



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
(Set up by an Act of Parliament)

[PR-246/14/DD/262/2014/BOD/260/2017]

ORDER UNDER SECTION 21A(3) OF THE CHARTERED ACCOUNTANTS ACT, 1949 READ WITH RULE 15(1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF INVESTIGATIONS OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT OF CASES) RULES, 2007

In the matter of:-

CA. Akhilesh Agarwal (M.No.93916),
Gurgaon

.... Complainant

-Vs-

CA. Radhey Shyam Bansal (M.No.091903),
M/s. R.S. Bansal & Associates

.... Respondent

[PR-246/14/DD/262/2014/BOD/260/2017]

MEMBERS PRESENT (in person):

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty (IAAS, ret'd.), Government Nominee

Date of Final Hearing: 17th March, 2023

1. The Board of Discipline vide Findings dated 10th February, 2023 was of the view that **CA. Radhey Shyam Bansal (M. No. 091903)** is Guilty of "Other Misconduct" falling within the meaning of Item (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 read with section 22 of the said Act in respect of the first charge only.
2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against **CA. Radhey Shyam Bansal** and communication dated 1st March, 2023 was addressed to him thereby granting him an opportunity of being heard in person and/or to make written representation before the Board on 17th March, 2023.
3. **CA. Radhey Shyam Bansal** made his written representation vide letter dated 14th February, 2023 and also appeared before the Board through video conferencing on 17th March, 2023 and made his oral submissions thereat.
4. **CA. Radhey Shyam Bansal**, in his written representation reiterated the submissions made at the time of hearing and further submitted the following:-
 - a) The Complainant has not come to the Hon'ble ICAI with complete and true facts.
 - b) The Complaint has been filed in order to shield the real mastermind and other alleged accused from escaping from the clutches of law.



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- c) The Complainant has not enclosed any documents which show dereliction of duties and responsibilities on the part of the Respondent.
- d) The Director(Discipline) failed to observe that matter relates to an alleged misconduct committed more than seven years prior to the Institute taking cognizance of the same and would, therefore, should have been barred under Rule 12 of the 2007 Rules. The period of 9 (Nine Years) i.e year 2005 to year 2014 have passed since the alleged misconduct took place shows the Complainant's malafide intentions and nefarious design.
5. The Board has carefully gone through the facts of the case along with the oral and written representation of **CA. Radhey Shyam Bansal**. As regard the plea of the Respondent that period of 9 years have passed since the alleged misconduct took place and the complaint should have been barred, the Board was of the view that hearing has already been concluded in the case and the said plea was never raised by the Respondent during the course of hearing before the Board. Thus, the Board was of the view that such plea is belated and hence not maintainable.
6. Further, as per the Findings of the Board as contained in its report, the act of the Respondent of being the facilitator/intermediary in the project of constructing buildings/flats wherein he sought investments from independent personnel which subsequently turned out to be fraudulent is highly indecorous and amounts to misconduct on the part of the Respondent. Hence, **CA. Radhey Shyam Bansal** was held Guilty of "Other Misconduct" falling within the meaning of Item (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 read with section 22 of the said Act in respect of the first charge only.
7. Thus, upon consideration of the facts of the case, the consequent misconduct of **CA. Radhey Shyam Bansal** and keeping in view his oral and written representation before it, the Board decided to remove the name of **CA. Radhey Shyam Bansal (M.No. 091903)** from the Register of Members for a period of 1 (One) month and also imposed a fine of Rs.1,00,000/- (Rs. One Lakh only) upon him.

Sd/-

CA. Rajendra Kumar P.
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, retd.)
(Government Nominee)

DATE: 19th April 2023

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy

बिना नाथ तिवारी / Bishwa Nath Tiwari
कार्यकारी अधिकारी / Executive Officer
अनुशासनात्मक विदेशालय / Disciplinary Directorate
इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विश्वास नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwas Nagar, Shahdara, Delhi-110032

CONFIDENTIAL**BOARD OF DISCIPLINE****Constituted under Section 21A of the Chartered Accountants Act 1949****Findings under Rule 14(9) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007****File No. : PR-246/14/DD/262/2014/BOD/260/2017****CORAM (Present in Person):**

