

N. Sampath Ganesh vs The Institute Of Chartered Accountants ... on 25 February, 2019

Author: C. Hari Shankar

Bench: C. Hari Shankar

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th February, 2019

Pronounced on: 25th February, 2019

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W.P.(C) 1183/2019 & CM APPLs. 5336/2019, 5337/2019

N. SAMPATH GANESH

..... Petitioner

Through:

Mr. Neeraj Kishan Kaul, Sr.
Adv. with Mr. Kamal Shankar,
Mr. Abhimanyu Chopra,
Mr. Pradyuman Sharma,
Mr. Deepak Joshi and Mr.
Shivam, Advs.

versus

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA AND ANR

..... Respondents

Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

+

W.P.(C) 1189/2019 & CM APPLs. 5348/2019, 5349/2019

SHRENIK BAID

..... Petitioner

Through:

Mr. Kapil Sibal, Sr. Adv. and
Mr. Abhinav Vaisisht, Sr. Adv.
with Mr. Manmeet Singh, Ms.
Priya Singh, Mr. Anugrah K.
Frey and Ms. Nishtha
Chaturvedi, Advs.

versus

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

..... Respondent

Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

+

W.P.(C) 1191/2019 & CM APPLs. 5352/2019, 5353/2019

CM No. 5336/2019 in W.P.(C) 1183/2019 & connected matters

UDAYAN SEN

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..... Petitioner

Through:

Mr. Kapil Sibal, Sr. Adv. and
Mr. Abhinav Vaisisht, Sr.

Adv.with Mr. Manmeet Singh,
Ms. Priya Singh, Mr. Anugrah
K. Frey and Ms. Nishtha
Chaturvedi, Adv.

versus

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

..... Respondent

Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

+ W.P.(C) 1192/2019 & CM APPLs. 5354/2019, 5355/2019
UDAYAN SEN Petitioner
Through: Mr. Kapil Sibal, Sr. Adv. and
Mr. Abhinav Vaisisht, Sr.
Adv.with Mr. Manmeet Singh,
Ms. Priya Singh, Mr. Anugrah
K. Frey and Ms. Nishtha
Chaturvedi, Adv.

versus

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

..... Respondent

Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

+ W.P.(C) 1193/2019 & CM APPLs. 5356/2019, 5357/2019
CA JAYESH GANDHI Petitioner
Through: Mr. Kapil Sibal, Sr. Adv. and
Mr. Abhinav Vaisisht, Sr.
Adv.with Mr. Prashant
Pakhiddey, Mr. Pranshu Paul,
Mr. Shalin Arthwan and Ms.
Priya, Adv.

versus

CM No. 5336/2019 in W.P.(C) 1183/2019 & connected matters

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA AND ANR.

..... Respondents

Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

+ W.P.(C) 1194/2019 & CM APPLs. 5358/2019, 5359/2019
CA. RAVI BANSAL Petitioner
Through: Mr. Kapil Sibal, Sr. Adv. and
Mr. Abhinav Vaisisht, Sr.
Adv.with Mr. Prashant
Pakhiddey, Mr. Pranshu Paul,
Mr. Shalin Arthwan and Ms.
Priya, Adv.

versus

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA AND ANR. Respondents
Through: Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Pooja Saigal, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER

% 25.02.2019

CM APPL. 5336/2019 (stay) in	W.P.(C) 1183/2019
CM APPL. 5348/2019 (stay) in	W.P.(C) 1189/2019
CM APPL. 5352/2019 (stay) in	W.P.(C) 1191/2019
CM APPL. 5354/2019 (stay) in	W.P.(C) 1192/2019
CM APPL. 5356/2019 (stay) in	W.P.(C) 1193/2019 &
CM APPL. 5359/2019 (stay) in	W.P.(C) 1194/2019

1. Notices have been issued, in these writ petitions, returnable on 10th April, 2019.
2. Detailed arguments were heard, in the applications for stay, and the present order is being passed consequent thereto.
3. It may be noted, at the outset, that, in penning this order, this Court is conscious of the proscription, contained in the order, dated 31st July, 2017, of the Supreme Court (albeit with reference to an intellectual property dispute), in M/s AZ Tech (India) Ltd v. M/s Intex Technologies (India) Ltd, MANU/SCOR/26917/2017, against penning of detailed judgments at the stage of adjudicating applications for interim relief, which may tantamount to deciding of the main dispute on merits. This order is, therefore, being issued keeping the said proscription in mind.
4. The terminus a quo of the sequence of events, which led to the filing of these petitions, may be said to be a media report, titled "IL & FS Crisis: SFIO proved to look for diversion of loan money". Shortly stated, this report referred to allegations that M/s Infrastructure Leasing & Financial Services (IL&FS) had diverted loans, granted to it by various banks and other institutions, for purposes other than those for which the loans were advanced, resulting in huge debts, which had touched the figure of 91,000 crores. It is not in dispute, however, that the said report made no reference to any auditor, or any person involved in the said diversion.
5. Drawing attention to the aforementioned news report, the Institute of Chartered Accountants of India (ICAI) issued a notice, dated 18th October, 2018, to M/s. BSR and Associates LLP (hereinafter referred to as "BSR"), Chartered Accountants, alleging possible commission of professional misconduct, by the said firm, within the meaning of clauses (5), (6), (7) and (8) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 (hereinafter referred to as "the CA Act"). The notice proposed to have been issued under Rule 8(1)(b) read with Rule 11 of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of

Cases) Rules, 2007 (hereinafter referred to as "the 2007 Rules"), and called upon BSR to respond thereto.

