

\$~59

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 12454/2021 & CM APPLs. 39201/2021, 2803/2022

ASHISH AGARWAL

..... Petitioner

Through: Mr. Divyakant Lahoti, Ms. Vindhya Mehra, Mr. Parikshit Ahuja, Ms. Praveena Bisht, Ms. Madhu and Mr. Kartik Lahoti, Advs.

versus

INSTITUTE OF CHARTERED ACCOUNTANT OF INDIA &
ANR. Respondents

Through: Mr. Febin M. Varghese, Adv. for R-1.
Ms. Shiva Lakshmi, CGSC with Ms. Srishti Rawat and Ms. Ritika Sneha,
Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% **01.09.2022**

1. The petitioner, a practicing Chartered Accountant impugns a communication dated 22 September 2021 issued by the Disciplinary Directorate of the Institute of Chartered Accountancy rejecting his contention that the complaint made against him would be barred by Rule 12 of the **Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007¹**. The respondents have, accordingly, called upon the petitioner to submit his final written statement on the merits of the allegations as leveled within seven days. The petitioner asserts that the complaint itself relates to an alleged misconduct committed more than seven years prior to the Institute

taking cognizance of the same and would, therefore, be barred under Rule 12 of the 2007 Rules.

2. In order to rule on the questions which arise, the following essential facts may be noticed. The petitioner was the Statutory Auditor of Canyon Financial Services during the period of 2003-2004 to 2007-2008. By virtue of an order passed by the Union Government in terms of Section 212(1) of the **Companies Act, 2013**², directions were framed for the Serious Fraud Investigation Office [“SFIO”] to initiate an investigation into the affairs of six companies. The aforesaid directions were, thereafter, extended to the affairs of an additional 104 companies and one Limited Liability Partnership [“LLP”] headed by the prime accused. In that investigation, the petitioner was summoned by the SFIO on 18 May 2017 and his statement recorded therein. SFIO is, thereafter, stated to have prepared and submitted a final report which was duly examined by the Ministry of Corporate Affairs under Section 212(14) of the 2013 Act and prosecution sanction granted on 11 August 2017.

3. Consequent to the grant of sanction, a complaint came to be filed before the **Additional Sessions Judge**³, Dwarka District Court, against the petitioner for alleged commission of offences under Sections 227 and 233 of the Companies Act, 1956, Sections 143 and 147 of the 2013 Act and Sections 21 and 22 of the Chartered Accountants of India Act, 1949. The petitioner was subsequently summoned in those proceedings by the Special Judge. His bail application came to be rejected by the Special Judge on 24 May 2019. However, the petitioner was granted regular bail by this Court

¹ 2007 Rules

² 2013 Act

on 31 May 2019. SFIO based on the material gathered during the course of its investigation, is, thereafter stated to have filed a complaint before the Institute on 15 April 2021. On 04 June 2021, the Disciplinary Directorate issued notice to the petitioner calling upon it to file its written statement in terms of the relevant rules. Responding to the same, the petitioner submitted what was styled as a “Preliminary Reply/Objections” on the maintainability of the complaint. The petitioner essentially asserted that since the complaint was based on audits conducted more than seven years prior thereto, the complaint was barred by Rule 12 of the 2007 Rules. It was principally contended that Rule 12 places a rule of limitation of seven years on the expiry of which, no cognizance can be taken by the respondents and in any case disciplinary proceedings cannot be initiated. The respondents upon the receipt of the same and by means of the order dated 12 August 2021, again called upon the petitioner to submit a written statement. The petitioner, in response to the letter of 12 August 2021, wrote back to the respondents requesting that the issue of Rule 12 of the 2007 Rules be decided as a preliminary issue. It is that request which has come to be turned down by the impugned order of 22 September 2021.

