
(2012) 08 DEL CK 0482

In the Delhi High Court

Case No : Writ Petition (C) No. 4938 of 2012

Shri Mahendra Kumr Mahajan

APPELLANT

Vs

ICAI and Another

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Chartered Accountants Act, 1949 — Section 21(B)

Citation : (2012) 08 DEL CK 0482

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Vibha Mahajan Sethi, for the Appellant; J.S. Bakshi, Advocate for Respondent No. 1, Mr Manoj Kr. Garg and Mr Animesh K. Sinha, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, J.

Caveat No. 851/2012

Since the learned counsel for caveator/respondent No. 2 has entered appearance, caveat stands discharged.

CM No. 10081/2012 (Exemption)

Allowed subject to just exceptions.

WP (C) No. 4938/2012 & CM No. 10080/2012 (Stay)

1. This writ petition lays a challenge to the order of the Appellate Authority dated 17.07.2012 of the Institute of Chartered Accountants of India (in short ICAI) and the reports/findings dated 17.10.2011 as well as order dated 01.02.2011 passed by the Disciplinary Committee. The net effect of the aforementioned orders and/or the report is that the petitioners has been found guilty of professional misconduct within the provisions of clause (11) of part 1 of First Schedule and

clause (4) of part 1 of the Second Schedule of the Chartered Accountants Act, 1949 as amended by Chartered Accountant (Amendment) Act, 2006 (in short the C.A. Act). Briefly, the aforementioned report and orders came to be passed against the petitioner in the background of the following facts:

2.1 On 19.12.2007 respondent No. 2, the ex-managing director of a company by the name of Indo Rollhard Industries Limited (IRIL) filed a complaint with ICAI against the petitioner wherein the following allegations were made:

(i) That one of the partners of the chartered accountancy firm by the name of Kumar Mahajan & Co. was the director/chairman of IRIL since the date of its incorporation (i.e, 1981), till 26.02.2001. During this period, M/s. Kumar Mahajan & Co. was also the statutory auditor of IRIL and beyond, i.e., till 22.03.2003.

(ii) Despite, the petitioner being a partner in M/s. Kumar Mahajan & Co. he signed IRIL's balance sheets, profit and loss account for various years, including the director's report, loan agreements etc. It was further alleged that though the petitioner resigned from IRIL on 26.02.2001, he signed a loan renewal agreement with Vijaya Bank on 27.04.2001.

(iii) An allegation was also made that the petitioner during this period received his fee from IRIL in his capacity as the partner of M/s. Kumar Mahajan & Co.

(iv) There were also allegations that the petitioner was running many other business establishments, and was also, a director in other companies. Respondent No. 2 squarely alleged that during the period M/s. Kumar Mahajan & Co. acted as a statutory auditor for IRIL, the petitioner held substantial interest in IRIL both as a director and shareholder for the said company. In these capacities, the petitioner had full knowledge of the day-to-day affairs of IRIL and was thus a signatory to vital documents executed on behalf of IRIL.

(v) There were also allegations with regard to sale of land at Bahadurgarh through power of attorney based on Board of Directors' resolution passed under the chairmanship of the petitioner. Allegation was also made with regard to sale of plots at Delhi and yet another land at Bahadurgarh during the period 2001-2002 which were not reflected in the financial statements for the year 2001-2002. This fact was evidently rectified only in the financial year 2003-04, upon appointment of a new chartered accountancy firm as the statutory auditor for IRIL.

2. Based on these allegations, the matter was taken up by the Director (Discipline), who after forwarding the complaint to the petitioner, directed him to file a written statement vide communication dated 13.03.2008. In response to the same the petitioner filed a written statement on 08.04.2008. In response to the same, the complainant/respondent No. 2 was given an opportunity to file a rejoinder, which he filed on 14.05.2008.

3.1 Importantly, the broad defences taken in the written statement before the

Director (Discipline) were as follows:

(i). The petitioner was a director of IRIL only till 08.07.1999; though he admitted that the requisite form, i.e., Form 32 was filed with the Registrar of Companies (ROC) only on 19.03.2001, wherein the change is reflected on 26.02.2001.

(ii). The petitioner denied that he was an active director or chairman of IRIL. In other words a stand was taken that he had no knowledge of the day-to-day affairs and dealings of IRIL; though an admission was made that he was a chairman of IRIL, albeit in a "very limited sense". The stand appears to be that he only presided over the meeting of the Board of Directors and shareholders whenever he happened to attend the said meetings.

(iii). The petitioner did not sign any document in his capacity as the auditor of the IRIL.

(iv). The petitioner also denied having been associated in the process of taking loans from banks or in the execution of loan agreements qua IRIL.

(v). The affairs of IRIL were handled by three full-time directors, amongst which respondent No. 2/complainant was one such person.