CA. Prasanna Kumar D., Presiding Officer

Ms. Dolly Chakrabarty (IAAS, retd.), Government Nominee

CA. (Dr.) Raj Chawla, Member

In matter of:CA. Akhilesh Agarwal (M.No.93916),
Gurgaon

.....Complainant

-Vs-CA. Radhey Shyam Bansal (M.No.091903),
M/s. R.S. Bansal & Associates,
Delhi

.....Respondent

DATE OF FINAL HEARING : 26th July 2022
PLACE OF FINAL HEARING : New Delhi/ through video conferencing

PARTIES PRESENT (through Video Conferencing):

Complainant : CA. Akhilesh Agarwal
Respondent : CA. Radhey Shyam Bansal
Counsel for Respondent : CA. Sandeep Manektala

FINDINGS:**BRIEF BACKGROUND OF THE CASE:**

- 1.1 The Respondent told the Complainant that he has knowledge about good projects which are being constructed by the builders at Dehradun. He further informed that by making investment in the projects, the Complainant can earn huge amount of profit and amount will be safe and secure. Since the Respondent was well known to the Complainant, he became ready to invest money in the projects as guided and

advised and also through the hands of the Respondent. Believing the contentions of the Respondent, the Complainant further disclosed about the projects as intimated by the Respondent for making investment in these projects to his near and dear ones namely, Sh. Anil Kumar Agrawal, Sh. Shekhar Agarwal, Sh. Dhanesh Kumar Agarwal and Sh. Krishan Kumar Singhal. After hearing about the projects they also agreed to invest their money on the Complainant's behalf.

- 1.2 The Respondent also showed the working projects as well as under construction projects of GTM (GTM Builders & Promoters Pvt. Ltd.) forest and hills. The Respondent also suggested to invest money to earn handsome profit. He also explained that either the Complainant will get his money back with huge profits within 6 months' time or the Complainant will get flats in GTM Projects at Dehradun.
- 1.3 The Respondent came at the Complainant's residence on 26.12.2005 and came into personal contact in presence of all persons mentioned in point No.1.1 above and also interacted with all and assured that he will stand as guarantors of their money if it is invested through his hands.
- 1.4 The Complainant and his other relatives came under the influence of the Respondent believing him to be true and honest person and became ready to invest collectively Rs.50,00,000/- as per his security and guarantee. The Complainant handed over the entire amount of Rs.50,00,000/- for investing in the aforesaid profit earning projects.
- 1.5 After passing of six months, the Complainant started demanding the aforesaid money of Rs.50,00,000/- from the Respondent to return their money with huge profits. Initially, the Respondent returned Rs. 15,00,000/- to the Complainant on 26.04.2006 and assured him to get the remaining money returned with profit or he himself will return the money from his own pocket as he stands responsible and liable to return the money.
- 1.6 The Complainant started demanding his money on mobile phones also time and again, but the Respondent put off the matter returning the money on one excuse or the other. He also assured that he has already taken the matter with the builder who is not fulfilling his promise.
- 1.7 Due to the adjournment of dates one after another for returning the Complainant's money, the Complainant felt suspected and started recording the conversation with the Respondent. A chip (CD) of such recording is also annexed with the complaint which clearly reveals that he took the money from the Complainant by giving false and fabricated assurances. However, the Respondent continuously assured the Complainant to return money on telephone calls.

- 1.8 Feeling humiliated and cheated at the hands of the Respondent, the Complainant send e-mails on his e-mail ID in which the Complainant made demand for his money given to him for investing in profit earning projects.
- 1.9 The Respondent also gave to the Complainant a list of such other persons who also invested their money in the aforesaid projects of GTM through him and the Complainant enquired about it. Two of such persons informed that they have been returned the money long back with profit. The handwritten name and numbers is attached.
- 1.10 The Complainant met the builder of the project on 06.02.2014 and the builder informed him that he has given back all the money invested by the Respondent years ago. He also made it clear that the Respondent arrange some bogus entry from some bogus companies and not confirmed them during his income tax assessment and due to the illegal and malafide acts of the Respondent, he has suffered huge losses in terms of penalty etc. He also told that the Respondent has also deceived him.
- 1.11 The Complainant also demanded the documents pertaining to the investment made by the Respondent and came to know that the main company M/s. Arha Build Con Ltd in which they made deal with the builder is dormant since 2005 and having its paidup capital of Rs.6,40,000/- in which they entered in agreement for Rs.4 crores. In the Complainant's recording statement, the Respondent has accepted and claimed that this Company belongs to him.
- 1.12 When the Complainant demanded his money of Rs.50,00,000/- again and again then the Respondent started threatening the Complainant on many occasions. Thus, it is a clear case of cheating, fraud, misrepresentation, cash embezzlement, passing & arranging wrong financial entries, money laundering, and finally threatening etc. by the Respondent.

