



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

[PR/313/2020/DD/310/2020/BOD/669/2022]

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. Gyan Prakash Agarwal (M. No. 083620)
M/s G Prakash & Associates
Chartered Accountants
M-3, Swastik Bhawan, Ranjit Nagar Complex,
New Delhi- 110008.

.... Complainant

-Vs-

CA. Pankaj Ambalal Kothari (M.No. 143999)
01, Meghalaya Building, Station Road,
Kalwa West, Near Prince Electronics,
Thane – 400605.

.... Respondent

[PR/313/2020/DD/310/2020/BOD/669/2022]

MEMBERS PRESENT (in person):

CA. Rajendra Kumar P, Presiding Officer
Ms. Dolly Chakrabarty (IAAS, retd.), Government Nominee
CA. Priti Savla, Member

Date of Hearing and passing Order: 11th January 2024

1. The Board of Discipline vide its Findings dated **28th December 2023** was of the view that **CA. Pankaj Ambalal Kothari (M.No. 143999)** is **GUILTY** of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949 and **NOT 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.
2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against **CA. Pankaj Ambalal Kothari** and communication dated **4th January 2024** was addressed to him thereby granting him an opportunity of being heard on 11th January 2024 which was exercised by him by being present before the Board through video conferencing. He confirmed receipt of the Findings of the Board. He requested the Board to take a lenient view in the case as the alleged misconduct had happened in the early stage of his career and is the sole case of misconduct against him.
3. Thus, upon consideration of the facts of the case, the consequent misconduct of **CA. Pankaj Ambalal Kothari (M.No. 143999)** and keeping in view his representation before it, the **Board decided to impose a Fine of Rs.35,000/- (Rs. Thirty-Five Thousand only) upon him.**

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

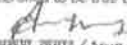
Sd/-

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

Sd/-

CA. Priti Savla
(Member)

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy


अरुण कुमार / Arun Kumar
वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
अनुशासनात्मक निदेशालय / Disciplinary Directorate
इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विश्व नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwas Nagar, Shahdara, Delhi-110032

[PR-313/2020/DD-310/2020/BOD/669/2022]

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-313/2020/DD-310/2020/BOD/669/2022]

CORAM (present in person):

CA. Rajendra Kumar P, Presiding Officer

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

In the matter of:

CA. Gyan Prakash Agarwal (M. No.083620)

M/s. G. Prakash & Associates

Chartered Accountants

M-3, Swastik Bhawan,

Ranjit Nagar Complex

New Delhi – 110008.

.....Complainant

Versus

CA. Pankaj A. Kothari (M. No. 143999)

M/s Pankaj Ambalal Kothari

Chartered Accountants

01 Meghalaya Building,

Station Road, Kalwa West, Thane,

Maharashtra India

Mumbai – 400605.

.....Respondent

DATE OF FINAL HEARING : 22nd May 2023

PARTIES PRESENT:

Complainant (through video conferencing) : CA. Gyan Prakash Agarwal

Respondent (in person) : CA. Pankaj A. Kothari

FINDINGS:

BRIEF BACKGROUND OF THE CASE:

1. The Complainant vide a resolution passed in the AGM of the Company held on 30th September 2014 was appointed the statutory auditor of the Company for the financial year 2014-15 to 2018-19. Meanwhile vide its letter dated 3rd September 2015 the

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company proposed the Respondent for his appointment as statutory auditor in the company and appointed him as the statutory auditor for 5 years i.e., from the F.Y. 2015-16 to 2019-20 by passing a Resolution in its AGM held on 30th September 2019. The Complainant has stated that he was holding the office as statutory auditor of the company till 2019 AGM but suddenly in 2015, the said Company because of some tax defaults shifted to Mumbai from Delhi and changed its auditor without adopting any procedure of Section 140 of Companies Act, 2013.

CHARGE(s) ALLEGED:

The Complainant alleged against the Respondent as under:

- 2.1 The Respondent illegally accepted the position as statutory auditor of the Company for the financial year 2015-16 without first communicating with him, being the previous auditor.
- 2.2 The appointment of Respondent as Statutory Auditor of the Company for the financial year 2015-16 was in violation of Section 140 of Companies Act 2013.
- 2.3 The Respondent kept silent for five years for which he was appointed and did not file any Form with the ROC and recently filed Form AOC-4 (to file the financial statements for each financial year) and MGT – 7 (to fill their annual return details) for 5 years from 2015-16 to 2019-20. The appointment letter of the Respondent for his appointment as statutory auditor of the company w.e.f. 30th September 2015 is of dated 1st October 2019 which proves the things as cooked up.
- 2.4 The address mentioned in the Forms viz. ADT-1 and AOC-4 submitted with ROC was fake and also the e-mail id of the company mentioned has also been alleged as wrong. The Complainant stated that the email id of the company mentioned in ADT-1 was his email id i.e. 'gprakash@yahoo.co.in' and is clearly false. Further, he stated that the address of the company was fake as there was no place of business of the Company in Delhi and the Company was having their offices and factories in Maharashtra only. This mistake is alleged to be deliberate from the side of Respondent.