6. While these writ petitions are directed against the aforementioned communication dated 18th October, 2018, as well as the proceedings that have commenced pursuant thereto, learned Senior Counsel appearing for the rival parties were ad idem that, at this stage, and particularly for the purpose of examination of the prayer for interim relief, it may not be appropriate for this Court to enter into the niceties of the said allegations. I propose, therefore, to eschew, in the present order, reference to the said allegations, altogether, and limit my observations and findings to the arguments advanced by learned Senior Counsel on the applications seeking grant of interim relief.

7. The aforementioned notice, dated 18th October, 2018, issued by the ICAI, may be reproduced, in extenso, thus:

"Ref. PPR/NP/065/18-DD/203/INF/2018 18th October, 2018 M/s. BSR & Associates LLP Chartered Accountants (FRN 116231W/W100024) BSR and Associates LLP 5th floor lodha excelsus Apollo Mills Compound N M Joshi Marg Mahalaxmi Mumbai-400011 Dear Sirs, Sub: In the matter of "Information" treated against your firm on the basis of various information available in media reports and/or other sources in respect of IL & FS matter regarding discrepancies in the financial statements of IL & FS Financial Services and auditors report thereon under Section 21 of the Chartered Accountants Act, 1949 Our attention has been drawn to News Reports that have appeared in the Economic Times and Indian Express on 4th October, 2018 titled as "IL&FS crisis: SFIO probe to look for diversion of loan money" and "IL&FS crisis:

Name us but why did not centre name shareholder directors" respectively (Copy enclosed for your ready reference). While we also understand that the Reserve Bank of India (RBI) is also conducting a special audit into the affairs of the said Company, moreover, as per the news reports emanating, the National Company Law Tribunal (NCLT) has since approved the takeover of IL&FS Board by the Government Nominees citing mis- management by the present Board in this crisis-ridden company, in terms of the Article 241 of the Companies Act. A copy of certain news reports dated 4th October, 2018 are attached for your, information. In this regard, it is seen that your firm has audited the financial statements of the captioned entity for the financial year 31st March, 2018 (along with M/S Deloitte Haskins & Sells LLP). The details of facts emanating vis-à-vis your audit are given herein below:-"

1. It is noted that IL&FS Financial Services (IFIN) is a systemically important non-banking finance company that provides credit and other services such as debt syndication and corporate advisor. The Reserve Bank of India had in its annual' inspection report for the financial year 2014-15 observed that net owned funds of the company turned negative and that it was over-

leveraged. Similar observation was made in the subsequent years too. However, it is noted that being statutory auditor of the company only attention was drawn to the concerned note in the financial statements of year 2018 which states as follows:

"In respect of the definition of 'companies in the same group', the Company has adopted a policy which was approved by the board of Directors in October 2007. This policy has been consistently followed, till date, for purpose of disclosure and computation of various ratios as per RBI directions and has been used for current financial statements. The RBI in its inspection reports adopted a different method, which requires the company to consider exposures as per section 370(IB) of the Companies Act, 1956 for determining 'companies in the same group'. This I impacts computation of New Owned Funds (NOF) and Capital to Risk Assets Ratio (CRAR) of the Company. The RBI has given time up to March 31, 2019 to fulfil the minimum NOF and CRAR requirements.

If the applicable RBI Directions were not followed then the concerned auditor has neither stated this fact in auditor's report nor reported about Net Owned Funds/being over leveraged entity.

2. It is noted that the newspapers have reported that as per RBI the share of 'bad loans' is much higher than that disclosed in the annual report and thus the provisioning requirement should have been much higher than what is reflected in the balance sheet. Further provisions against NPAs were also not adequate.

3. It is observed that the Company is servicing its debt by either fresh borrowings or monetization of its assets due to inadequate cash flow from operations. Further there is a mismatch in asset liability; management in short term but still no such issues appear to have been pointed out in your audit report.

4. In view of the above, it was noted that the following indicators exists:

- Fixed term borrowings approaching maturity without realistic prospects of renewal or repayment; or excessive reliance on short term borrowings of finance long-term assets.
- Indications of withdrawal of financial support by bankers/financial institutions.
- Negative operating cash flows.
- Adverse key financial ratios.
- Significant deterioration in the value of assets used to generate cash flows.

which casts significant doubt about the going concern assumption.

Upon a consideration of the above contained therein, it has been decided the said matter be treated as 'Information' against you within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. A copy of the aforesaid Rules is also enclosed herewith for your ready reference.

The aforesaid allegations, if proved, would fall within the purview of Professional Misconduct falling -

within the meaning of Clauses (5), (6), (7) & (8) of Part-I of the Second Schedule to be Chartered Accountants Act, 1949.

Further, in accordance with the provisions of clause (b) of sub-rule (1) of Rule 8 read with Rule 11 of the aforesaid Rules, we are sending herewith a copy of the said Information and request you to disclose the name or names of the member or members who is/are answerable to the allegation/s and send a copy of the aforesaid Information letter along with its enclosures to the said member/members. Thereafter, the member/members answerable is/are required to forward his/her Written Statement, if any, in triplicate, within 21 days of the receipt of this letter.