Charge Alleged:

- 2.1 The crux of allegations in the instant case relates to the cheating and fraud done by the Respondent to the Complainant and his relatives for an amount Rs. 50,00,000/- which has been alleged to be paid in cash to the Respondent for investment in some building projects.
- 2.2 The Complainant also alleged that the Respondent provided bogus entries through some bogus companies.



Brief of Proceedings held:

- 3.1 At the time of hearing held in the case on 18th January 2021, the Board noted that the Respondent alongwith his Counsel and the Complainant were present before it through video conferencing and they confirmed that they have read and understood the contents of the modalities and protocols of e-hearing and follow them. Since there was a change in the composition of the Board, further to the last hearing, the Board provided the parties to the case the chance of a de-novo hearing to which the Respondent replied that he would like to opt for De-Novo enquiry. Accordingly, with the concurrence of both the parties, the charges alleged against the Respondent were treated as read. On being asked by the Board as to whether the Respondent pleaded guilty in respect of the charges alleged against him, he replied in negative and his Counsel made detailed oral submissions on the charges alleged against the Respondent. The Complainant also made his counter oral submissions to substantiate the charges alleged against the Respondent. The Respondent was examined by the Board. Considering the oral submissions made by both the parties and the documents available on record, the Board directed the Respondent to provide a copy of his further written submissions dated 24th November 2020 to the Complainant for making his comments thereon, if any and thereafter, adjourned the hearing in the case.
- 3.2 At the time of hearing held in the case on 26th July 2022, the Board noted that the Complainant and the Respondent along with his Counsel was present before it through video conferencing. Since there was a change in the composition of the Board since last hearing, the Board gave an option to the parties as to whether they would like to have a De-Novo enquiry or continue from the last proceedings to which the parties stated that they would like to continue from the last proceedings. Thereafter, the Complainant and the Counsel for the Respondent made their respective detailed submissions before the Board. Upon consideration of the documents and submissions on record, the Board concluded the hearing in the case.

Brief of the Submissions of the parties to the case:**(a) Respondent:**

The Respondent through his Written Submissions submitted as under:

- 4.1 Observation in Para 9.4 of the PFO that the Respondent was casual and was not responding to the emails of the Complainant is a biased opinion without understanding correct facts. The PFO fails to appreciate the fact that the alleged investment was made in December 2005 and complaint to the ICAI was made by the complainant in 2014 after passing of almost 9 years.

- 4.2 Contents in para 9.5 of the PFO in the context of Para 4 in the written statement, are correct, however the inference drawn from Para 7 of the written statement was wrong.
- 4.3 Observation in para 9.6 is preposterous. The Director (Discipline) had made the conclusion in para 9.6 without any direct or indirect evidence of involvement of the Respondent in the transaction. Further there was no relation between the cheques referred to in para 5.2 of the PFO and the allegation made by the Complainant.
- 4.4. The Director (Discipline) in para 9.7 raises doubts on the conduct of the Respondent. It was inappropriate on the part of Director (Discipline) to assume that it was the Respondent (who pointed out a potential investment opportunity to the Complainant) should have been more prudent than the Complainant who is a Chartered Accountant and the one who actually claimed to have invested Rs 50.00 Lac (with his money and of other's money too). Even by assuming for argument that the Respondent suggested an investment avenue to the Complainant, that does not make a case of Professional or Other Misconduct for the simple reason that a suggestion or even an advice is not binding on anyone. As such there are no evidences in support of the allegations made by the Complainant.

Conclusions made by Director (Discipline) are not backed by any evidences and entertaining the complaint of the nature made by the Complainant is not at all in jurisdiction of the ICAI in anyway.

