(2012) 12 DEL CK 0098

In the Delhi High Court

Case No : LPA No. 843 of 2012

Shri Dinesh Gupta — APPELLANT

Vs

Shri Vishal Chandra Gupta and Another — RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:
Companies Act, 1956 — Section 225

Citation : (2012) 12 DEL CK 0098

Hon'ble Judges : D. Murugesan, C.J;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Subhiksh Vasudev, Mr. Anish Makhija, Ms. Neha Jain and Mr. Inderjeet Singh, for the Appellant; Rakesh Aggarwal and Mr. Pulkit Agarwal for R-2, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This intra-court appeal impugns the order dated 12th October, 2012 of the learned Single Judge of this Court of dismissal of W.P.(C) No. 6470/2012 preferred by the appellant with costs of Rs. 25,000/- to be paid to the benevolent fund of the respondent no. 2 The Institute of Chartered Accountants of India (ICAI). The said writ petition was filed by the appellant impugning the order dated 20th January, 2012 of the Director (Discipline) of the respondent no. 2 ICAI (on a complaint filed by the appellant, a Chartered Accountant, against the respondent no. 1, also a Chartered Accountant, of professional misconduct) expressing a prima facie opinion that the respondent no. 1 is not guilty of professional and/or other misconduct falling within the meaning of Clauses (8) & (9) of Part I of First Schedule of the Chartered Accountants Act, 1949 [as amended by the Chartered Accountants (Amendment) Act, 2006].

2. It was the complaint of the appellant that though he was appointed as the Statutory Auditor of certain companies and had completed audit thereof and signed the balance sheets provided to him by two of the Directors of the Company but the financial statements filed by the Company were signed by the

respondent no. 1. It was further the complaint of the appellant that since he had neither resigned nor was removed as the Statutory Auditor of the said companies, the financial statements could not be signed by another auditor and the respondent no. 1 had accepted the position as Auditor previously held by the appellant without first communicating to the appellant in writing and without ascertaining whether the requirements of Section 225 of the Companies Act, 1956 in respect of such appointments had been duly complied with. It was yet further the complaint of the appellant that the respondent had not disclosed material facts in the financial statements and had failed to exercise due diligence in his professional duties.

3. It was the defence of the respondent no. 1 that the appellant had resigned as the Auditor and his appointment was in compliance of Section 225 supra and proper communication had also been sent to the office of the appellant.

4. The appellant of course controverted.

5. It appears that the Director (Discipline) of the respondent no. 2 ICAI, after the appellant had rejoined to the response of the respondent no. 1, sought some additional documents from the respondent no. 1 and which were provided by the respondent no. 1. The Director (Discipline) of the respondent no. 2 ICAI on perusal of all the papers i.e. the complaint, written statement, rejoinder as well as the said additional documents, formed a prima facie opinion that the appellant had resigned as Statutory Auditor and the respondent no. 1 was appointed thereafter only and had also sent the requisite communication to the appellant. Accordingly the respondent no. 1 was held not guilty of professional misconduct.

6. The challenge by the appellant to the aforesaid is on the ground that the additional documents sought from the respondent no. 1 and supplied by the respondent no. 1 and on the basis whereof also the opinion aforesaid was formed, were not put to him and thus the procedure adopted by the Director (Discipline) is faulty.

7. The learned Single Judge in his detailed judgment, on the basis of the record produced before him, has held that the Director (Discipline) accorded complete opportunity to the appellant and that there was no necessity to grant oral hearing. It was further observed that in the regime envisaged under the Chartered Accountants Act and the Rules & Regulations framed thereunder, the scrutiny by the Director (Discipline) is the first stage at which a charge leveled against a member of ICAI is examined and at that stage the Director (Discipline) is required to only form an opinion as to whether a prima facie case is made out. The learned Single Judge has concurred with the opinion of the Director (Discipline) of the respondent no. 2 ICAI that no case was made out. Reliance in this regard has been placed on a number of precedents noted in the judgment of the learned Single Judge.

8. We have perused the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. Chapter 3

thereof is titled "Procedure of Investigation". Rule 8 thereunder lays down the procedure to be followed by Director on a complaint. Though the same, while providing for the complaint to be forwarded to the member against whom complaint is made uses the word "shall", but while laying down the procedure after receipt of the written statement provides that "the Director may send a copy thereof to the complainant". Sub Rule (5) of Rule 8 is worth quoting and is as under:-

(5) On perusal of the complaint, the respondent''s written statement, if any, and rejoinder of the complainant, if any, the Director may call for such additional particulars or documents connected therewith either from the complainant or the respondent or any third party or parties, as he may consider appropriate

Rule 9(1) provides the procedure thereafter as under:-

The Director shall examine the complaint, written statement, if any, rejoinder, if any, and other additional particulars or documents, if any, and form his prima facie opinion as to whether the member or the firm is guilty or not of any professional or other misconduct or both under the First Schedule or the Second Schedule or both.

