

**(2012) 10 DEL CK 0051**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 6470 of 2012

Dinesh Gupta

APPELLANT

Vs

Sh. Vishal Chandra Gupta and Another

RESPONDENT

**Date of Decision :** 12-10-2012

**Acts Referred:**

Chartered Accountants Act, 1949 — Section 21(2), 21(3)  
Companies Act, 1956 — Section 173(2), 224(6), 225

**Citation :** (2012) 10 DEL CK 0051

**Hon'ble Judges :** Rajiv Shakdher, J

**Bench :** Single Bench

**Advocate :** Munish Tyagi and Mr. Kamlesh Uniyal, for the Appellant; Rakesh Agarwal and Mr. Pulkit Agarwal, Advocates for R-2, for the Respondent

**Final Decision :** Dismissed

## Judgement

Rajiv Shakdher, J.—This writ petition is directed against the order dated 20.01.2012, passed by Director (Discipline), [i.e., respondent No. 2], of the Institute of Chartered Accountant (in short ICAI).

1.1 It may be noted at the very outset that, under the disciplinary regime, contemplated in the Chartered Accountants Act, 1949 (in short the CA Act) and the Rules and Regulations framed thereunder, there are various tiers through which a complaint filed against any member of the ICAI is processed. At the initial stage, a complaint filed against a member, is referred to the Director (Discipline), to ascertain as to whether a prima facie case is made out, based on the complaint and material filed therewith. It is only after a prima facie opinion is formed by the Director (Discipline), that the complaint is referred to the Board of Discipline if, the member is guilty of any professional or other misconduct mentioned in the first schedule of the CA Act; and to the Disciplinary Committee if the member is guilty of professional misconduct mentioned in the second schedule of the CA Act [See Sections 21(2) and 21(3) of the CA Act]. If the conduct is such that it falls under both Schedules it is referred to the Disciplinary

Committee.

1.2 In forming a prima facie opinion, one way or the other, the Director (Discipline) is required to call for comments of the delinquent member, with an opportunity to the complainant to rejoin.

1.3 The principal ground of challenge to the impugned order of the Director (Discipline) is that, no oral hearing was granted to the petitioner, who in this case, is the original complainant; though what cannot be denied is that every opportunity was given to the petitioner/the original complainant, to present his case in writing and also by filing relevant documentary evidence.

1.4 As a matter of fact, undeniably, the Director (Discipline), had also called for documents from respondent No. 2; the person against whom the petitioner's complaint was directed.

1.5 I will deal with this aspect of the matter, which is, whether an oral hearing is a mandatory requirement at the stage of formation of prima facie opinion; in the latter part of my order.

#### BACKGROUND

Briefly, the petitioner/the original complainant approached ICAI with allegations against respondent No. 1 in the background of the following facts:

1.6 The petitioner's firm, M/s Dinesh Kumar Gupta & Associates was appointed as a statutory auditor of eight (8) companies vide an annual general meeting held on 30.09.2009. The eight (8) companies in issue, are admittedly part of a group. The names of the eight (8) companies are not material, as this aspect is not in dispute. What is material, is that, the engagement of the petitioner as a statutory auditor of the said eight (8) companies was for the year ending 31.03.2010. The petitioner claimed that he had fulfilled the necessary formalities, required for being engaged as a statutory auditor and towards that end, had filed Form 23B.

1.7 It was further claimed, that from amongst the eight (8) companies; of which the petitioner's firm was appointed as the statutory auditor, the balance sheet of six (6) companies were signed both; by their respective directors and the petitioner, on 25.11.2010.

1.8 To the petitioner's surprise, he found, on viewing the Ministry of Corporate Affairs portal (qua Form 23AC and Form 23ACA) for the year ending 31.03.2010 that, respondent No. 1 had appended his signatures on balance sheets of six (6) out of the eight (8) companies, to which he was appointed a statutory auditor.

1.9 Based on the aforesaid allegations, the petitioner claimed that respondent No. 1, had acted in violation of clause 8 & 9 of part 1 of the first schedule of the CA Act read with Section 225 of the Companies Act, 1956 (in short Companies Act) and clauses 5 to 7 of part 1 of the second schedule of the CA Act.