(vi). The land at Bahadurgarh had not been sold, as alleged, to one Sh. Trilok Khara. He was only given powers to look after the land and arrange for its sale. Since the petitioner resigned from IRIL on 08.07.1999, he was unaware of the sale of properties of IRIL between 2001-2002. Therefore, a stand was taken that no resolution was passed which was in the knowledge and in presence of the petitioner pertaining to sale of properties of IRIL.

3. Respondent No. 2/ complainant, in the rejoinder, squarely took the point that the purported resignation letter dated 08.07.1999, was fabricated. This fact was sought to be demonstrated by adverting to the alleged actions of the petitioner in executing various documents post the said date. It was also stated by the complainant that the Directors Report of 02.09.1999, would demonstrate that the petitioner had offered himself for re-appointment as the director of IRIL, while M/s. Kumar Mahajan & Co. was its statutory auditor. Stress was laid by respondent No. 2/complainant on the fact that, the petitioner had not taken permission of ICAI before entering into any business with IRIL. An allegation was also made that the minute books and other important files of IRIL always remained with the petitioner, which had not been returned to date.

4. On a consideration of the material on record, including the information sought for in respect of the allegations made, the Director (Discipline) came to a prima facie opinion that the petitioner was a guilty of professional and other misconduct falling in the First and Second schedule of the C.A. Act. 5.1. The prima facie opinion of the Director (Discipline) was considered by the Disciplinary Committee of the ICAI constituted u/s 21(B) of the C.A. Act at its meeting held on 26.11.2008. Based on the deliberations held at this meeting the Disciplinary Committee agreed with the prima facie opinion of the Director (Discipline) and

accordingly decided to proceed further in the matter under the provisions of Chapter V of the Chartered Accountants (Procedure of Investigation of Profession and other Misconduct and Conduct of Cases) Rules, 2007 (in short the said Rules).

5. The Disciplinary Committee in consonance with the provisions of the Rules, forwarded the opinion of the Director (Discipline), both to the petitioner and respondent No. 2/complainant and sought their response with regard to the same. The petitioner admittedly submitted his response on 26.01.2009. Likewise, respondent No. 2/complainant submitted his rejoinder to the response of the petitioner. Opportunity of hearing was granted to the petitioner, whereupon the Disciplinary Committee came to the conclusion that the petitioner was guilty of professional and other misconduct with respect to the 1st and 2nd charge. As regards the 3rd charge, the petitioner was exonerated. The first charge pertained to the petitioner acting as a director as well as statutory auditor of IRIL. The second charge pertained to the petitioner being engaged in other businesses while holding a certificate of practice. The third charge which pertained to the petitioner allegedly having sold the assets of IRIL and the same not being reflected in the financial statements of IRIL, was held as not proved, in the absence of the necessary documentary evidence.

6. Having held the petitioner guilty of misconduct on two counts, the Disciplinary Committee at a separate hearing considered the sentence to be accorded to the petitioner. Written communication in that regard was sent to the petitioner, who responded accordingly, both in writing and in person. Upon considering the submissions of the petitioner, the Disciplinary Committee vide order dated 01.02.2012 directed removal of the petitioner's name from the register of members for a period of one year. Significantly the Disciplinary Committee in coming to the said conclusion as regards the quantum of sentence was also impacted by the fact that the petitioner continued to contend that there was no misconduct on his part.

7. Aggrieved by the order of the Disciplinary Committee dated 01.02.2012, an appeal was preferred by the petitioner. After considering the submission of the petitioner, the Appellate Authority passed a detailed order dismissing his appeal and confirming the order of the Disciplinary Committee.

8. Having heard the learned counsels for parties, it is quite obvious that the findings of the Disciplinary Committee which were affirmed by the Appellate Authority are unimpeachable. The two counts on which the petitioner has been held guilty of professional and other misconduct are based on findings, which are backed by material on record. There is no dispute that the petitioner was the Director of IRIL from the date of its incorporation till 26.02.2001 when Form 32 was filed with the ROC. Even though, the petitioner had tried to establish a case that he had resigned on 08.07.1999, this assertion could not be established by him. Nevertheless, in view of the fact that Form 32 was filed with the ROC only on 26.02.2001, the assertion of the petitioner that he had made repeated