- 4.5 The Respondent submitted copy of status report of Arha Buildcon Limited, copy of status report of Top-tech Cables Ltd., and copy of status report of Pine View Investment Private Limited.
- 4.6 The Complainant had not stated on record nor mentioned in his complaint dated 27/08/2014 about the alleged role of the Respondent in getting the investment done in projects in Dehradun. Further, the Complainant did not mentioned/ disclosed in his complaint following matters:-
- i. The Complainant failed to disclosed that the alleged deal of Rs. 50,00,000/- was done in cash.
 - ii. The Complainant failed to disclose that he has taken any receipt from the Respondent after entering the alleged deal of Rs. 50,00,000/- was done in cash.
 - iii. The Complainant failed to disclose that whether it was out of his returned income or it his ill-gotten wealth.
 - iv. The Complainant failed to disclose why the alleged investment of Rs. 50,00,000/- was done in cash tan by way of cheque/ banking transactions.
 - v. The Complainant failed to disclose or attach his income tax return that it is out of his returned income.
 - vi. The Complainant failed to enclose the bank statement from where the alleged Rs. 50,00,000/- was withdrawn.

- vii. The Complainant failed to prove that the alleged Rs. 50,00,000/- was his and out of his bonafide income.
- viii. The Complainant failed to enclose copy of the brochure of the alleged construction of projects of GTM (GTM Builders & Promoters Private Limited)
- ix. The Complainant failed to apprise in his complaint which kind of investment was allegedly proposed by the Respondent.
- x. The Complainant failed to apprise how he has relied on the Respondent for the alleged investment in Dehradun Project whether he has done any other alleged investment through the Respondent.
- xi. The Complainant not disclosed what was scheme of things of the alleged investment proposal of the Respondent.
- xii. The Complainant failed to apprise the Hon'ble Board of Discipline if the alleged investment of Rs. 50,00,000/- was made in cash in December, 2005 and the Respondent allegedly returned Rs. 15,00,000/- on 26/04/2006 then why and under what compulsions the Complainant waited for 8 years to meet the builder of the Project or probably the Complainant did not want to land himself in trouble with Income Tax Department over his ill-gotten wealth.
- xiii. The Complainant did not mentioned in his complaint why he has not availed remedy under Indian Penal Code, 1860 by following proper procedure laid down under the Code of Criminal Procedure, 1973. The main reason is that there is no verifiable evidence with the Complainant against the Respondent which can prove the alleged malicious and baseless allegations levelled by the Complainant.
- xiv. The Complainant has failed to apprise that if at all there were alleged financial transactions why he has not filed Civil Recovery Suit against the Respondent.
- xv. The Complainant has failed to demonstrate and apprise that "whether there is any clinching evidence against the Respondent."
- xvi. The Complainant does not have a prima facie case for a criminal prosecution, therefore has not approached for filing of regular case against the Respondent. The Complainant knows that no case is made out against the Respondent.
- xvii. The Complainant knew that no alleged case is made out under Criminal Procedure Code and Civil Procedure Code against the Respondent but in order to malign the image of the Respondent, the Complainant has come out with baseless and motivated allegations.
- xviii. The Respondent was not related with the conduct of the business of the Company (GTM Builders & Promoters Private Limited) referred by the Complainant. Further, the Respondent was neither consultant, broker, advisor, fund arranger, nor was Share Holder, Auditor and Director in the alleged Company. The Complainant is put to strict proof to substantiate the allegations.
- xix. The Respondent also places on record and that the Hon'ble Board of Discipline shall appreciate "How a person who has alleged to have made an investment of Rs. 50,00,000/- in cash shall be quiet for such a long time and not invoking all his legal remedies of recovery and only approaching the Hon'ble ICAI for resolution of the matter".
- xx. The Complainant have tried to include some persons like Sh Anil Kumar Agarwal, Sh Shekhar Agarwal, Sh Dhanesh Kumar Agarwal and Sh Krishan Kumar Singhal in the matter, it is submitted that no such meeting was held

with the named persons and it is an afterthought to wrongly implicate the Respondent to build the case against him.