The Board noted that the Director (Discipline) in his Prima Facie Opinion held the Respondent prima facie Guilty of Professional & Other Misconduct falling within the meaning of Item (8) & (9) of Part I and Item (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949 and the said view had been accepted by the Board. Accordingly, the conduct of the Respondent was examined in respect of Professional Misconduct & Other Misconduct falling within the meaning of Item (8) & (9) of Part I and Item (2) of Part IV of Part I of First Schedule to the Chartered Accountants Act, 1949 in respect of the charge specified at para 2.1 to 2.3 above only.

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BRIEF OF PROCEEDINGS HELD:

3.

S.no.	Date of Hearing(s)	Status of Hearing(s)
1.	28 th March, 2023	Part- heard and adjourned with the direction to the Respondent to provide the copy of his appointment letter together with his response with respect to the charge no. 2 alleged against him.
2.	29 th March, 2023	Part- heard and adjourned with the direction to the Respondent to share a copy of his response with the Complainant for his comments thereon, if any.
3.	22 nd May, 2023	Heard and Concluded.

BRIEF SUBMISSIONS OF THE RESPONDENT:

4. The Respondent in his defence, inter-alia, stated as under:

- 4.1 The Company M/s. Seemsan Pumps & Equipments Pvt. Ltd. Approached the Respondent for conducting statutory audit from FY 2015-2016 onwards. The Respondent accordingly enquired reasons for changing the auditors and it was informed to him that the directors of the company are placed in Mumbai since 2008 and they have additional place of business in Mumbai as well. Accordingly, they intend to have statutory auditors from Mumbai. Respondent then enquired about any unpaid fees for previous financial years and verified books of accounts for the same and did not observe any unpaid statutory audit fees.
- 4.2 Accordingly, Respondent informed his staff to draft NOC for previous auditors and he was under the impression that the same had been done. However, on getting the letter from the Institute, the Respondent was shocked to observe that the requisite process of NOC has not been complied. Accordingly, Respondent tried to recover NOC from his email which he failed to. With deepest regret and sincere apology, the Respondent informed that he may have missed on sending communication with respect to NOC and comply with provisions of clause 9 of part I of First Schedule of The Chartered Accountants Act, 1949 which is completely erroneous and was not intentional at all as alleged.
- 4.3 He was appointed as "Statutory Auditors" of the Company on 30.09.2015 and he was not responsible for company's compliance with respect to ROC which was taken care by the company itself. Any non-compliance / delayed compliance with respect to ROC fillings cannot be considered as fault of Statutory Auditors as alleged. AOC 4, ADT 1 and MGT 7 is being filed by the Company and not by Statutory Auditors.



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OBSERVATIONS OF THE BOARD:

- 5.1 As regard the charge that the Respondent illegally accepted the position as statutory auditor of the Company for the financial year 2015-16 without first communicating with the previous auditor, the Board took into view the requirement of Item (8) of Part I of the First Schedule to the Chartered Accountants Act, 1949 which provides as under:

"A Chartered Accountant in practice shall be deemed to be guilty of Professional Misconduct, if he-

Accepts a position as auditor previously held by another chartered accountant or a certified auditor who has been issued certificate under the Restricted Certificate Rules, 1932 without first communicating with him in writing."

The Board observed that there are two essential requirements under Item (8) of Part I of the First Schedule to The Chartered Accountant Act, 1949 which are as follows:

- i. The communication should be prior to the acceptance of the appointment as auditor.
 - ii. The communication should be in writing.
- 5.2 The Chartered Accountants Act, 1949 read with Code of Ethics – 2009 cast a duty on the incoming auditor to communicate with the previous auditor in writing not only as a professional courtesy but also to know the reason of such change in auditor. However, in the extant case, the Board noted that the Respondent admitted the fact of not communicating in writing with the Complainant i.e., the previous auditor, before accepting his appointment as statutory auditor in the company for the F.Y.2015-16. Accordingly, the Board held the Respondent **Guilty** of Professional Misconduct falling within the meaning of Item (8) of Part I of the First Schedule to the Chartered Accountants Act 1949.