The member or members answerable to the information should also send a declaration duly signed in the enclosed format. In case, the name/s of member/s answerable to the Information is not disclosed, then all the members who were partners or employees of the firm on the date of occurrence of the alleged misconduct, shall be responsible for answering the allegation or allegations contained in the said Information.

Please note that in case no reply is received from you within the aforesaid period of 21 days, it shall be presumed that you have nothing to state and the matter will be dealt with in accordance with the relevant Rules without any further reference to you.

It may also be noted that any correspondence by your firm in the aforesaid matter should clearly mention the name and designation of the person writing to us on behalf to your firm."

7. Vide letter dated 13th November, 2018, the petitioner responded to the above notice dated 18th October, 2018, of the ICAI. It was asserted, in the said response, that the entire proceedings were without jurisdiction, as media reports could never be regarded as "information", within the meaning of Rule 7 of the 2007 Rules. It was also emphasized that the media reports, annexed to the said communication, contained no allegation against BSR or against the petitioners in these writ petitions.

8. Before proceeding further, it becomes necessary to outline the scheme of the provisions relating to "Misconduct" and the action to be taken in respect thereof, as

contained in Chapter V of the CA Act, which comprises Section 21 to 22G. Section 21, titled "Disciplinary Directorate" requires, for this purpose, the setting up of a Disciplinary Directorate, headed by an officer of the ICAI, to be designated as the Director (Discipline) (referred to, hereinafter, as "Director"). Sub-

section (2) of Section 21 requires the Director, on receipt of any information or complaint, to arrive at a prima facie opinion regarding the occurrence of the alleged misconduct. In case the Director forms the prima facie opinion that misconduct has been committed by a member of the ICAI, he is required, where the misconduct is mentioned in the First Schedule to the CA Act, to place the matter before the Board of Discipline (hereinafter referred to as "BOD") and, where the misconduct is mentioned in the Second Schedule, or in both Schedules, to the CA Act, to place the matter before the Disciplinary Committee. Sub-section (4) of Section 21 requires the Disciplinary Committee to follow such procedure, in investigating into the matter, "as may be specified", and "specified" is defined, in clause (ha) of Section 2, as specified by Rules made under the CA Act.

9. Section 21A of the CA Act refers to the BOD. Sub-section (2) stipulates that the BOD shall follow a summary procedure. Sub-section (3) requires the BOD to grant an opportunity of hearing to the member concerned, and, thereafter, if it finds the member guilty of professional or other misconduct mentioned in the First Schedule, to take one of the actions contemplated therein, which are (a) reprimand,

(b) removal of the name of the member from the Register of Chartered Accountants for upto 3 months, and (c) imposition of fine. Cases in which the Director arrives at the prima facie opinion that there is no case against the concerned member are also required, by sub-section (4) of Section 21A, to be submitted by the Director to the BOD, which, if it agrees with the Director, may close the matter, and, if it does not so agree, may direct the Director to conduct further investigation.

10. Section 21B deals with the Disciplinary Committee, and sub-section (2) thereof requires the Disciplinary Committee to follow "such procedure as may be specified" (meaning, therefore, as specified in the 2007 Rules) while considering cases placed before it. Sub-section (3) of Section 21B is identical to sub-section (3) of Section 21A which deals with the BOD, except for the fact that the Disciplinary Committee is, in addition to reprimanding the member and/or fining him, empowered to remove the name of the member from the Register permanently, or for such period as it thinks fit.

11. Section 21C of the CA Act confers, on the Director, the BOD and the Disciplinary Committee, the powers of a civil court, in respect of (a) summoning and enforcing the attendance of any person and examining such person on oath, (b) discovery and production of any document, and (c) receiving evidence on affidavit.

12. Proceeding to the 2007 Rules, it is seen that, while Rules 3 to 6 thereof deal with "complaints", Rule 7 deals with "information".

13. Rule 3 deals with the "procedure for filing complaint", Rule 4 deals with the fee to be paid therefor, Rule 5 deals with the registration of the complaint, and Rule 6 deals with the withdrawal of

the complaint. Of these, Rules 4 and 6 are of no significance, so far as the controversy in issue is concerned.

14. Rule 3, which sets out the procedure for filing a complaint, requires the complaint to be filed in Form I (annexed to the 2007 Rules), before the Director, in person or by post or courier, and sub-rule (6) requires every complaint, received by the Directorate, to be acknowledged by ordinary post, together with an acknowledgement number. Sub-rule (1) of Rule 5 which, in a way, takes over from where sub-rule (6) of Rule 3 leaves off, requires an authorized officer to endorse, on every complaint, the date of its receipt, and to sign the endorsement. The complaint is, thereafter, required, by sub-rule (2), to be scrutinized by the Director, or by an officer authorized by him and, if found to be in order, to be registered under sub-rule (3). The remaining sub-rules of Rule 5 do not impact the present controversy.

15. Rule 7 deals with "Information" and, inasmuch as the notice dated 18th October, 2018, purported to have been issued under the said Rule, deserves to be reproduced, in extenso, thus:

"7. Information. -

(1) Any written information containing allegation or allegations against a member or a firm, received in person or by post or courier, by the Directorate, which is not in Form I under sub-rule (1) of rule 3, shall be treated as information received under section 21 of the Act and shall be dealt with in accordance with the provisions of these rules.