- xxi. The Complainant failed to observe that submission of CD without authenticity certificate is invalid and placing reliance is bad in law. Applicability of Section 65B of the Indian Evidence Act.
- xxii. The contention of Complainant regarding handwritten names and numbers are denied and Complainant is put to strict proof to substantiate the allegations.
- xxiii. Reference is drawn to para 1.12 of the Prima Facie Opinion where the Complainant have made an allegation that Arha Buildcon Limited having paid up capital of Rs 640000/- is Respondent's company and they have made a deal Rs 4 Crores with the alleged builder. The allegation of the Complainant is frivolous, wrong and denied. As per information taken from www.zaubacorp.com the name of the Company have been strike off and no further details of the said Company therefore the allegations of the Complainant have no substance. Copy of the status report of Arha Buildcon Limited is enclosed.
- xxiv. This Complaint have been filed on frivolous grounds and without any substance and clinching evidences against the Respondent. The Complaint have been filed in order to save the real master mind and other alleged accused who were directors in number of Companies.
- xxv. There is no financial dealing with Complainant what so ever as alleged by the Complainant.
- xxvi. The Respondent was not related with the conduct of the business of the Company (Arha Buildcon Limited) referred by the Complainant. Further the Respondent was not consultant, broker, investor, advisor, fund arranger, nor was Share Holder, Auditor and Director in the alleged Company.
- xxvii. Observations of Director (Discipline):-
Reference is drawn to Para 9 of the Prima Facie Opinion where in the Director (Discipline) heavily relied upon on the statement of the Complainant and totally disregarding the statement/submissions of the Respondent. The Director (Discipline) failed to appreciate that the alleged Complaint is regarding the alleged transaction which was more than 8 (eight) year old. The Respondent reiterates his submissions stated in Para 3.1 to 3.14 of the Prima Facie opinion dated 30.12.2016 which have been overlooked by the Director (Discipline) while framing the Prima Facie opinion along with legal provisions. The Complainant have not been able to contradict / convincing rebuttal to the Written Statement of the Respondent instead raising frivolous issues in order to divert the attention of the Director (Discipline) on the legal issues which have not been addressed by the Complainant. The Director (Discipline) also failed to observe that submission of CD without authenticity certificate is invalid and placing reliance is bad in law as per Section 65B of the Indian Evidence Act, 1872.

The Respondent also referred matter of Hon'ble Supreme Court of India in Appeal No.4028/2012 ""Anwar P.V. Vs. P.K.Basheer & ors.", dated 18.09.2014

4.7 The Respondent further relied on following case laws:-

In R M Malkani vs. State of Maharashtra, AIR 1973 SC 157 their Lordships observed:

"23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue: secondly, there is identification of the voice: and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act, It is res-gestae.

It was said that the admissibility of the tape recorded evidence offended Arts. 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape recorded conversation was not procedure established by law and the Respondent was incriminated.

In R.V.Leatham, (1861) 8 Cox C.C. 198 it was said "It matters not how you get it if you steal it even, it would be admissible in evidence" as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible."

'Thus, in view of the above discussion it is clear that if an accurate tape-recorded version of the statement is produced in evidence, the same is relevant and admissible in evidence in case the recording is not tempered with and the voice is properly identified.

Art.21 of the Indian Constitution says that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The expression 'personal liberty includes 'right to privacy'. A citizen has a right to safeguard his personal privacy, plus, that of his family, education, marriage, motherhood, child bearing, and procreation, among other matters.

In the case of TUKRAM S. DIGHOLE Vs. MANIKRAO SHIVAJI KOKATE reported in (2010) 4 Supreme Court cases 329, the importance of authenticity of an electronic evidence is discussed which is as follows:

"23. The second issue, in our opinion, is of greater importance than the first one. It is well settled that tape-records of speeches are documents as defined in Section 3 of the Evidence Act and stand on no different footing that photographs. (See Ziyauddin Burhanuddin Bukhari V. Brijmohan Ramdass Mehra 4, SCC p.26, para 19.) There is also no doubt that the new techniques and devices are the order of the day. Audio and video tape technology has emerged as a powerful medium through which a first-hand information about an event can be gathered and in a given situation many prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and

alterations by transposition, excision etc, which may be difficult to detect and therefore, such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasized that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence."