- 5.3 As regard the charge that the appointment of Respondent as Statutory Auditor of the Company for the financial year 2015-16 was in violation of Section 140 of Companies Act 2013, the Board noted that the appointment of the complainant in the company was for 5 years i.e. from F.Y.2014-15 till F.Y 2018-19 and even in the Director's Report dated 26th August, 2015 of the company for the F.Y. 2014-15, the name of the Complainant was proposed to be ratified as its statutory auditor by the members in its 23rd AGM which was held on 30th September, 2015. The Board further noted that the Company thereafter vide its letter dated 03rd September, 2015 to the Respondent asked of his acceptance for his appointment for 5 years as statutory auditor in its 23rd AGM. In response, the Respondent vide its letter dated 05th September, 2015 accorded its acceptance. However, in all such mentioned documents nowhere it was mentioned that there was change in auditor of the company or the appointment of the Respondent was owing to the resignation / removal of the existing auditor i.e., the Complainant. The Board also noted that in Form ADT-1 filed by the company for the

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appointment of Respondent as statutory for the period 01-04-2015 to 31-03-2020, the nature of appointment under point 3(b) of such Form has been shown as "Appointment/Reappointment in AGM" instead of resignation / removal of previous auditor or appointment due to casual vacancy. Further, on perusal of the offer letter of appointment of the Respondent dated 03rd September, 2015 or acceptance letter dated 05th September, 2015 or the Resolution of AGM dated 30th September, 2015, it is seen that nowhere the fact about the removal/resignation of the Complainant from the post of statutory auditor of the Company has been mentioned.

5.4 In this regard the relevant extracts of Section sub section (4) of Section 140 of Companies Act, 2013 which provides for removal, resignation of auditor and giving of special notice were taken into view by the Board:

"(i) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be re-appointed, except where the retiring auditor has completed a consecutive tenure of 5 years or, 10 years, as provided under sub-section (2) of section 139.

(ii) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(iii) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to member of the company, the company shall, unless the representation is received by it too late for it to do so, —

(a) In any notice of the resolution given to members of the company, state the fact of the representation having been made; and

(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company, and if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting"

From the above provision, it is clear that to remove an auditor before the expiry of his term a set procedure is defined under the Companies Act, 2013 which needs to be complied with by the concerned Company. Further, to above, the provision of Item (9) of Part I of First Schedule to the Chartered Accountants Act, 1949 cast a duty on the incoming auditor to ensure before accepting his appointment as auditor of a company whether the

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requirements of Sections 139 and 140 of Companies Act, 2013 (Replaced with Section – 224 and 225 of Companies Act, 1956) in respect of such appointment have been duly complied with or not.

5.5 On a conjoint reading of the aforesaid, the Board was of the view that it is apparent that the due procedure as prescribed under the Companies Act for the appointment of the Respondent and the removal of the Complainant has not been followed. Further, the Respondent in his written submissions made at Prima Facie stage as well as during the course of hearing admitted his mistake in complying with the provision of clause – 9 of Part-I of the First Schedule to the Chartered Accountants Act, 1949. Accordingly, the Board held the Respondent **Guilty** of Professional Misconduct falling within the meaning of Item (9) of Part I of the First Schedule to the Chartered Accountants Act 1949.

5.6 As regard the charge that the appointment letter of the Respondent for his appointment as statutory auditor of the company w.e.f. 30th September 2015 is of dated 1st October 2019 which proves the things as cooked up, the Board noted that the Respondent brought on record the following documents:-

- a) Copy of Intimation Letter dated 3rd September 2015 from Company to appoint the Respondent as Statutory Auditor.
- b) Copy of Respondent's Consent Letter dated 5th September 2015.
- c) Copy of Board Resolution appointing Respondent as Statutory Auditor of the Company dated 30th September 2015.
- d) Copy of Appointment Letter dated 30th September 2015.
- e) Copy of Form AOC 4 and MGT 7 from F.Y. 2015-16 to F.Y. 2019-20 filled by the company.

5.7 The Board on perusal of the documents brought on record by the Respondent was of the view that it is apparent that the Respondent was intimated for his appointment as auditor on 3rd September 2015 and he submitted his Consent Letter dated 5th September 2015 to the Company. Thereafter, the Respondent was given an appointment letter dated 30th September 2015. The Board further noted that Form AOC 4 and MGT 7 from F.Y. 2015-16 to F.Y. 2019-20 were filed by the company with the help of some Company Secretary and the Respondent did not have any role to play in the same. He during the course of hearing expressly denied of having received any alleged appointment letter dated 1st October 2019. Thus, on the basis of documents and submissions on record, the Board was of the view that no misconduct on the part of the Respondent in respect of the said charge is evident and accordingly held him **Not Guilty** in respect of the same.

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CONCLUSION:

6. Thus, In conclusion, in the considered opinion of the Board, the Respondent is **GUILTY** of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949 and **Not 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.

Sd/-

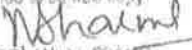
CA. Rajendra Kumar P
(Presiding Officer)

Sd/-

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

DATE: 28-12-2023

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निशा शर्मा / Nisha Sharma
वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
अनुशासनसंवर्धन विभाग / Disciplinary Directorate
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