9. It would thus be seen that the Rules do not provide for any hearing. The said Rules have to be examined in the context of the situation with which they deal. The complaints dealt thereunder are of professional misconduct. The respondent no. 2 ICAI, in its concern to maintain high standards in the profession, has provided for in house mechanism of inquiry. We may highlight that the Rules are not under challenge before us. All that we are thus required to examine is whether the procedure followed is as per the Rules. The role of Director (Discipline) of the respondent no. 2 ICAI, as noticed by the learned Single Judge also, is merely inquisitorial i.e. whether the complaint is to be closed or to be further investigated. We repeat, the said stage is inquisitorial rather than adjudicatory. The said stage is intended to prevent the members of the respondent no. 2 ICAI from being harassed by being required to undergo the entire adjudicatory process qua each complaint which may be made against them. We are thereof of the opinion that the learned Single Judge is correct in holding that there is no error in the procedure followed by the Director (Discipline) of the respondent no. 2 ICAI.

10. A Division Bench of this Court in R.K. Sharma Vs. Institute of Chartered Accountants of India and Others, held that ICAI is only required to form a prima facie opinion whether a member is guilty of professional misconduct or not and at that stage there is no requirement for formulation of formal charges on which inquiry is to be held and only if a prima facie opinion that the member is guilty of professional misconduct is formed, is the inquiry to be held. It was further held that at the stage of forming the prima facie opinion there is no requirement to frame any formal charges. Thus the challenge to formation of such prima facie opinion on the ground that the member complained against had not been

informed of the charges on which inquiry was proposed to be held was negatived.

11. Recently the Supreme Court in Competition Commission of India Vs. Steel Authority of India Ltd. and Another, carved out a distinction between inquisitorial and adjudicatory functions and held that the Competition Commission before issuing a direction to cause an investigation to be made is required to form only a prima facie opinion without entering upon any adjudicatory or determinative process and the Commission is entitled to form such opinion without any assistance from any quarter or even with assistance of experts or others. It was held that the function of forming of prima facie opinion is of a very preliminary nature and therefore application of audi alteram partem is not called for.

12. A Division Bench of this Court in DLF Ltd. Vs. Securities and Exchange Board of India and Others, also held that in the absence of any provision in the Securities and Exchange Board of India Act, 1992 under consideration in that case, suggesting that any right to hearing inheres in any party at the first stage of investigation, when SEBI considers whether to act on a complaint, no such right can be claimed. It was further reiterated relying on Swadeshi Cotton Mills Vs. Union of India (UOI), that a right of hearing exists only when the decision is based on the adjudication of the rights of the parties. Yet further, relying on Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, and New Prakash Transport Co. Ltd. Vs. New Suwarna Transport Co. Ltd., it was reiterated that a right of hearing is contextual and takes its colour from individual legislation. We may in this context notice that the right to take action for professional misconduct is of ICAI only and not of the appellant. The appellant only has a right to make a complaint and it is up to the ICAI, to in accordance with its Rules and Regulations, deal with such complaint and we in the context of the Chartered Accountants Act or the Rules and Regulations framed thereunder are unable to decipher any further right in the appellant as complainant.

13. We have noticed that the appellant who is the complainant is a professional colleague of the respondent no. 1. We have enquired from the counsel for the appellant as to what is the reason for the appellant to pursue the complaint in the writ petition as well as in this appeal. The counsel states that the companies aforesaid of which the appellant was a Statutory Auditor owe money to the appellant. That according to us can be hardly a reason for the appellant to proceed against the respondent no. 1. We have enquired whether any proceedings for recovery of the said dues have been undertaken. The answer is in the negative.

14. The counsel for the appellant has next contended that the matter be remanded to the Director (Discipline) of the respondent no. 2 ICAI for a fresh look and after giving opportunity to the appellant to respond to the additional documents sought from and supplied by the respondent no. 1. However, without our finding any error in the order, repeated opportunities cannot be given.

15. The counsel for the appellant has next contended that since the opinion

formed by the Director (Discipline) of the respondent no. 2 ICAI is only prima facie, the appellant should be permitted to avail of other remedies against the respondent no. 1. We do not feel the need to express any opinion in this regard. If the appellant is advised that any other remedy is available to him it is up to the appellant and we have not examined whether the same would be available or not. The counsel for the appellant lastly seeks waiver of the costs of Rs. 25,000/- imposed by the learned Single Judge. Though ordinarily we would not interfere with the order of costs but only for the reason that the appellant and the respondent no. 1 are professional colleagues and acrimony ought not to be allowed to brew between them, we, subject to the condition that the appellant puts a quietus to the matter, reduce the costs from Rs. 25,000/- to Rs. 10,000/-. For the same reason we do not impose any further costs of this appeal on the appellant.