

BEFORE THE DISCIPLINARY COMMITTEE OF THE INSTITUTE OF COMPANY  
SECRETARIES OF INDIA  
DC: 61/2009-10

IN THE MATTER OF COMPLAINT OF PROFESSIONAL OR OTHER MISCONDUCT

Shri Bhogilal H Bachkaniwala (Deceased) - the original Complainant  
and

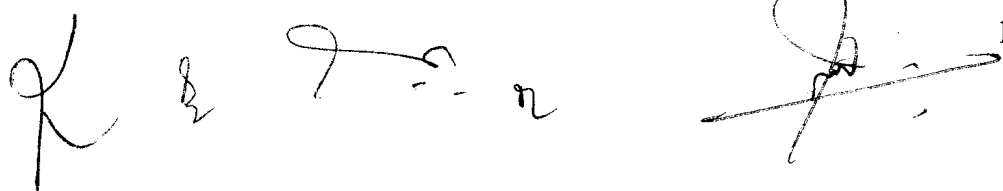
Mrs. Vasumati B Bachkaniwala &  
Shri Darshan B Bachkaniwala - the Substituted Complainants

Vs

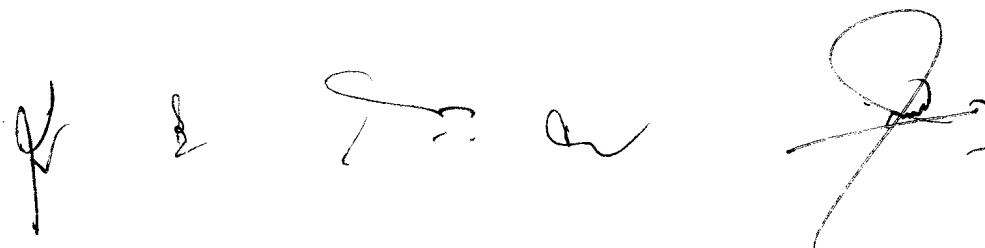
Shri Dhiren R Dave, FCS-4889 - Respondent

ORDER

- 1 The Institute had received a complaint dated the 15<sup>th</sup> December, 2009 in Form-I filed by Shri Bhogilal H. Bachkaniwala (deceased)(hereinafter referred to as the 'original Complainant') against Shri Dhiren R. Dave hereinafter referred to as the 'Respondent').
- 2 Pursuant to sub-rule (3) of Rule 8 of the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (the Rules), a copy of the complaint was forwarded to the Respondent vide letter dated the 18<sup>th</sup> January, 2010 asking him to submit his written statement on the complaint followed by a reminder dated the 8<sup>th</sup> March, 2010. The Respondent submitted his written statement dated the 9<sup>th</sup> March, 2010. Pursuant to sub-rule (4) of Rule 8 of the Rules, a copy of the written statement was forwarded vide letter dated the 15<sup>th</sup> March, 2010 to the original Complainant asking him to submit the rejoinder to the same which he submitted on the 31<sup>st</sup> March, 2010.

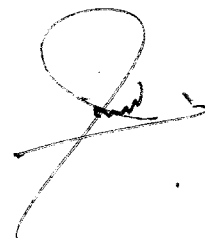
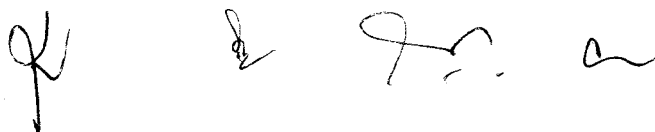