(2) On receipt of such an information, the sender of the information, including the Central Government, any State Government or any statutory authority, shall be, in the first instance, asked whether he or it would like to file a complaint in Form I apprising him of, the following information, ☐

(a) that relatively longer time is taken for disposal of any information than the complaint;

(b) that the person giving information will not have the right to be represented during the investigation or hearing of the case;

(c) that the Institute will be under no obligation to inform the sender the information of the progress made in respect of the information received under sub-rule (1) including the final orders: Provided that where the sender of the information is the Central Government, any State Government or any statutory authority, a copy of final order shall be sent to such sender.

(3) An anonymous information received by the Directorate will not be entertained by the Directorate."

16. Consequent to receipt of a complaint, the Director is required to proceed in the manner as prescribed by Rules 8, 9, 10 and 11 of the 2007 Rules, which read as under:

"Procedure of Investigation

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 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 allegation 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 or any 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.

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.

10. Mode of Sending Notice.- (1) Every notice or letter issued by the Director, Board of Discipline, or the Committee under these rules shall be sent to the member or the firm or any other person, by registered post with acknowledgement due or speed post, except where specified otherwise in any rule.

(2) If any notice or letter is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice or letter, the notice or letter shall be deemed to have been served.

(3) If the notice or letter is returned with an endorsement to the effect that the addressee, cannot be found at the address given, the Director shall ask the complainant or any other person who may be in a position to provide another address of the member, or firm or person whose address is found to be not correct, and on production of the correct address, a fresh notice or letter shall be issued at such address.

(4) Where the notice or letter is returned under sub- rule (3), it may be served by fixing a copy thereof in some conspicuous place at the professional address or residence of the respondent which was last registered with the Institute or in such other under as the Board of Discipline may think fit and such service shall be deemed to be sufficient service for the purposes of these rules.

11. Certain provisions relating to complaint also to be applicable for information relating to misconduct of members.-

The procedure laid down for dealing with complaints in sub-rule (6) of rule 3, sub-rules (1), (2), (3) and (4) of rule 5, sub-rules (1), (2), (3) and (5) of rule 8, rule 9 and rule 10 shall also apply to

information received by the Director relating to misconduct of members."

17. Apparently, in compliance with Rule 9(1) of the 2007 Rules, the Director of the Disciplinary Directorate of ICAI, communicated on 6th December, 2018 his "prima facie opinion" to BSR, in which he opined that BSR, prima facie, was guilty of professional misconduct. The said letter was forwarded, to BSR, by the Disciplinary Committee of the ICAI, to file its written statement with respect thereto, within 21 days of receipt of the letter i.e. by 31st December, 2018.

18. Before the said Committee, personal hearing was fixed on 28 th December, 2018, vide notice dated 12th December, 2018. On receiving the said notice, the petitioner sought extension of time, to file his reply thereto, till 15th February, 2019.

19. Vide communication dated 26th December, 2018, addressed to the petitioner, the Disciplinary Committee extended the time granted to the petitioner to file reply till 24th January, 2019.

20. Vide notice dated 8th January, 2019, addressed to the petitioner, by the ICAI, personal hearing was fixed, before the Disciplinary Committee on 29th and 30th January, 2019.

21. This was followed by further communication dated, 15 th January, 2019, by the ICAI, directing the petitioner to produce evidence to substantiate his reply, on 29th January, 2019, when hearing was fixed.

22. The petitioner responded, by filing written statement, dated 24 th January, 2019, in which, while asserting once again that the proceedings were bad for want of jurisdiction, as media reports could not be regarded as "information" within the meaning of Rule 7 of the 2007 Rules, the petitioner also made submissions on merits. The petitioner further named a former Deputy Governor of the Reserve Bank of India, as an expert witness whose evidence he sought to cite in his favour before the Disciplinary Committee.

23. The writ petitions aver that, on 29th January, 2019, when the matter was taken up by the Disciplinary Committee, the Director refused to permit the petitioners to lead the evidence of the aforementioned expert witness, stating that he himself was competent to examine the issue. The petitioners' objection, to the effect that the proceedings were being conducted in violation of sub-rules (14) and (16) of Rule 18 of the 2007 Rules, it is contended, were to no avail.

24. The Deputy Director in the Disciplinary Directorate, thereafter, issued, to the petitioner, a notice/letter, dated 31st January, 2019, which has provoked the petitioner to approach this Court. This notice fixed the next hearing, before the Disciplinary Committee, on 5 th February, 2019, and directed the petitioners to appear on the said date with oral or documentary evidence. The petitioners had also been permitted to engage an authorized representative to represent them.