- 4.8 Reference is drawn to Para 10 of the Prima Facie Opinion of the Director Discipline wherein the Hon'ble Director (Discipline) is of the view that the Respondent is guilty of "Other Misconduct" falling within the meaning of Clause (2) of the Part IV of the First schedule to the Chartered Accountants Act, 1949. The Respondent craves liberty to refer to and rely upon the decision rendered by the Hon'ble Appellate Authority in the matter of Rajeev Maheshwari versus ICAI and other similar matters.

Further he reproduced the contents of revised code of ethics, which states as under:-

2.14.4.2 A member of the Institute, whether in practice or not, shall be deemed to be guilty of Other Misconduct, if he -

Clause (2): in the opinion of the Council, brings disrepute to the profession or the Institute as a result of his action whether or not related to his professional work.

2.14.4.2(i) The Council has been empowered to opine on any action of a member which brings the Institute or Profession in disrepute as Misconduct.

2.1 4.4.2(ii) This Clause, read with Section 22 of the Act, now defines 'Other Misconduct', which has been covered under this Part does not limit or abridge in anyway the power conferred or duty cast on the Director (Discipline) under Section 21(1) of the Act to inquire into the conduct of any member of the Institute under any other circumstances.

The offence of 'Other Misconduct' as defined under and within the meaning of the First Schedule, Part IV, Clause (2), of the Act, which offence the Respondent has been found guilty of, is not of bringing disrepute to the profession or the Institute, but of having done so in the opinion of the Council, which opinion is required to be in the form of a clear finding based on valid considerations and reason, and which opinion is, admittedly, missing in the present case.

(b) Complainant:

The Complainant inter-alia, submitted as under:

- 5.1 Often, the Respondent asked the Complainant verbally over phone or whenever they met to stop sending mails. The Respondent always assured that he was regularly following-up with the builder and you don't worry and keep patience. The

Complainant in utter good faith believed the Respondent. The real face of Respondent came in front when he started rigorous follow up with the Respondent and finally, he arranged the meeting with the builder on 06.02.2014, where builder stated about some bogus investment entries through Respondent and further disclosed no more amount is payable to the Respondent. Thereafter on realizing that he has been duped by the Respondent, the Complainant filed present complaint in August 2014.

- 5.2 The Respondent was wrong in challenging and trying to change the meaning of what he has mentioned in his WS in para 7. In para 4 of WS, he has accepted and hence no need to reply.
- 5.3 The Respondent was wrong in saying that the observation in para 9.6 is preposterous. He is trying to hide the open proven facts. Earlier he has denied that there is no professional relationship between us and now stating that there is no relation between cheques referred to in para 5.2 of PFO.
- 5.4 The Respondent is wrong, he himself knows the facts very well and just to misappropriate money, trying to take shelter and cushion himself with bonafide trust and belief in him by stating that as a chartered accountant, the Complainant should be more prudent than him. Few questions, Respondent may wish to answer to clear the cloud:
 - i) As Respondent has stated/admitted of returning of Rs.15 Lacs to the Complainant can he present any proof of returning Rs.15 Lacs to us?
 - ii) Recording conversation in CD have Respondent's voice, does Respondent admit his voice and agree to get the verification of recorded CD by an expert?
 - iii) Respondent has stated/admitted that he has arranged meeting with builder, why he has arranged our meeting with builder if he has no connection with us & builder?
 - iv) Why Respondent has given us photocopies of some agreements, receipts of builder etc ?
 - v) Whether Respondent has courage to call other persons, names of which he has given us in his own handwriting and conversations about this are also available in CD recording that they were also part of total investment, out of which 2-3 are chartered accountants?
 - vi) Why Respondent threatened the Complainant in public meetings?

Observations of the Board:

- 6.1 At the outset, the Board noted that the Respondent in his submissions raised certain technical objections with respect to the case. The Board decided to deal with the same prior to arriving at its Findings on the conduct of the Respondent.