- 3 The Director (Discipline) pursuant to Rule 9 of the Rules examined the complaint, written statement and rejoinder and was of the *prima-facie* opinion that the Respondent was 'guilty' of Professional Misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980.
- 4 The *prima-facie* opinion of the Director (Discipline) was placed before the Committee at its meeting held on the 17<sup>th</sup> July, 2010. The Committee considered and agreed with the *prima-facie* opinion of the Director (Discipline) and directed to proceed further in accordance with the Rules.
- 5 The matter was enquired into by the Disciplinary Committee at its meeting held on the 16<sup>th</sup> August, 2010. Shri S Suryanarayana, Advocate appeared on behalf of the original Complainant and made oral submissions before the Committee. He also requested the Committee to allow him to make written submissions. The Committee allowed him ten days time to make written submissions. The Respondent did not put in appearance before the Committee.
- 6 The matter was again placed before the Committee at its meeting held on the 13<sup>th</sup> September, 2010. Shri S Suryanarayana, Advocate appeared on behalf of the original Complainant and filed his written submissions. The Respondent also appeared in person and made oral submissions and submitted his written submissions. After hearing the parties, the proceedings were closed.
- 7 The brief facts of the complaint are that the original Complainant (deceased) was a Director and Shareholder of M/s. Himson International Pvt. Ltd., a company registered on the 25<sup>th</sup> April, 1990 with the Registrar of Companies, Gujarat, Ahmedabad under the Companies Act, 1956. The company was allotted the Corporate Identification Number (CIN) - U51909GJ1990 PTC013668. The original Complainant (deceased) was also a subscriber to the Memorandum of Association of the company and was one of the first directors of the company and was continuing as the director of the company since inception. Shri Kamlesh Bachkaniwala and Shri Darshan Bachkaniwala are the other directors in the Board of this company. Mrs. Vasumati Bachkaniwala, wife of the original Complainant, is a majority shareholder in the company. These facts were admitted by the Respondent.
- 8 The original Complainant had alleged that because there were some differences of opinion among the directors of the company,



he did not sign any DIN 2 for the above said company. However, he found that DIN 3 was filed under the alleged resolution of Board of Directors passed in their meeting held on the 20<sup>th</sup> July, 2007.

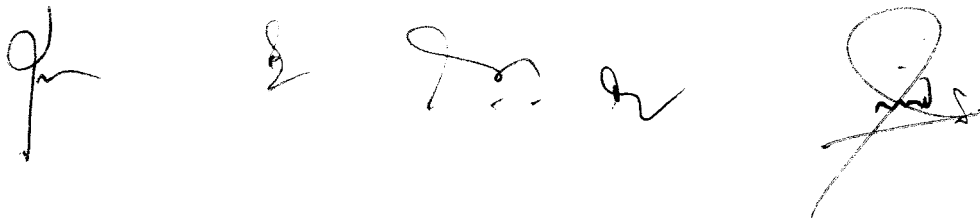
- 9 The DIN 3 was digitally signed by Shri Kamlesh Bachkaniwala as Director and the Respondent signed the same digitally certifying that he had verified the particulars. The DIN 3 Form contained DIN 2 of the original Complainant having certain details without any date or signature of the original Complainant. The Respondent had made a noting that the directors have refused to sign the DIN 2 as they were to resign from the company. No evidence of refusal was placed on record. No evidence of the original Complainant's intention to resign was also placed on records. The original Complainant had submitted that he had never expressed any such intention to the Respondent.
- 10 The original Complainant had further alleged that another Form No. 32 under document No.D-20070731-2656038-EFORM was filed removing him from the directorship of the company under the alleged resolution passed at the alleged Extraordinary General Meeting held on the 20<sup>th</sup> July, 2007. The said Form No. 32 was also digitally signed by Shri Kamlesh Bachkaniwala as the Director of the company and the Respondent had signed the same digitally certifying that he had verified the particulars from the books and records of the company and found them to be true and correct. It was stated in the said Form No. 32 that the original Complainant was not associated with the company w.e.f the 20<sup>th</sup> July, 2007 due to his removal under section 284 of the Companies Act, 1956. The Respondent had also made a noting that Shri Kamlesh Bachkaniwala had informed him that the company had the practice of giving oral intimation of Board meeting of the day, date, place and time and oral intimation was given to all the directors where the draft notice of Extraordinary General Meeting was approved and notice of General Meeting was given by ordinary post as per the normal practice of the company since inception. No notice of any kind either of the alleged Board meeting or the alleged Extraordinary General Meeting was served on him (the original Complainant).
- 11 It was further alleged that the Respondent had certified the said Form No. 32 stating that a meeting of the Board of Directors took place on the 10<sup>th</sup> July, 2007 which authorized the issue of the notice of the Extraordinary General Meeting. As on the 10<sup>th</sup> July, 2007, there were four directors as per the records of the Registrar of