4. Learned counsel for the petitioner has principally assailed the impugned order contending that since the complaint related to an act of alleged misconduct, committed more than seven years prior to the filing of the complaint, the same was liable to be rejected on this short ground alone and that there existed no justification for continuance of the proceedings or the trial of the complaint under the relevant rules. According to learned counsel, Rule 12 of the 2007 Rules puts in place a bar of limitation to the

³ Special Judge

entertainment of complaints which may be based on allegations of misconduct allegedly committed more than seven years ago. Learned counsel appearing for the petitioner would contend that once the Disciplinary Directorate had found that the complaint had been lodged beyond the period of limitation prescribed under Rule 12 of the 2007 Rules, no cognizance on the same could have been taken. Drawing the attention of the Court to the contentions which were raised in the preliminary reply, it was additionally pointed out that it was, *ex-facie*, evident that the complaint related to Financial Years 2003-04 to 2007-08 and thus evidently made after more than 13-17 years. Reliance was also placed on the provisions contained in the “Consequential Amendment to Audit Documentation Retention Period in Standard on Auditing (SA) 230”, to submit that a statutory auditor is obliged to retain documents relating to an audit for a period of seven years only. It was contended that since the documentation retention period had already expired, the petitioner had no material on the basis of which an effective defense could be proffered or submitted. It was further asserted that in terms of the provisions contained in Rule 6F(5) of the Income Tax Rules, 1962, the assessee is obliged to preserve books of accounts for a period of six years only from the end of the relevant assessment year. Reliance was also placed on the provisions contained in Section 128(5) of the 2013 Act to submit that even an audited company is not liable to retain financial records beyond a period of eight years from the end of the relevant financial year. It is in the aforesaid light that the petitioner has contended that the continuance of proceedings is wholly without jurisdiction and illegal. Learned counsel for the petitioner also placed reliance on a decision rendered by a learned Judge of the Court in

Wholesale Trading Services P. Ltd. v. Institute of Chartered Accountants of India and Others⁴, where upon a consideration of the provisions made under Rule 12 of the 2007 Rules, the Court had observed as follows:-

“15. A plain reading of the aforesaid Rule indicates that there are several grounds on which the Director (Discipline) would refrain from entertaining any complaint made more than seven years after the same is alleged to have been committed. The Director (Discipline) would reject the complaint if he is satisfied that it would be difficult for securing proper evidence of the alleged misconduct. The second ground for doing so is if the member, against whom such allegation is made, would find it difficult to lead evidence to defend himself. And, the third is on account of changes, rendering the inquiry to be procedurally inconvenient or difficult.

16. In the present case, JMG had clearly stated in his response that he had retired from the firm of Chartered Accountants that was appointed to conduct the audit in view of disputes inter se the partners of the firm. He had also pointed out that the complaint had been made beyond the period of seven years and the Chartered Accountants were not required to maintain audit records for more than seven years. JMG also pointed out that he had felt constrained with regard to access to information and relevant data files. In addition to the above, the Director (Discipline) had also taken note of the fact that several complaints had been filed inter se the partners of the audit firm in question, which had been dealt with by the Disciplinary Directorate. In this view, it was obvious that JMG would face constraints in accessing information and records from the firm.

17. Keeping the aforesaid in view, the Director (Discipline) accepted JMG's plea for invoking Rule 12 of the Rules. He declined to entertain the complaint and forwarded his prima facie opinion that JMG was not guilty of the alleged misconduct.”

5. It becomes pertinent to note that the aforesaid decision was affirmed by the Division Bench in **Wholesale Trading Services P. Ltd. v. Institute of Chartered Accountants of India and Others**⁵ which came to be dismissed on 11 September 2019 with the Court observing as follows:-

⁴ 2019 SCC OnLine Del 9543

⁵ 2019 SCC OnLine Del 11603

“8. A conjoint reading of Rule 12 with the written statement filed by Respondent No.3, it appears that the complaint was filed after 7 years, which has led to difficulty for the chartered accountant - Mr. Jayesh M. Gandhi. It has been mentioned categorically by Respondent No. 3 that the working papers may not be available on the basis upon which the last audit report was filed in the year 2009, and the complaint was only filed after several years, in 2016. Thus, no error has been committed by the Director (Discipline) while passing the order dated 24 September, 2018 (Annexure A-4) as well as no error has been committed by the Board of Discipline while passing an order dated 1 February, 2019 (Annexure A-3). No error has also been committed by the learned Single Judge in appreciating Rule 12 of the Rules, 2007, while dismissing W.P. (C) 8081/2019 by order dated 1 August, 2019 (Annexure A-1). We are in full agreement with the reasons given by the learned Single Judge. The complaint of this appellant was absolutely time barred and also, it has created a lot of difficulty for the chartered accountant - Respondent No. 3, against whom the complaint is filed, looking to the written statement filed by the said chartered accountant (Annexure A-7).