1.10 Thus, briefly, the allegations of the petitioner were as follows: (i) respondent No. 1 had accepted the position of a statutory auditor without first communicating with him in writing; (ii) respondent No. 1 had accepted the appointment as statutory auditors of eight (8) companies, in respect of which, the petitioner's firm was appointed, without first ascertaining whether the requirements of Section 225 of the Companies Act had been fulfilled; (iii) respondent No. 1 had failed to make disclosure of material facts in the balance sheet of the said companies, which were known to him; (iv) respondent No. 1 had failed to report material mis-statements which were known to him; and (v) lastly, respondent No. 1 had failed to exercise due diligence, and was thus, grossly negligent in conduct of his professional duties.

2. Based on the aforesaid, the Director (Discipline) issued notice to respondent No. 1 and called upon the said respondent to file a written statement. The defence taken by respondent No. 1 was briefly as follows:

(i) Respondent No. 1 had communicated to the petitioner vide letter dated 19.11.2010, the factum of his firm's appointment as a statutory auditor of the companies in issue. The aforementioned letter was delivered by hand and duly acknowledged by the petitioner's office. Thus, the allegation of non-communication was denied.

(ii) The petitioner's firm had in fact resigned on 18.11.2010, as the statutory auditor of the companies in issue, and therefore, it was a case of filling up a casual vacancy caused by resignation, to which the provisions of Section 224(6) and not Section 225 of the Companies Act were applicable.

(iii) Before accepting the appointment, respondent No. 1 had taken due precaution by verifying the following-with reference to the documents and books of the companies in issue: (a) whether the resignation letters of the previous auditor were in place; (b) whether the resolution of general body meeting of the members of the said companies to fill up the casual vacancy had been passed; and (c) whether any fee was payable to the petitioner, as per the petitioner's statement of account, maintained in books of the companies in issue.

2.1 Having found that: the record of each of the companies in issue, reflected that the petitioner's firm had resigned; a resolution of the general body of the members had been passed to appoint respondent No. 1 to fill up the casual vacancy which had arisen as a consequence of the resignation; and that, there was no fee outstanding vis-a-vis the petitioner's firm-respondent No. 1's firm accepted the appointment.

2.2 A defence was also taken, that all that the petitioner had done, was to file balance sheets of the six (6) out of the eight (8) companies, without articulating, as to what were those material facts and mis-statement, which were known to the respondent and, which ought to have been disclosed in the financial statements of the said companies but, were kept back. It was stated by respondent No. 1 that, his firm had exercised due diligence in the conduct of

audit of the companies, to which his firm was appointed as a statutory auditor, and therefore, the allegations of the petitioner were baseless.

3. Undeniably, a copy of the written statement was furnished to the petitioner to enable him to file his rejoinder, in accordance with the provisions of Rule 8(4) of the Chartered Accountants (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as the said Rules).

4. The Director (Discipline), on consideration of the pleadings on record, thought it necessary to call upon respondent No. 1, to furnish certain documents vide its communication dated 30.05.2011. The documents called for, included the following: the communication dated 19.11.2010, evidently sent by the respondent No. 1, to the petitioner firm; copy of the resignation letter of the petitioner's firm; notice convening the meeting of the general body of the members of the companies in issue; resolution passed in the said meetings to fill up casual vacancy caused by the petitioner's firm; copy of the account of the petitioner firm in the books of accounts of the companies in issue, pertaining to financial year 2009-2010; and lastly, Form 23B, filed by respondent No. 1, with the Registrar of Companies.

5. It appears, by communication dated 16.06.2011 that, respondent No. 1 furnished the documents sought for. To be noted, qua the last piece of information, respondent No. 1 had forwarded Form 23 instead of Form 23B. The Director (Discipline), called for the said information vide reminder letters dated 28.06.2011 and 10.08.2011. It appears that this information was not supplied.

#### FINDINGS OF DIRECTOR (DISCIPLINE)

6. Therefore, based on the material available on record, the Director (Discipline), returned the following findings of fact:

(i) There was communication on record which showed that respondent No. 1 had vide letter dated 19.11.2010, informed the petitioner about the factum of his firm accepting the audit. Though the said communication was not on the letter head of respondent No. 1, it however bore the stamp and acknowledgement of petitioner's firm/office.

(ii) The petitioner had resigned from the companies in issue and, therefore, the accusation that respondent No. 1's firm had accepted appointment of companies in issue without first ascertaining whether the requirements of section 225 of the Companies Act were fulfilled, was without basis as this was a case of filling up of a casual vacancy.