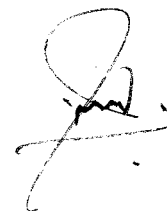
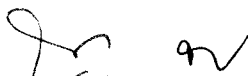
Companies, Gujarat viz. Shri Bhogilal Bachkaniwala (the original Complainant), Shri Kamlesh Bachkaniwala, Shri Darsha Bachkaniwala, and Mrs. Lina Bachkaniwala. In other words, the original Complainant was also a director in the company as on the date of the alleged Board meeting. No notice of any kind either written or oral was ever given to the original Complainant. Hence, the claim that there was a meeting of Board of Directors on the 10<sup>th</sup> July, 2007 is false and the Respondent is a party to the fraud.

12 The said Form No. 32 was filed for removal of the original Complainant from the Board of the company under section 284 of the Companies Act, 1956. Section 284(2) of the Companies Act, 1956 specifically provides that special notice shall be required for any resolution to remove a director under section 284 of the Act. Sub-section (3) of section 284 provides that the director(s) sought to be removed shall be entitled to be heard on the resolution at the meeting. Sub - section (4) entitles director(s) sought to be removed to make representation in writing to the company which will be circulated to the members. In other words, removal of directors under section 284 of the Companies Act, 1956 is by a resolution requiring special notice of the director sought to be removed. The original Complainant had submitted that no notice of any kind, much less an intention to remove him from the directorship was ever given to him. He had further submitted that even the resolution enclosed with Form No. 32 did not mention as to whether it was passed as an ordinary resolution or special resolution, whether it was served on the original Complainant and whether it mentioned the reason for removal, etc. In other words, two of the directors of the company viz. Shri Kamlesh Bachkaniwala and Mrs. Lina Bachkaniwala illegally authorized and filed Form No. 32 purporting removal of the genuine director under section 284 of the Companies Act, 1956, to which fraud, the Respondent is the main party and the advisor. The Respondent has deliberately certified the said Form despite his professional knowledge of the law and facts.

13 The original Complainant had also informed that he had served a legal notice dated the 3<sup>rd</sup> November, 2009 through his Advocate to the Respondent pointing out the above instances of professional misconduct/ negligence and asking him to show cause as to why legal action should not be initiated against him for such professional misconduct/ negligence. The reply by the Respondent through his Advocate testifies the wilful intention of the Respondent and also admission of the various illegalities pointed out in the said notice.



- 14 The Respondent had admitted that the DIN 2 was not signed by the original Complainant but the said fact was mentioned in the Form and necessary qualification in this regard was attached with Form DIN 3.
- 15 The Respondent had further admitted that the notice of Extraordinary General Meeting in which the agenda item for removal of the original Complainant was placed, was sent through ordinary post under certification of posting on 2<sup>nd</sup> July, 2010 about 18 days in advance of Extraordinary General Meeting. The receipt of the said notice was however denied by the original Complainant.
- 16 The Respondent claimed to have issued the following certificate:-  
" TO WHOM SOEVER IT MAY CONCERN  
THIS IS TO CERTIFY THAT I have been informed by Shri Kamlesh Bachkaniwala, Director of the company that company has a practice to give oral intimation of Board Meeting day, date and place and this time also oral intimation was given to all directors where draft notice of Extraordinary Meeting was approved and Notice of General Meeting was given by an ordinary Post as per normal practice of the company since inception."
- 17 The Committee at its meeting held on the 13<sup>th</sup> September, 2010 had considered the allegations made by the original Complainant and defence advanced by the Respondent and found that—
- (i) the Respondent has admitted that the DIN 2 attached by the company with DIN 3 is unsigned and necessary certifications are attached to DIN 3. The Respondent claimed that there is no fault committed by him for non disclosure of the fact of
  - (ii) un-signed form. The Respondent has further claimed that certification is neither audit nor investigation. It is certification of contents of the form and its attachments. This claim of the Respondent can not be accepted. It is proved beyond doubt that the Respondent knew about the provisions contained in the Act and made the qualifications knowing fully well the provisions of the Act. Also, the qualifications or the disclosures are not substitute for non compliance of a statutory audit imposed on the Company, its directors and the certifying Respondent.
  - (iii) The claim of the Respondent that the forms were approved by the Registrar of Companies does not validate the forms as