25. It is in these circumstances, and at this stage, that the petitioners have moved this Court by means of these writ petitions, which contain prayers in the alternative. The prayer clause, in WP (C) 1183/2019 - which is representative of the prayer clause in all these petitions - may be reproduced

thus:

"A. Hold and declare the present proceedings against the petitioner bearing Ref. No.PPR/65/18- DD/203/INF/18-DC/844/2018, including the proceedings before the Respondent No.2 as being without jurisdiction, null and void ab initio and without authority of the law and consequently, quash and set aside the present proceedings qua the petitioner, which have been instituted without there being any 'information' against the petitioner to initiate such proceedings in terms of Section 21 of the CA Act read with Rule 7 further read with Rules 5 and 11 of the Rules;

Alternatively and without prejudice to Prayer A B. Issue an appropriate writ, order or direction in the nature of prohibition, setting aside and quashing the Impugned Letter dated 31st January, 2019 issued in pursuance of the hearing on 29.01.2019, to the extent requiring the petitioner to address submissions on merits in the matter, without affording him with an opportunity to lead evidence in defense and without considering his application filed under Rule 18 (14) for production of documents, in breach of the principles of natural justice and the procedure prescribed under the Rules; and C. Issue an appropriate writ, order or direction to the respondent to permit the Petitioner to present his evidence, including, the right to seek summoning of the appropriate witness(es) and production of documents through the Respondent No.2 in terms of Rule 18(14) of the Rules and a reasonable time thereafter to consider the same and prepare his defense; and D. Issue Rule Nisi in terms of prayers A or B and C above.

E. Pass any such other and further orders and/or directions in favour of the Petitioners as may be necessary and expedient in the facts and circumstances of the present case."

26. Detailed arguments were advanced, by learned Senior Counsel Mr. Kapil Sibal and Mr. Neeraj Krishan Kaul for the petitioners, and Mr. A. S. Chandhiok for the respondent, on the application for stay of the proceedings before the Disciplinary Committee.

27. The submissions of learned Senior Counsel appearing for the petitioners may be enumerated, for the sake of clarity and convenience, thus:

(i) The proceedings were void ab initio. The communication, dated 18th October, 2018 supra, wherefrom they emanated, completely erred in treating the information contained in the news reports, enclosed therewith, as "information" within the meaning of Rule 7 of the 2007 Rules.

- Rule 7 required the information to
- (a) be in writing,
 - (b) contain allegation or allegations against a member of the firm in question, and
 - (c) be received in person or by post or courier.

The news report, on which the communication dated 18 th October, 2018 relied, did not satisfy any of these tests.

(ii) The news report did not make any allegation even against BSR, let alone against any of the individual petitioners. They were not, therefore, in a position to know the exact case against them, which they were required to answer.

(iii) Rule 7(2) required the "sender of the information" to, in the first instance, be asked as to whether he would like to file a complaint in Form I annexed to the 2007 Rules. This was impossible of compliance, where the information was in the form of a news report.

(iv) Rule 7(3) stipulated, further, that anonymous information would not be entertained in the Directorate. The news report was analogous to anonymous information, insofar as the scheme of the Rules was concerned.

(v) The procedure contemplated by the 2007 Rules was observed only in its breach. Rule 9 required the Director to examine the complaint, written statement, rejoinder and other additional documents, and form a prima facie opinion regarding guilt, or otherwise, of the member of the firm concerned, of the commission of misconduct. Where the prima facie opinion of the Director was that the member of the firm was guilty of misconduct, he was required to place the opinion, along with the complaint and all other relevant papers, before the BOD and, where he felt that the member of the firm had committed misconduct under the Second Schedule, or under both First and Second Schedules, to place the matter before the Committee. In either case, Rules 14 and 15 prescribed a detailed and elaborate procedure to be followed by the BOD or the Committee, as the case may be. In the present case, inasmuch as the matter was referred to the Committee, and the allegation against the petitioners was of commission of misconduct under the Second Schedule to the CA Act, Rule 18 applied. Sub-rules (11) to (13) clearly required that

(a) the Committee would first "take all such evidence as may be produced by the Director, including oral examination of witnesses and production of documents",

(b) "after the presenting of evidence by the Director is over", the complainant would be given an opportunity to present any additional evidence, after satisfying the Committee that it was relevant and had not been brought forward during the presentation by the Director, be called upon to enter upon his defence and produce his evidence. In the case at hand, the Committee was, in clear breach of the above scheme, requiring the petitioners to produce their defence before calling for the evidence of the Director. Such proceedings, which were clearly in the teeth of the regulatory dispensation, could not be allowed to continue.

(vi) Para 8 of the statement of the case, as presented by the Director to the Committee, clearly acknowledged thus:

"At the outset, it is felt here necessary to mention that Disciplinary Directorate had written to various Government agencies involved in the investigation of this matter to

share the relevant details with ICAI so as to examine at the level of this Directorate the same to identify the role of concerned auditors, if any in the matter. However, the information were not provided by these agencies. Certain details were also sought from the new Board of the parent company which were also not provided by the Company. Therefore, this prima facie opinion is based on limited information available on record with the Directorate."

(Emphasis supplied) Proceedings against Chartered Accountants, which had serious and deleterious ramifications, could not be initiated on such a flimsy foundation.

(vii) The petitioners had been asked to produce the evidence in their defence without even been made known the case against them.

28. To the above submissions, Mr. Chandhiok, learned Senior Counsel appearing for the respondents, replied thus:

(i) Section 22 of the CA Act cast, on the Director, the "duty ... under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances". Sub-section (2) of Section 21 required the Director to arrive at a prima facie opinion on the occurrence of the alleged misconduct "on receipt of any information or complaint". The Director could, therefore, take cognizance either on the receipt of information, or on the receipt of a complaint. The 2007 Rules dealt with these two categories of cases separately, in Rules 3 to 6, and Rule 7, respectively. The procedure, on which learned Senior Counsel for the petitioner were placing such reliance, was the procedure outlined in the 2007 Rules for dealing with complaints, not with information.

