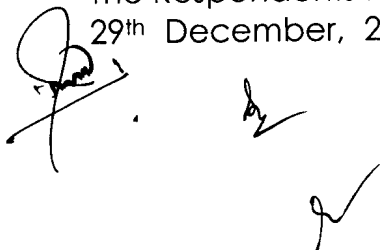
The Complainant had further stated that the issue is whether the Respondent will convene a Board meeting under notices issued allegedly under postal certification and then agree for removal of a director under Section 283(1)(g) and 283(1)(i) of the Companies Act, 1956 as a Company Secretary and whether the accused alleging that his appointment was as a professional director can countenance the acts and decisions of the Board of directors.

The proceedings under Section 397/398 of the Companies Act, 1956 are independent to Section 21 of the Company Secretaries Act, 1980 and the Respondent cannot escape because of the proceedings under Section 397/398 of the Companies Act, 1956. The Complainant has submitted that the former is due to his grievance of oppression at the hands of the hijackers of the company while the latter is specifically against misconduct of the Respondent No. 2 in the whole episode as a professional member of the ICSI.

13. *Prima-facie* opinion of the Director (Discipline)

The Director (Discipline) examined the various allegations of the Complainant and the defence of the Respondents. Shri Chirag B Shah (Respondent No. 2) was inducted as a Professional director on the Board of the company on 3rd December, 2009 and he resigned on 2nd June, 2010. Form 32 for appointment of Shri Chirag B Shah (Respondent No. 2) as director was filed on the 27th May, 2010. However, the liability of filing Form 32 rests with the company and not on the Respondent. Therefore, Shri Chirag B Shah (Respondent No. 2) is *prima-facie* not 'Guilty' of professional or other misconduct.

The Respondents have placed on record a copy of the order dated 29th December, 2010 of the CLB, Mumbai Bench passed in the

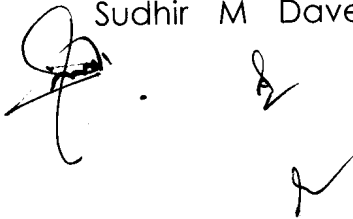
The block contains several handwritten signatures and initials in black ink. On the left, there is a large, stylized signature. To its right, there are two smaller, more compact signatures or initials. The handwriting is cursive and somewhat informal.

petition under section 397 and 398 of the Companies Act, 1956 filed by the Complainant in which the Company Law Board has observed that the Complainant was not a shareholder of the company. Therefore, the Complainant does not have any right as a shareholder.

As regards filing of Form 32 in regard to cessation of the directorship of the Complainant under 283(1)(g) 283(1)(i) of the Companies Act, 1956, Shri Sudhir M Dave, the Respondent No. 1 has informed that the notices for the Board meeting were issued under UPC which the Complainant has denied to have received. There are conflicting judgments on validity of sending the notices by UPC particularly when it has been denied by the recipient.

Therefore, there is a *prima-facie* case for professional and other misconduct against Respondent No.2 (Shri Sudhir M Dave) for not exercising due care while certifying the various Forms.

14. The *prima-facie* opinion of the Director (Discipline) was placed before the Disciplinary Committee at its meeting held on 6th June, 2011. The Disciplinary Committee while agreeing with the *prima-facie* opinion of the Director (Discipline) decided to proceed further in accordance with Chapter- V of the Company Secretaries (Procedure of Investigation of Professional and other Misconduct and Conduct of Cases) Rules, 2007.
15. Accordingly, a copy of the *prima-facie* opinion of Director (Discipline) was forwarded to Shri Sudhir M Dave, the Respondent No. 1 vide letter dated 10th June, 2011 asking him to file his written statement along with supporting documents and list of witnesses, if any, to the Director (Discipline) with a copy to the Complainant latest by 17th June, 2011. The *prima-facie* opinion of the Director (Discipline) was also forwarded to the Complainant vide letter dated 10th June, 2011 asking him to submit the rejoinder to the written statement along with the supporting documents and list of witnesses, if any, within one week thereof.
16. The Respondent No. 1 vide letter dated 13th June, 2011 had requested to grant time up to 30th June, 2011 for filing the written statement. The Complainant vide letter dated 23rd June, 2011 had *inter-alia* stated that he was surprised to note that Shri Chirag B Shah, the Respondent No.2 is held not 'Guilty' of misconduct. Shri Sudhir M Dave, the Respondent No.1 submitted his written

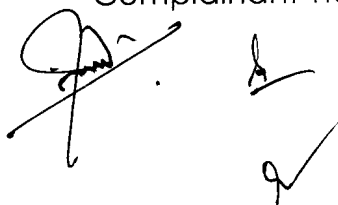


statement dated 27th June, 2011 to the *prima-facie* opinion of the Director (Discipline).