(viii) Counsel appearing for the appellant has submitted that law does not require locus. Looking to the peculiarity of the present case, it appears that the present appellant (original petitioner) has nothing to do with the aforesaid seven companies. Moreover, this appellant has no specific authorization, as required under Rule 3(4) of the Rules, 2007. A complaint for improper audit for the year 2005-06 is filed in the year 2016. Similarly, for the year 2006-07, for the year 2007-08, and for the year 2008-09, the complaint is filed in the year 2016, i.e., after several years. Looking to the written statement filed by chartered accountant Sh. Jayesh M. Gandhi, especially as stated hereinabove, paragraph 4 of the written statement (Annexure A-7), the totality of these circumstances lead to the fact that this appellant is harassing Respondent No. 3. No justifiable reasons have been given by this appellant as to why he has filed complaint against Respondent No. 3 and that too after several years of the audit of the aforesaid seven companies with which this appellant has no connection. These aspects of the matter have been also properly and appropriately appreciated by the learned Single Judge while dismissing the writ petition preferred by this appellant.”

6. Learned counsel appearing for the Institute controverting the aforenoted contentions, submitted that in terms of the 2007 Rules which apply, the petitioner was obliged to file a written statement in response to

the complaint. It was his submission that the 2007 Rules do not contemplate the Disciplinary Directorate entertaining preliminary objections of the nature as raised by the petitioner. Learned counsel further urged that the writ petition had clearly been filed prematurely since the Disciplinary Directorate was yet to take or form a prima facie opinion on the question of guilt and the merits of the complaint. It was the submission of learned counsel that the petitioner in terms of the 2007 Rules was obligated to file a written statement dealing not just with the provisions made in Rule 12 of the 2007 Rules, but also the merits of the allegations levelled in the complaint. Learned counsel submitted that the Disciplinary Directorate was yet to take a decision on the objections as tendered by the petitioner and that consequently the apprehension as harbored is clearly misconceived. According to learned counsel, the ends of justice would warrant the Court permitting the Disciplinary Directorate to proceed in the matter in accordance with law and the relevant rules which apply. The aforesaid submissions were adopted and reiterated by learned counsel appearing for the SFIO.

7. In order to examine the merits of the rival submissions, it would be appropriate to briefly advert to the procedure of investigation which is contemplated under the 2007 Rules. Rule 8 of the 2007 Rules sets out the procedure to be followed by the Director on receipt of a complaint and reads thus:-

“8. Procedure to be followed by Director on a complaint

(1) The Director or an officer or officers authorized by the Director, within sixty days of the receipt of a complaint under rule 3, shall, –

(a) if the complaint is against an individual member, send particulars of

the acts of commission or omission alleged or a copy of the complaint, as the case may be, to that member at his professional address;

(b) if the complaint is against a firm, send particulars of the acts of commission or omission alleged or a copy of the complaint, as the case may be, to the firm at the address of its head office, as entered last in the Register of Offices and Firms maintained by the Institute, with a notice calling upon the firm to disclose the name or names of the member or members concerned and to send particulars of acts of commission or omission or a copy of the complaint, as the case may be, to such members:

Provided that while disclosing the name or names of the member or members, the firm shall also send a declaration signed or, as the case may be, jointly signed by the member or members concerned to the effect that he or she or they shall be responsible for answering the complaint and that the particulars of acts of commission or omission or the copy of the complaint sent to the firm by the Director had been duly received by him, her or them.

Explanation – A notice to the firm shall be deemed to be a notice to all the members who are partners or employees of that firm as on the date of registration of the complaint.

(2) A member whose name is disclosed by the firm shall be responsible for answering the complaint, provided such a member was associated, either as partner or employee, with the firm, against which the complaint has been filed, at the time of occurrence of the alleged misconduct:

Provided that if no member, whether erstwhile or present, of the firm, own responsibility for the allegation or allegations made against the firm, then the firm as a whole shall be responsible for answering the allegation or allegations and, as such, all the members who were partners or employees of that firm, as on the date of occurrence of the alleged misconduct, shall be responsible for answering the allegation or allegations as contained in the complaint.