(a) The Board noted that the Respondent stated that the present proceedings of Professional Misconduct is a quasi-criminal proceedings and they are not in civil nature. The Hon'ble Supreme Court of India has decided that the charge of Professional Misconduct is in the nature of quasi-criminal charge. Such charge requires to be proved beyond reasonable doubt. Evidence must be free from all doubts under Rules of Evidence Act and Information Technology Act (IT Act). The electronic evidence are subject to the Rules of evidence and principles of natural justice. In this regard, the Board viewed that the proceedings before the Board of Discipline are quasi-judicial in nature where the Misconduct can be proved by preponderance of probabilities having regard to the conduct of the Respondent which is distinct from Criminal proceedings where the commission of offence is required to be proved beyond reasonable doubt. While coming to the said view, the Board took into consideration the decision of the Hon'ble Supreme Court in the matter of "Ajit Kumar Nag –vs- General Manager (PJ) Indian Oil Corporation Limited- AIR 2005 SC 4217 wherein the Hon'ble Apex Court held as under :-

"The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rules relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused 'beyond reasonable doubt' he cannot be convicted by a Court of law. In a departmental enquiry penalty can be imposed on the delinquent Officer on a finding recorded on the basis of 'preponderance of probability'."

Similarly in the matter of Capt. M Paul Anthony –vs- Bharat Gold Mines Limited - AIR....1999 SC 1416 the Hon'ble Supreme Court held as under:-

"In Departmental proceedings, factors prevailing in the mind of the Disciplinary authority may be many, such as enforcement of discipline or to investigate level of integrity of delinquent or other staff. The standard of proof required in those proceedings is also different from that required in a criminal case. While in Departmental proceedings, the standard of proof is one of preponderance of

probabilities; in a criminal case, the Charge has to be proved by the prosecution beyond reasonable doubt."

- (b) As regard the objection of the Respondent that no Clauses had been specified in s.no. 5 of the Form 'I', the Board took into view the provisions of Section 21(3) of the Chartered Accountants Act 1949 which provides as under:

*"Where the Director (Discipline) is of the opinion that a member is guilty of **any** (emphasis provided) professional or other misconduct mentioned in the First Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee."*

Similarly, in Rule 9 of the CA Rules 2007, the word 'any' Misconduct has been used. The complainant has to file complaint in the prescribed Form 'I' where he is expected to specify the 'Clause' of the First/Second Schedule under which the alleged Misconduct will fall. However, the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 are silent in case the same is not specified in Form 'I'. Although, Rule 5(5) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 talks of rectification of a 'defective' complaint, however, what constitutes a 'defect' has neither been expressly provided under the Chartered Accountants Act 1949 nor under the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

Thus, the Board was of the view that where Act/Rules are silent with respect to the course of action to be followed in case any technical lapse is there, the principle of natural justice has to be taken into view. Thus, the complaint cannot be turned down merely because the Complainant has not specified the exact 'Clause' of the Schedule in which the alleged Misconduct of the member falls.

The Board also took into view the following observations of the Hon'ble Supreme Court of India in Appeal (civil) 6701 of 2005 in the matter of Uday Shankar Triyar vs Ram Kalewar Prasad Singh & Anr on 10 November, 2005:

*"17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. **Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-***

i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.

ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant"

Further, the onus to formulate a prima facie opinion as to the Misconduct rests with the Director (Discipline) and therefore, on the basis of submissions and documents placed on record, it is the Director (Discipline) which has to first formulate a prima facie opinion on the alleged Misconduct. Therefore, notwithstanding the assertions as to the particular clause of Misconduct by a complainant, the Director (Discipline) shall, after perusing the material available, conclude as to existence or otherwise of the Misconduct alleged. This is also apparent from the provisions of various sub clauses of Rule 9(2)(a) of the Misconduct Rules 2007, which requires the Director (Discipline) to place the matter before the Board of Discipline, if the Misconduct alleged falls within the First Schedule and before the Disciplinary Committee, if the alleged Misconduct falls within the Second Schedule or both under the First and Second Schedule. This also supports the view that the sifting of the allegations to identify the clauses of Misconduct is to be performed by the Disciplinary Directorate. Also, the complainant can be a statutory authority, a member of the Institute who is well versed with the provisions of the Act or even a member of public who may not be familiar with the provisions of the Act. In such a scenario, to give a pedantic interpretation to the provisions of the Act and the Rules making it incumbent on a complainant to specify specific clauses of Misconduct would be denying the remedy otherwise available under the statute. If the allegations stated in the complaint do not fall within any specified clauses of Professional Misconduct, the same may however be a case of "Other Misconduct" and the ICAI would be within jurisdiction to proceed further on the allegations. Thus, the non-mentioning of clauses pertaining to "Misconduct" does not in any manner vitiate the proceedings.