(iii) It was also observed that, the necessary resolutions passed at the extraordinary general meeting of the share holders was placed on record.

(iv) Lastly, there were no dues towards the petitioner's firm shown as pending in the petitioner's statement of account maintained in the books of the companies

in issue. As a matter of fact, it was observed that some of the companies involved had paid the petitioner's dues on 18.11.2010, which was the date when the petitioner had tendered his resignation.

6.1 Therefore, the Director (Discipline) formed a prima facie opinion that, allegations against respondent No. 1's firm, pertaining to violation of clause 8 & 9 of part 1 of first schedule of CA Act were not made out. As regards the charge which pertained to non-disclosure and/or mis-statement in the financial statements of the companies in issue, by respondent No. 1's firm, were also rejected on the ground that they were general in nature and not specifically articulated. This finding, if I may note, dealt with charge relating to violation of the provisions of clauses 5, 6 & 7 of part I of the Second Schedule of the CA Act.

#### SUBMISSIONS OF COUNSEL

7. It is in the background of the aforesaid facts and circumstances, that the Learned Counsel for the petitioner made the following submissions:

(i) The petitioner's firm had not resigned on 18.11.2010, as found by the Director (Discipline). This contention was supported by relying upon the fact that, the balance sheet of the companies in issue, which not only bore the signatures of the petitioner and the directors but also carried the date 25.11.2010 when, according to respondent No. 1, the petitioner, had resigned on 18.11.2010.

(ii) The purported signature of the petitioner on the resignation letter were forged and fabricated.

(iii) The petitioner was not granted an oral hearing, by the Director (Discipline).

#### REASONS

8. In my view, none of the grounds are made out. An ocular comparison of the signatures appended on the petitioner's resignation letter, which is dated 19.11.2010, with those on record before me, in the affidavit accompanying the writ petition, as well as, those at the foot of the writ petition would show that they are identical. The resignation letter dated 19.11.2010, which is on record at page 160 of the paper book, alludes to the fact that the petitioner had tendered his verbal resignation on 18.11.2010 due to "personal reasons" as the statutory auditor qua all eight (8) companies, which undoubtedly are part of a single group. There is, therefore, no doubt in my mind that the petitioner did resign.

9. In view of the resignation, it cannot be argued that a casual vacancy did not arise which, the shareholders were not entitled to fill up under the provisions of Section 224(6) of the Companies Act. A notice convening the EGM along with the explanatory statement appended thereto u/s 173(2) of the Companies Act, is on record. The explanatory statement shows that the petitioner's firm being pre-occupied with other assignments was unable to conduct the statutory audit despite several requests and follow ups, and finally it indicated its unwillingness

to continue as a statutory auditor, and therefore, offered to verbally resign, (conveyed through petitioner) in the evening of 18.11.2010. The Board of Directors of the companies in issue, convened an urgent meeting, through video conferencing whereby, it decided to appoint respondent No. 1's firm, as the statutory auditor of the companies in issue, who would continue to act as such, till the conclusion of the ensuing Annual General Meeting.

10. The argument of the Learned Counsel for the petitioner that the resignation was forged and fabricated is also misconceived. First and foremost, there is no averment to that effect, either in the complaint or, in the rejoinder filed by the petitioner. I had specifically asked Learned Counsel for the petitioner to take me through that part of the rejoinder where this was specifically averred. What the Learned Counsel for the petitioner instead chose to highlight, was the averment that, he had not resigned on 18.11.2010. As indicated above, the documents on record clearly demonstrate the position to the contrary. This finding is buttressed by the fact that, there was nothing on record to show that any amounts were due and outstanding to petitioner No. 1's firm towards fee.

10.1 To establish forgery and fabrication, the Learned Counsel for the petitioner, laid stress on the fact that the balance sheets of the companies in issue, which were in possession of the petitioner carried the date of 25.11.2010 alongwith the signatures of the two directors of the said companies and that of the petitioner; while according to respondent No. 1, the petitioner, incongruously, is alleged to have resigned on 18.11.2011.