the Registrar of Companies is only doing ministerial duties by accepting the fees and forms and displaying the same for search by other members and public.

18 Section 284 and 286 of the Companies Act, 1956 provide as under:-

**Removal of Directors**

284.

- (1) .....
- (2) Special notice shall be required of any resolution to remove a director under this section, or to appoint somebody instead of a director so removed at the meeting at which he is removed.
- (3) On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.
- (4) Where notice is given of a resolution to remove a director under this section and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and request their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so,-
  - (a) In any notice of the resolution given to members of the company, state the fact of the representations having been made; and
  - (b) Send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company);

and if a copy of the representation is not sent as aforesaid because they were received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting :

**Provided** that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the [Central Government] is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the [Central Government] may order the company's costs on the application to

be paid in whole or in part by the director notwithstanding that he is to a party to it.

### Notice of Meetings

286.

- (1) Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.
  - (2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to [one thousand rupees].
- 19 The Committee opined that it is amply clear and established that the Respondent has failed to ascertain the compliance of Sections 284 and 286 of the Act before certification of Form No. 32 and also he has certified and filed DIN 3 in respect of the original Complainant without a valid signed DIN 2 received from the original Complainant.
- 20 The Committee had concluded that the Respondent did not exercise due diligence and is grossly negligent in conduct of duties and, therefore, 'Guilty' of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act 1980.
- 21 In the mean time, the Council of the Institute had re-constituted the Disciplinary Committee w.e.f 19<sup>th</sup> January, 2011. The newly constituted Committee at its meeting held on the 4<sup>th</sup> April, 2011, had decided to conduct *de-novo* inquiry in the matter.
- 22 The newly constituted Disciplinary Committee was of the view to hold the meeting of the Committee at Ahmedabad to consider *inter-alia* this matter *de-novo*. However, the meeting could not be held at Ahmedabad due to certain constraints.
- 23 The Committee at its meeting held on 9<sup>th</sup> December, 2011 took note of the letters dated the 15<sup>th</sup> March, 2011 received from Mrs. Vasumati B Bachkaniwala (wife) and Shri Darshan B Bachkaniwala (son) of Shri Bhogilal H Bachkaniwala (the original Complainant) wherein they have informed about the death of Shri Bhogilal H Bachkaniwala (the original Complainant) on the 5<sup>th</sup> February, 2011 and requested to include their names as the Complainants in this matter. The Committee considered the letters and decided to

include the names of Mrs. Vasumati B Bachkaniwala and Shri Darshan B Bachkaniwala as the Complainants in the matter. The Committee also noted the letter dated the 30<sup>th</sup> March, 2011 of Shri S Suryanarayana, Advocate of the Complainants' in the matter.