requests and sent reminders to IRIL to file the said form is not backed by any material on record, was therefore, rightly rejected. It is also not disputed that M/s. Kumar Mahajan & Co. acted as statutory auditors of IRIL during this period. The fact that the petitioner alongwith his family members held 20.19% of the share in IRIL is also not in dispute. This fact was admitted quite categorically by Ms. Mahajan, counsel for the petitioner during course of hearing before. As a matter of fact in the appeal filed before the Appellate Authority, this fact is clearly reflected, in paragraph 8(c). In said paragraph, the petitioner categorically avers that as on 31.03.2000, he held 17.86% shares, while the balance shares were held by his wife, son and daughter. I have no doubt in mind that this was a substantial shareholding and hence, precluded the petitioner's firm i.e., M/s. Kumar Mahajan & Co. from acting as statutory auditors of IRIL. The fact that the petitioner was admittedly the Chairman and Director of IRIL during the aforesaid period is also not in dispute. Therefore, the petitioner being both a Director in IRIL and partner of M/s. Kumar Mahajan & Co., could not have acted as the statutory auditor of IRIL. The fact that the petitioner alongwith his family members held more than 20.19% shares in IRIL from 30.09.1997 till 31.03.2000, made it only worse. Therefore, the finding of the Disciplinary Committee and the Appellate Authority that the petitioner had committed a professional misconduct within the meaning of clause (4) of Part I of Second Schedule of the Chartered Accountants Act, 1949, is unassailable.

9. The second charge which is that the petitioner could not have engaged in another business while holding a certificate of practice without the permission of the ICAI is clearly established in the instant case. The petitioner was admittedly a signatory to the Memorandum of Association and is reflected therein as one of the Promoter Directors. As indicated above, he admittedly acted as a Chairman of IRIL. While holding the position of Director and Chairman of IRIL the petitioner participated in the affairs of the company, as is reflected in the Board of Resolution dated 05.12.1998 and the balance sheets of the IRIL as on 31.03.1985 and 31.03.1986. It was not the case of the petitioner before me that these documents are not genuine. The only submission made was these were filed with the rejoinder prepared before the Appellate Authority which in my view cannot help the cause of the petitioner.

9.1 A perusal of the Board of Directors Resolution of 05.12.1988 shows that it gave powers to the petitioner amongst others to negotiate loan from Vijaya Bank. In so far as the balance sheets are concerned, they admittedly bear the signature of the petitioner in his capacity as a Director.

9.2 Therefore, the stand taken before the authorities below that the petitioner was acting as a "Director Simplicitor" and not involved in the day-to-day affairs of IRIL was quite correctly rejected. In my view, once again, the petitioner was quite clearly guilty of misconduct within the meaning of clause (11) of Part I of the First Schedule to the Chartered Accountants Act when read in consonance with regulation 190 A.

9.3. The submission of the petitioner that if the pre-amended provisions were made applicable that he did not have to take permission of the "Council" in order to take up Directorship or Chairmanship was correctly rejected by the Appellate Authority. The un-amended provisions of clause (11) of Part I of First Schedule to the Chartered Accountants Act, quite clearly bears out the fact that permission was required.

10. It is in the background of these findings, after a longish hearing that Ms. Mahajan, who appears for the petitioner has submitted that she does not wish to contest the finding of guilt returned by the authorities below but would like the court to examine the quantum of sentence imposed on the petitioner given the fact that the petitioner was registered as a Chartered Accountant with the ICAI since 1967, coupled with the fact that as of today, the petitioner is 68 years of age and therefore, at the fag end of his professional career.

10.1 Given the aforesaid submission of the petitioner, learned counsel for respondent No. 1 left it to the discretion of the court as to the quantum of sentence which ought to have been imposed in the aforesaid matter. Learned counsel for respondent No. 2/complainant, however, submitted that in the given facts and circumstances, no leniency ought to be shown.

11. I have considered the matter from all angles. Undoubtedly, the petitioner is guilty of professional misconduct, which continued for a substantial period of time. This fact, however, was in the knowledge of respondent No. 2/complainant, who could have brought this aspect to the notice of ICAI much earlier in point of time as he was one of the Promoter Directors of IRIL alongwith the petitioner. The complaint was lodged by respondent No. 2 only on 19.12.2007. This is not to say that the petitioner in his capacity as a Chartered Accountant ought not to have complied with the provisions of the Chartered Accountants Act, the regulations framed thereunder and the Code of Ethics drawn up by the Council of ICAI with regard to professional conduct; the delay in lodging the complaint highlights the fact that such like cases, come to light only when it affects the interest of the complaining party. This in my view is a sad aspect of the matter. Therefore, given the fact that the petitioner has practiced as a Chartered Accountant for nearly 45 years as also the fact that the misconduct, in a sense, took place qua a company in which substantial control is of the petitioner's family, I propose to reduce the period of sentence accorded to the petitioner of removal from the Register of Members of ICAI, from one (1) year to six (6) months. I may also indicate, that in addition to the aforementioned factors what persuaded me to reduce the quantum of sentence was also the fact that, the Disciplinary Committee had exonerated the petitioner of the third charge, which pertained to the allegation that, he had sold assets, which were not reflected in the financial statements of IRIL. I may also put on record that, at the end of hearing, the quantum of reduced sentence that I proposed to impose was put to learned counsel for the petitioner, who in no uncertain terms indicated that the petitioner will suffer said sentence, without further cavil. Accordingly, the writ

petition is disposed of with the impugned order modified to the extent indicated above.