10.2 In my view at first blush this argument seems attractive, however, a closer examination of the balance sheets reveals a different tale. A visual examination of the balance sheet(s) would show that, while the date on the auditor's report is typed as 25.11.2010, the one which appears on the balance sheet is stamped (See pages 34 and page 37 of the paper book). It would not be out of place to mention that, before a statutory audit is taken up by a statutory auditor, the board of directors are required to furnish a copy of the draft financial statements to the statutory auditor. It is quite possible that, the petitioner retained copies of the balance sheets with him and stamped the date 25.11.2011 on it, after he had resigned. It is, for this precise reason that it is said that, fraud is required to be pleaded, with material particularity.

10.3 Therefore, this argument by itself would not cut much ice. The fact that this is so, clearly emerges from the stand taken by the petitioner in its rejoinder, filed before the Director (Discipline), where it is admitted that draft copies of the balance sheet and trial balance were provided qua all companies, except two companies, as directors of those two companies were not in town.

10.4 Based on the averments made in the said rejoinder, the petitioner had tried to demonstrate that, because he had raised points and queries in respect of certain entries, [which were noted down by the General Manager (Finance)], he was changed as the auditor. According to the petitioner, these queries were

raised on 22.10.2010; that is, much after the purported date of resignation.

10.5 In my view even this submission is without merit for the following reasons: the fact that these queries were raised for the first time in the rejoinder would by itself show how much importance the petitioner would give to this assertion. Importantly, no documents were filed before me, to establish that purported working notes of the General Manager (Finance) were generated on 22.10.2010. As a matter of fact, Learned Counsel for the petitioner tried to hand over certain documents, in court, to buttress this point; an attempt which was out rightly repelled. If these documents were part of the record, they should have been filed by the petitioner, in the very first instance as, he was making a serious charge against the co-professional, i.e., respondent No. 1. Even if I were to assume, that such queries were raised, it is obvious they would not carry the petitioner's case any further, if the finding of the Director (Discipline) qua the resignation by the petitioner as a statutory auditor of the company in issue, is not disturbed. I find no reason to disturb that finding, for the reasons indicated hereinabove.

10.6 However, what these events do establish is the fact that, balance sheets for conduct of audit were provided by the management of the companies in issue and, therefore, they bore the signatures of the directors.

10.7 On the question of date, as indicated above, I have already noted that I have no difficulty in stating that the stamped date would show that these are dates generated post the event keeping in mind the overall circumstances emerging in this case.

11. As regards the last issue with regard to the petitioner not being afforded a personal hearing, in my view, the said submission is also misconceived. The principles of natural justice require that parties should be afforded a complete opportunity to present their respective case. The record shows quite clearly that, the Director (Discipline) accorded complete opportunity to the petitioner, and as a matter of fact, after deliberating on the material placed before her, she sought on her own, information from respondent No. 1, which, according to her was material for adjudicating the charge, levied against respondent No. 1. It is well settled that hearing does not necessarily mean oral hearing. Much would depend upon the nature of the proceedings. As was indicated by me, at the very outset, in the regime envisaged under the CA Act, Rules and Regulations framed thereunder, the scrutiny by the Director (Discipline) is the first stage, at which, a charge is examined when, levied against a member of the ICAI. At this stage, the Director (Discipline) is required to form an opinion as to whether a prima facie case is made out. In the facts of the present case, no case was made out based on the material placed before the Director (Discipline). Therefore, the fact that no oral hearing was granted would not vitiate the proceedings. In this regard, I may only refer to the observations of the Supreme Court in the Case of Union of India and another Vs. M/s. Jesus Sales Corporation, .

...It need not be pointed that under different situations and conditions the

requirement of compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearing have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which all be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or application in all events, the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply its judicial mind to the issues involved....

(Emphasis supplied)

(Also see *Oriental Bank of Commerce and Another Vs. R.K. Uppal*, ; *Ganesh Santaram Sirur v. State Bank of India and Anr.*, 2005 Vol. 107(2) Bom. L.R. 8 (SC), 21; *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.*, ).

11.1 For the aforesaid reasons, I therefore reject this submission as well.

Consequently, I find that the writ petition is without merit. The petitioner has leveled a serious charge contrary to the material which got brought on record, i.e., the petitioner's resignation letter as a statutory auditor of the companies in issue. Therefore the writ petition is dismissed with costs quantified at Rs. 25,000/- to be paid to the benevolent fund of the ICAI.