17. The Complainant and Shri Sudhir M Dave, the Respondent No. 1 was asked to appear before the Disciplinary Committee at its meeting on 9th December, 2011.
18. The Respondent *vide* e-mail dated 8th December, 2011 had requested that due to non-availability of tickets as well as ill health of his mother he will not be able to attend the hearing on 9th December, 2011 and accordingly sought some other suitable date with a prior notice of at least 30 days. Shri S Suryanarayana, the Advocate submitted his Vakalatnama dated 2nd December, 2011 before the Disciplinary Committee for his appearance as Advocate for the Complainant.
19. The Disciplinary Committee at its 28th meeting held on 9th December, 2011 noted the letter of the Respondent dated 8th December, 2011 and the Vakalatnama dated 2nd December, 2011 of Shri S Suryanarayana, Advocate and took these documents on record. The Disciplinary Committee informed the Advocate about the request of Shri Sudhir M Dave, the Respondent No.1 about ill health of his mother. The Disciplinary Committee thereafter adjourned the matter and decided to call upon the parties to appear before the Disciplinary Committee at its next meeting, failing which the Disciplinary Committee decided to proceed *ex-parte*. Accordingly, the parties were called upon to appear before the Disciplinary Committee at its 29th meeting on 5th January, 2012.
20. Shri S Suryanarayana, the Advocate and Shri Hitesh D Buch, FCS – 3145 appeared before the Disciplinary Committee for the Complainant and the Respondent No.1 respectively.

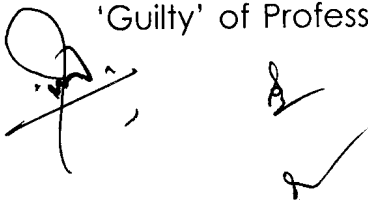
The Advocate for the Complainant stated that Shri Sudhir M Dave, the Respondent had certified Form 32 with regard to cessation of the directorship of the Complainant under Section 283 (1)(g) and 283(1)(i) of the Companies Act, 1956 without verifying the records of the company as to whether the Complainant had received the Notice of the meeting of the Board of directors of M/s. V S Cosmopharma Pvt. Ltd.

The authorised representative for the Respondent stated that the Complainant has vacated the office under Section 283 (1)(g) and



283(1)(i) of the Companies Act, 1956 which was an automatic vacation and same was registered by the ROC, Gujarat.

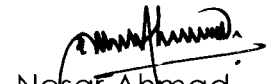
21. The Disciplinary Committee heard the submissions of the parties and adjourned the matter for its next meeting.
22. The Complainant and the Respondent No. 1 vide letters dated 27th March, 2012 were called upon to appear before the Disciplinary Committee at its meeting on 20th April, 2012. Shri S Suryanarayana, Advocate appeared before the Disciplinary Committee on behalf of the Complainant and Shri Hitesh D Buch, FCS – 3145 appeared on behalf of the Respondent No.1.
23. The Disciplinary Committee after hearing the arguments advanced by both the parties directed the Complainant to file the written submissions within two weeks with an advance copy to the Respondent. The Disciplinary Committee further decided that the Respondent may file the reply to those written submissions within 10 days of the receipt of the same from the Complainant. With this direction, the Disciplinary Committee closed the hearing and reserved its Order.
24. Shri S Suryanarayana, the Advocate for the Complainant had submitted the written submissions vide letter dated nil on behalf of the Complainant with an advance copy to the Respondent No.1, wherein he has cited various judgements in support of the Complainant's case. He has also stated that the Director (Discipline) could not have concluded that there is no misconduct on the part of Shri Chirag B Shah (Respondent No.2) in this case. He has further stated that the acts and omissions of the Respondent amounts to serious professional misconduct and stands proved against the Respondent.
25. The Respondent vide his letter dated 15th May, 2012 had submitted his reply to the written submissions of the Complainant wherein he had *inter-alia* stated that there was no mention in the complaint or conclusion in the report of Director (Discipline) as to the charge or allegation and as to the Schedule/Clause/Part under which the same would fall.
26. The Disciplinary Committee at its 32nd meeting held on 1st June, 2012 considered the submissions made by the parties and other material available on record, came to the conclusion that the Respondent is 'Guilty' of Professional Misconduct under Clause (7) of the Second

Handwritten signatures and initials, including a large signature on the left and several smaller initials or marks on the right.

Schedule of the Company Secretaries Act, 1980 as the Respondent did not exercise due diligence for certifying and filing *inter-alia* Form 32 in regard to cessation of the directorship of the Complainant which is expected from a professional. The Committee, in terms of sub-rule (1) of Rule 19 of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007, hereby affords an opportunity of being heard to the Respondent on Monday, the 9th July, 2012 before passing order under Section 21B of the Company Secretaries Act, 1980.


B Narasimhan
Member


S K Tuteja
Member


Nesar Ahmad
Presiding Officer

Date: 1st June, 2012