(3) A member who has been informed of the complaint filed against him (hereinafter referred to as the respondent) shall, within 21 days of the service of a copy of the complaint, or within such additional time, not exceeding thirty days, as may be allowed by the Director, forward to the Director, a written statement in his defence.

(4) On receipt of the written statement, if any, the Director may send a copy thereof to the complainant and the complainant shall, within 21 days

of the service of a copy of the written statement, or within such additional time, not exceeding thirty days, as may be allowed by the Director, forward to the Director, his rejoinder on the written statement.

(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:

Provided that if no reply is sent by the respondent within the time allowed under sub-rule (3) or by the complainant within the time allowed under sub-rule (4), the Director shall presume that the respondent or the complainant, as the case may be, have nothing further to state and take further action as provided under this Chapter."

8. The procedure pertaining to formation of a prima facie opinion by the Director on the examination of the complaint, the written statement and any other additional particulars or documents which may be placed before it, is set out in Rule 9 of the 2007 Rules, which reads as follows:-

"9. Examination of the Complaint

(1) 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.

(2) (a) Where the Director is of the prima facie opinion that:-

(i) the member or the firm is guilty of any misconduct under the First Schedule, he shall place his opinion along with the complaint and all other relevant papers before the Board of Discipline;

(ii) the member or the firm is guilty of misconduct under the Second Schedule or both the First and Second Schedules, he shall place his opinion along with the complaint and all other relevant papers before the Committee.

(b) If the Board of Discipline or the Committee, as the case may be, agrees with the prima facie opinion of the Director under clause (a)

above, then the Board of Discipline or the Committee may proceed further under Chapter IV or V respectively.

(c) If the Board of Discipline or the Committee, as the case may be, disagrees with the prima facie opinion of the Director under clause (a) above, it shall either close the matter or advise the Director to further investigate the matter.

(3) Where the Director is of the prima facie opinion that the member or the firm is not guilty of any misconduct either under the First Schedule or the Second Schedule, he shall place the matter before the Board of Discipline, and the Board of Discipline, –

(a) if it agrees with such opinion of the Director, shall pass order, for closure.

(b) if it disagrees with such opinion of the Director, then it may either proceed under chapter IV of these rules, if the matter pertains to the First Schedule, or refer the matter to the Committee to proceed under Chapter V of these rules, if the matter pertains to the Second Schedule or both the Schedules, or may advise the Director to further investigate the matter.

(4) The Director shall, after making further investigation as advised by the Board of Discipline under sub-rule (2) or (3) of this rule or by the Committee under sub-rule (2), shall further proceed under this rule.”

9. Rule 12 of the 2007 Rules and on which the challenge essentially rests, reads as under: -

“12. Time limit on entertaining complaint or information

Where the Director is satisfied that there would be difficulty in securing proper evidence of the alleged misconduct, or that the member or firm against whom the information has been received or the complaint has been filed, would find it difficult to lead evidence to defend himself or itself, as the case may be, on account of the time lag, or that changes have taken place rendering the inquiry procedurally inconvenient or difficult, he may refuse to entertain a complaint or information in respect of any misconduct made more than seven years after the same was alleged to have been committed and submit the same to the Board of Discipline for taking decision on it under sub-section (4) of section 21A of the Act”

10. Before proceeding further, the Court also deems it necessary to

extract the relevant part of the impugned order which reads thus:-

“This has reference to your letter dated 26th August, 2021, in the captioned complaint matter.

On perusal of the contents of the aforesaid letter, it has been observed that you are stating that the matter being more than eight years old, you are unable to trace the relevant records pertaining to the matter at your end. The papers available on record in the instant matter have been perused by the competent authority and it is noticed that your statement in the matter has been recorded in 2017 by the Complainant department and in view of the same, your request regarding applicability of Rule 12 cannot be acceded to. Accordingly, you are once again called upon to submit your final written statement, if any, on merits of allegations, within 7 days of receipt of this communication.

Please note that in case no reply/written statement is received from you within the specified time schedule, your reply dated 26th August, 2021 would be taken on record as your final written statement and the matter shall be processed further in terms of the provisions of The Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.”