(ii) Learned Senior Counsel for the petitioners were attempting to read the initiating communication dated 18 th October, 2018, in a truncated fashion. The communication was not based on news items. No doubt, news reports made the Director wise to the fact that serious financial malfeasance may have taken place. Thereafter, however, the communication noted that the Reserve Bank of India (RBI) was conducting a special audit into the affairs of IL&FS, and the National Company Law Tribunal had also approved takeover of the Board of the IL&FS by government nominees citing mismanagement by the existing Board of the said Company, under Section 241 of the "Companies Act, 2013". Reliance was also placed on the annual inspection report of the RBI and to the financial statements of IL&FS for the year 2018. The inquiry was being initiated "upon consideration of the above", by deciding to treat "the said matter as 'information'" under Rule 7 of the 2007 Rules. Moreover, the communication clearly referred to the facts, enumerated therein, as "facts emanating vis-à-vis your audit". The inquiry was not, therefore, initiated, as learned Senior Counsel for the petitioners had sought to submit, solely on the basis of news reports.

(iii) The submission that the communication dated 18th October 2018 did not implicate the petitioners, or indicate their complicity in the IL&FS affair, was also meritless, as BSR, the statutory auditor of IL&FS during the period in question, was answerable for the allegations against IL&FS. No further elaboration of the role of the petitioners was, therefore, required, at that stage.

(iv) The petitioners had, moreover, filed detailed replies to the communication dated 18th October, 2018, meeting the case on merits.

(v) The petitioners could not complain that they had not been apprised of the allegations against them, as these allegations were enumerated in para 10 of the written statement of case presented to the Committee by the Director.

(vi) Apropos the petitioners' request for permission to lead their evidence, it was essential that the petitioners disclose the necessity to lead the evidence of any particular witness, before the request could be allowed.

Reliance was placed, by Mr. Chandhiok, on para 30 of the judgment of the Division Bench of this Court in *The Institute of Chartered Accountants of India v. P. Rama Krishna*, 2011 (126) DRJ 151, which was upheld in appeal by the Supreme Court, *Larsen & Toubro Ltd v. State of Jharkhand*, (2017) 13 SCC 780 and para 3 of the decision in *Talluri Srinivas v. The Institute of Chartered Accountants of India*, 2012 SCC Online Del 1512.

29. Advancing submissions in rejoinder, learned Senior Counsel for the petitioners submitted thus:

(i) Sub-section (4) of Section 21 of the CA Act, on which Mr. Chandhiok had placed reliance, required the Disciplinary Directorate to, "in order to make investigations under the provisions of this Act ... (follow) such procedure as may be specified". Additionally, sub-section (2) of Section 21B expressly stipulated that the Disciplinary Committee "while considering the cases placed before it shall follow such procedure as may be specified". Clauses (c) and (d), of Section 29A(2), made it clear that this procedure was to be found in the Rules framed under the Act, viz., the 2007 Rules. The use of the word "shall" in Section 21(4) and Section 21B(2) made it clear that the requirement of adhering, strictly, to the procedure stipulated in the 2007 Rules, was indispensable as well as imperative. That had not been done in the present case.

(ii) The submission, of Mr. Chandhiok, that the Disciplinary Directorate was proceeding on the basis of "information", as contemplated by Rule 7 of the 2007 Rules, inasmuch as the financial statement of IL&FS had also been relied upon, in the communication dated 18th October, 2018, was neither here nor there, as the "information", on the basis whereof the Directorate could proceed under Rule 7, had to contain allegation(s) against the members of the firm being inquired into, and the financial statement of IL&FS could not be said to contain any allegation against any of the petitioners.

(iii) Moreover, Rule 7(2) of the 2007 Rules made it clear that Rule 7 could apply only to information of which there was a sender. No such "sender" existed in the present case.

(iv) The 2007 Rules, which were framed under the CA Act, therefore, did not permit the Director to conduct a roving and fishing inquiry, without any adequate material on the basis of which the inquiry could be initiated in the first place.

Learned Senior Counsel also sought to distinguish the judicial pronouncements on which Mr. Chandhiok had placed reliance.

30. The submissions advanced by learned counsel, on either side, are undoubtedly weighty, and merit consideration.

31. I am prima facie in agreement with the argument, of learned Senior Counsel for the petitioners, that strict and rigorous adherence to the 2007 Rules, is the sine qua non for a valid enquiry, thereunder. This is apparent from the use of the word "shall" in Section 21 (4), as well as Section 21-B(2), of the CA Act.

32. It would also be apposite, before proceeding to the regime of the 2007 Rules, to examine Chapter V of the CA Act, which contains the provisions relating to "Misconduct", as well as the various Sections of the said Act, contained in the said Chapter.

33. Section 21(1) requires the ICAI to, by Notification, establish a Disciplinary Directorate, headed by the Director, for making investigations in respect of any information or complaint received by the Directorate. On receipt of any information or complaint, accompanied by the prescribed fee, sub-section (2) mandates that the Director shall arrive at a prima facie opinion on the occurrence of the alleged misconduct. Proceedings can, therefore, clearly be initiated consequent to receipt either of "information" or a "complaint". However, significantly, the CA Act does not condescend to define either of the said expressions, namely "information" or "complaint". This is a clear lacuna, which the legislature would do well to plug.