- (c) As regard the issue that the 'Opinion of the Council' is required for the purpose of charging the Respondent under Item (2) of Part IV of the First Schedule to the Chartered Accountants Act 1949, the Board held that the issue had already been decided by the Hon'ble Appellate Authority, and therefore, there is no merit in the argument of the Respondent in this regard.

- 6.2 Further, as regard the request of the Complainant to get the voice test of the Respondent in the conversation recorded in the CD through Director, Forensic Science Laboratory, Rohini, Delhi, the Board clarified that the Respondent's voice sample was sent to the Forensic Science Laboratory, Rohini, Delhi vide letter dated

1st May 2019. However, Forensic Science Laboratory vide letter dated 9th May 2019 returned the voice sample of the Respondent stating that the request cannot be entertained on account of huge number of cases being handled by them. The Board on consideration of the same together with the facts of the case and submissions on record was of the view that since the mobile number belongs to the Respondent as per the member records of ICAI, in case the Respondent denies the conversation, then the onus is on him to prove so. Accordingly, the Board decided that the request of the Complainant as regards getting the forensic voice examination of the Respondent done, need not be acceded to.

6.3 As regard the first charge, the Board noted that the Respondent in his Written Statement submitted at Prima Facie Opinion stage clearly admitted that he acted as an intermediary between the Complainant and the Builder. The Respondent further admitted that when he received certain amount of money from the Builder, to be handed over to the Complainant, it was duly given to him on behalf of the Builder. He also stated that there was no direct nexus between the Respondent and the builder. Thus, the Board observed that the role of the Respondent as a facilitator/intermediary in the said transaction is undisputed. Also, in his Written Statement submitted at Prima Facie Opinion stage, the Respondent clearly admitted of his presence in the meeting with the builder and of arranging the said meeting. Thus, the Board observed that the said transactions of the Complainant with the builder were in the complete knowledge of the Respondent.

6.4 Apart from the telephonic conversation between the Complainant and the Respondent, the Board noted that the Complainant time and again wrote emails to the Respondent on the email id which is registered as his email-id as per Member records of ICAI also seeking clarification as to when will his money be returned. The

Complainant also expressed his will to amicably resolve the issue. However, the Respondent chose not to respond to the emails. Furthermore, the Respondent during the course of hearing replied to the said issue by stating that if the complainant is sending frivolous e-mails, bogus mails, he is under no obligation to respond to the same. In this regard, the Board was of the view that it is not that the Respondent was completely unaware of the said transactions. His silence in the matter indicates his ill-intention.



- 6.5 The Board was of the view that a Chartered Accountant can indulge in any other business or occupation apart from being in practice with the general/specific permission of the Council depending upon the engagement. It is expected of a Chartered Accountant to use his professional acumen in the interest of the profession rather than indulging in acts which bring disrepute to the profession. In the instant case, the act of the Respondent of being the facilitator/intermediary in the project of constructing buildings/flats wherein he sought investments from independent personnel which subsequently turned out to be fraudulent is highly indecorous and amounts to Misconduct on the part of the Respondent. Hence, the Respondent is held Guilty in respect of the charge alleged.
- 6.6 As regard the second charge, the Board noted that there were neither any direct nor circumstantial evidences to substantiate the charge alleged against the Respondent. Hence, the Respondent is held not guilty for the said charge.

CONCLUSION:

7. Thus, in conclusion, in the considered opinion of the Board, the Respondent is **GUILTY** of "Other Misconduct" falling within the meaning of Item (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 read with section 22 of the said Act in respect of the first charge only.

Sd/-

CA. Prasanna Kumar D.
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, rettd.)
(Government Nominee)

Sd/-

CA. (Dr.) Raj Chawla
(Member)

DATE: 10th February 2023

सही प्रतिलिपि होने के लिए प्रमाणित /
Certified to be true copy

मौलम प्रदीप / Mohan Pradiip
कार्यकारी अधिकारी / Executive Officer
अनुशासनात्मक निदेशालय / Disciplinary Directorate
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