11. Having noticed the rival contentions, the Court notes that the contentions addressed at the behest of the petitioner, appear to proceed on the assumption that Rule 12 constructs a rule of limitation in respect of complaints relating to professional misconduct. Learned counsel appearing for the petitioner has contended that Rule 12 must be construed as erecting a bar against cognizance being taken of complaints which may relate to allegations of misconduct committed more than seven years ago. Learned counsel sought to urge that the moment it is found that the complaint rests on acts of misconduct committed more than seven years ago, the same must not only be shelved, the Director Discipline must refuse to take cognizance of the same. The Court finds itself unable to accept the aforesaid submissions for the following reasons.

12. It would be pertinent to firstly note that Rule 12 does not expressly

debar the Director Discipline from entertaining a complaint merely because it may relate to acts of misconduct committed seven years prior to the same being lodged. The said Rule also does not prescribe that a complaint would not lie if it be preferred seven years after the alleged misconduct was committed. Rule 12 is founded on the satisfaction of the Director Discipline that the circumstances envisaged and stipulated therein render it impracticable to conduct an enquiry. That satisfaction may be arrived at if the Director be of the considered opinion that it would be difficult to gather evidence in connection with the complaint made or where it be of the view that the member would find it difficult to lead evidence to defend himself effectively in the proceedings contemplated. The Director could arrive at the aforesaid conclusions either on account of the time that may have elapsed since the commission of the misconduct or on account of other changes that may tend to make the enquiry “*procedurally inconvenient or difficult*” to hold. It is in the aforesaid circumstances that the Director “*may refuse*” to entertain a complaint preferred seven years after the commission of the misconduct.

13. The usage of the expressions “*is satisfied*” and “*may refuse*” in Rule 12 clearly detract from that provision being construed or understood as a rule of limitation or one which may warrant a complaint being shelved the moment it is found that it pertains to an act of misconduct committed more than seven years ago. Rule 12 confers a power on the Director to examine and weigh into consideration whether the lapse of time since the commission of the alleged misconduct renders the holding of the enquiry reasonably impracticable. The formation of opinion in this regard may rest on either a difficulty in securing evidence or even where it be found that the “*time lag*”

between the commission of the misconduct and the making of the complaint would place the member under an unreasonable burden of collecting material and evidence which may be required to proffer a wholesome defense. The Court thus finds itself unable to accept the contentions advanced on behalf of the petitioner that the complaint proceedings must be interdicted merely because seven or more years have elapsed since the commission of the misconduct.

14. However, that still leaves the Court to consider the validity of the impugned order passed by the respondents in terms of which the objection taken by the petitioner based on Rule 12 has been summarily rejected. The Court is of the considered opinion that the respondent was clearly unjustified in rejecting the objection that was raised outrightly as it has in terms of the impugned order. The Court notes that before proceeding to reject that objection, it was incumbent upon the respondent to have duly considered whether the petitioner was in fact severely handicapped from submitting a response to the allegations levelled in the complaint as also whether there was material and evidence available on the basis of which the enquiry could be proceeded with. It was, in the considered opinion of this Court, incumbent upon the respondent to have recorded cogent reasons in support of its conclusion that the objection taken with reference to Rule 12 was unfounded or unjustified. This the respondent has clearly failed to do since it has straight away proceeded to reject the objection taken without any discussion or recordal of reasons. For all the aforesaid reasons, the matter would merit being remanded to the respondent for consideration of the issue afresh. The Court also takes on board the statement of learned counsel for the petitioner who had stated that the objections taken by the petitioner

may be treated as the written statement under the 2007 Rules and the respondent be directed to decide the issue in accordance with law.

15. Accordingly, and for all the aforesaid reasons, the writ petition along with the pending applications is allowed. The impugned order 22 September 2021 is quashed and set aside. Bearing in mind the statement made on behalf of the petitioner that the preliminary reply / objections be treated as the written statement of the petitioner, the Disciplinary Directorate may proceed further in the matter afresh bearing in mind the observations made hereinabove.

YASHWANT VARMA, J.

SEPTEMBER 1, 2022

bh

To join our WhatsApp group, click anywhere on this page