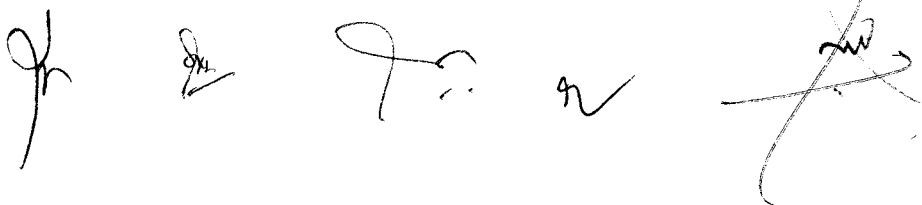
24 The Committee decided to provide an opportunity of hearing to both the parties to appear before the Committee at its next meeting.

a. Accordingly, the parties *vide* letters dated the 16<sup>th</sup> December, 2011 were called upon to appear before the Committee at its meeting on 5<sup>th</sup> January, 2012.

b. The Respondent *vide* his letter dated the 21<sup>st</sup> December, 2011 had submitted a copy of the death certificate of late Shri Bhogilal Bachkaniwala, the original Complainant and drawn the attention towards order 1 rule 10 of Civil Procedure Code stating that suit filed in the name and by a dead man is a nullity. He further submitted that he has one pre-determined social commitment and therefore, requested to allow him to appear in the next meeting of the Committee to be held after the 5<sup>th</sup> January, 2012. The Committee opined that Shri Bhogilal Bachkaniwala, the original Complainant passed away after he had filed the complaint which in no way makes the case a nullity.

25 Shri S Suryanarayana, Advocate appeared before the Committee for the Complainants' and submitted the Vakalatnamas dated the 31<sup>st</sup> December, 2011. The Committee heard Shri S Suryanarayana and informed about the letter dated 21<sup>st</sup> December, 2011 of the Respondent.

26 The Committee at its meeting held on 5<sup>th</sup> January, 2012, after considering the material on record came to the conclusion that the Respondent is 'guilty' of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 as he did not exercise due diligence and is grossly negligent in conduct of his professional duties as he failed to ascertain the necessary due diligence required to be carried out to comply with section 284 and 286 of the Companies Act, 1956 before certifying Form No.32 for cessation of directorship of Shri Bhogilal H Bachkaniwala (deceased) from M/s. Himson International Pvt. Ltd., and signed DIN 3 digitally certifying that he had verified the particulars in respect of Shri Bhogilal H Bachkaniwala (deceased).





- 27 The Committee decided that an opportunity of hearing be provided to the Respondent pursuant to sub-section (3) of section 21B of the Company Secretaries Act, 1980 and accordingly the Respondent to appear before the Committee at its next meeting.
- 28 Accordingly, the parties vide letters dated the 27<sup>th</sup> March, 2012 have been called upon to appear before the Committee at its meeting on 20<sup>th</sup> April, 2012.
- 29 Shri S Suryanarayana, Advocate appeared on behalf of the Complainant. None Appeared on behalf of the Respondent despite service of the Notice and accordingly decided to decide the matter ex-parte.
- 30 The Committee after considering the material on record found the Respondent 'guilty' as he had not exercised due diligence and is grossly negligent in conduct of duties and, therefore, 'Guilty' of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act 1980. The Committee passed the following order:

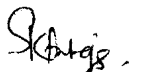
**"Reprimand"**

The Committee also imposed a fine of Rs. 10,000/- (Rupees ten thousand only) on the Respondent payable within 15 days of the expiry of the 30 days of issuance of this order.

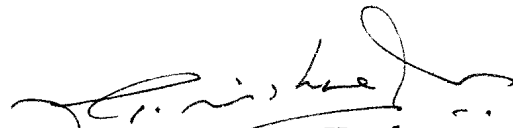
The Order shall be effective after the expiry of 30 days of issue of this order.



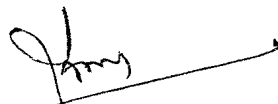
**B Narasimhan**  
Member



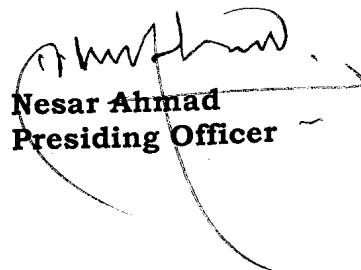
**S K Tuteja**  
Member



**Gopalakrishna Hegde**  
Member



**S Balasubramanian**  
Member



**Nesar Ahmad**  
Presiding Officer

Date: 20<sup>th</sup> April, 2012