34. Misconducts are enumerated in the First, as well as the Second, Schedule to the CA Act. Depending on whether the prima facie opinion of the Director, arrived at, in terms of Section 21(2) (supra), is that the allegedly delinquent member is guilty of professional or other misconduct mentioned in the First, or the Second Schedule, different statutory dispensations apply. Sub-section (3) of Section 21 postulates that, where the Director is of the opinion that the member is guilty of misconduct mentioned in the First Schedule to the Act, he shall place the matter before the BOD, whereas, where he is of the opinion that the member is guilty of misconduct mentioned in the Second Schedule, or in both the First and Second Schedules, he shall place the matter before the Disciplinary Committee. Where the matter is placed before the BOD, i.e., where the opinion of the Director is that the member is guilty of misconduct specified in the First Schedule to the Act, Section 21A(2) requires the BOD to follow summary disposal procedure. However, where the matter is placed before the Disciplinary Committee, i.e. where the prima facie opinion of the Director is that

the member is guilty of professional or other misconduct specified in the Second Schedule to the CA Act, sub- section (2) of Section 21B mandates (as is apparent from the use of the word "shall") the Committee to follow "such procedure as may be specified". Section 21C of the CA Act confers, on the Committee, as well as the Director, the powers as vested in a civil court under the Code of Civil Procedure, 1908, in respect of summoning and enforcing the attendance of any person, examination of such person on oath, discovery and production of documents and receiving of evidence on affidavit.

35. "Complaints" are, dealt with, by Rules 3 to 6 of the 2007 Rules, whereas "information" is covered by Rule 7 thereof. As is noted hereinabove, Mr. Chandhiok has considerably stressed the difference between these two regimes.

36. "Complaints", under Section 21 of the Act, have, as per Rule 3 (1) of the 2007 Rules, necessarily to be filed in Form I annexed to the 2007 Rules, in triplicate, before the Director, in person or by post or by courier, and are required to be acknowledged, under Rule 3(6), by the Directorate, by ordinary post along with an acknowledgement number. Rule 4 requires the complaint to be accompanied by a fee.

Rule 5(1) contemplates registration, by the Director, or by officers/officers authorised by him, of the date on which the complaint is presented to the Director, by way of endorsement on the complaint itself, accompanied by the signature of the Director or officer/officers. Sub- rule (2) of Rule 5 requires the complaint to be scrutinised by the Director, or by the authorised officer/officers and, if it is found in order, sub-rule (3) contemplates registration of the complaint and allocation, to it, of a unique reference number, to be quoted in all future correspondence. Where the complaint is, on the other hand, found to be defective, sub-rule (5) of Rule 5 requires the complaint to be returned for ratification and resubmission, within such time as may be determined by the Director. Where the defect/defects is/are not so rectified, the Director is mandatorily required, by sub-rule (6) of Rule 5, to form an opinion that there is no prima facie case, and to present the complaint before the BOD, for its closure, whereupon there is the option, under sub- rule (7), either to agree with the opinion of the Director and pass an order for closure of the case, or to disagree with the opinion of the Director and advice to further investigate the matter. Rule 6 deals with withdrawal of a complaint.

37. It is nobody's case that any "complaint", as would attract Rules 3 to 5 of the 2007 Rules, was ever received, at any point of time, by the Directorate, against any of the petitioners.

38. The submissions advanced by learned Senior Counsel appearing for the petitioners may be conveniently categorised as (i) submissions regarding the validity of the enquiry itself, as initiated under Rule 7 of the 2007 Rules, and (ii) submissions regarding the validity of the procedure being followed, firstly by the Director while arriving at his prima facie opinion and, thereafter, by the Disciplinary Committee, till the present stage.

39. Having carefully examined the submissions advanced by both sides before me, I am of the opinion that, though the grievances voiced, by learned Senior Counsel for the petitioners, regarding the manner in which the proceedings are being conducted by the Disciplinary Committee, chiefly the

objection with respect to violation of Rule 18(11) to (13) of the Rules, merit serious consideration, before arriving at any prima facie view regarding the validity of the procedure being followed by the Disciplinary Committee, it would be appropriate to call for a response, from the respondents, on the said objection, as contained in the writ petition and as argued, before me, by learned Senior Counsel appearing for the petitioners.

40. Regarding the first aspect, i.e., the validity of the enquiry proceedings, seen in the backdrop of the provisions of the Act and the 2007 Rules, especially Rule 7, the submission, of learned Senior Counsel appearing for the petitioners, was that the entire inquisitorial exercise, in the present case, was vitiated from the beginning, as the invocation, by the Director, of Rule 7 of the 2007 Rules was itself illegal.

41. Rule 7 of the 2007 Rules, which has been invoked in the present case, deals with "information". At the same time, it is significant that Rule 7 does not define "information". No definition of "information" is, for that matter, to be found anywhere in the 2007 Rules - as was the position obtaining in the CA Act as well. What Rule 7 ordains, prima facie, is that any information, which satisfies the indicia laid down in sub- rule (1) thereof, is liable to be treated as "information" received under Section 21 of the CA Act. These indicia are that the information is in writing, it contains allegations against a member/members of the firm, and is received in person, or by post or courier.

39. To the initial submission, of learned Senior Counsel for the petitioners, that the entire exercise being conducted, by the Director, or the Committee, in the present case, against the petitioners, was vitiated ab initio, as it was based on a news report, which could not constitute "information", within the meaning of Rule 7 of the 2007 Rules, Mr. Chandhiok sought to contend that the inquisitorial exercise had not been commenced merely on the basis of a news report, though, unquestionably, the news report was the first indicator, to the Director, of the diversion of loan money allegedly effected by IL&FS. Mr. Chandhiok sought to contend that a holistic reading of the communication, dated 18th October, 2018, indicated that it was based not only on the news report, but on various other material, set out in the said communication, chiefly the financial statement of IL&FS. The response of learned Senior Counsel for the petitioners, in rejoinder, was that financial statements, too, could not qualify as "information", within the meaning of Rule 7 of the 2007 Rules, as financial statements could not possibly contain any allegation/allegations against the petitioners, which was one of the essential indicia for any information to merit cognizance under Rule 7.

40. In conjunction therewith, learned Senior Counsel also contended that the petitioners had not been informed about the allegation against them. Rule 7, it was sought to be contended, could not be the basis of ferretting out information, but could be invoked only where information already existed in the first place. Such "information", it was submitted, necessarily had to contain allegations against the members of the firm against which the enquiry was being conducted. In the absence of any such "allegations" being made known to them, the members were obviously unable to furnish any meaningful response. Effectively, therefore, what the learned senior Counsel for the petitioner would seek to contend is that the Director/Committee was, in the present case, shooting, as it were, in the dark, which was contrary to the spirit of the Act as well as the 2007 Rules, which set out a

detailed procedure even before the inquisitorial exercise could commence.

41. Learned Senior Counsel have also drawn my attention to the fact that, in their various communications, addressed to the Director and the Committee, after issuance of the missive dated 18 th October, 2018 (supra), they had specifically objected that, in the present case, "information", satisfying the criteria set out in Rule 7 of the 2007 Rules, was lacking and that, therefore, the entire inquisitorial exercise, commencing from the issuance of the communication dated 18th October, 2018, was bad for want of jurisdiction. It is also clear that there has been no response, by the Director or the Committee, to this preliminary objection.

43. Learned Senior Counsel appearing for the petitioners are correct in their submission that the consequence of having to suffer the ignominy of enquiry, under the provisions of the CA Act and the 2007 Rules, are by itself deleterious, irrespective of the outcome, and that the result, were the final decision, of the Disciplinary Committee, to be adverse to the members of the firm being enquired into, could be disastrous. This is also apparent from the fact that a very detailed and exhaustive procedure has been prescribed, in the 2007 Rules, to be followed before such a decision is arrived at. In case, as the petitioners contend, the proceedings before the Committee are actually bad for want of jurisdiction, or have been commenced in a manner foreign to the scheme contained in the 2007 Rules, it would be a travesty of justice to require them to suffer the said proceedings.

44. As has already been noted herein above, the petitioners had taken a preliminary objection, before the Disciplinary Committee, to the effect that the entire proceedings are vitiated ab initio, not having been initiated in accordance with Rule 7 of the 2007 Rules. In my opinion, it would be appropriate, before this Court arrives at a prima facie view regarding the said objection, to have, before it, the opinion of the Disciplinary Committee thereon. I am, therefore, of the opinion that, in the interests of justice, the Disciplinary Committee ought to be directed to address the preliminary submission, by the petitioners, that the enquiry proceedings being conducted by, and before, it, are unsustainable ab initio, not having been commenced on the basis of any "information", as would satisfy the test laid down in Rule 7 of the 2007 Rules, and to return a finding, thereon, before proceeding with the enquiry. I have made certain observations, hereinabove, in this regard, without returning any categorical finding, even tentative, on this issue which should, in my view, firstly engage the attention of the Committee.

45. In the circumstances, for the present, the following directions are issued:

(i) Let notice issue, on the stay applications, i.e. CM Nos.

5336/2019, 5348/2019, 5352/2019, 5354/2019, 5356/2019 and 5359/2019, calling for a response, from the respondents, thereto, within a period of three weeks, with advance copy to the petitioner, who may file rejoinder, thereto, if any, within one week thereof. This period shall be reckoned from the date of pronouncement of this order, i.e. 25th February, 2019. Apart from the averments contained in the pleadings of the petitioners, the response of the respondents would address, inter alia, all the submissions of the learned Senior Counsel for the petitioners, as noted hereinabove.

(ii) The Committee is directed to examine, as a preliminary objection by the petitioners, the submission that the enquiry proceedings being conducted by it are without jurisdiction, as they have not been initiated on "information" which satisfies the tests prescribed in Rule 7 of the 2007 Rules. For this purpose, an opportunity of personal hearing would be granted to both sides, for which they are directed to be present, before the Committee on 1st March, 2019. The committee is at liberty to hear the matter on the said date, on the aforesaid preliminary objection, or to fix a date for hearing thereon, as per its convenience. Both sides would be at liberty to file a written note of submissions, before the Committee, limited to the aforesaid preliminary objection. The parties would also be at liberty to be represented by counsel, should they so desire. It is made clear that the brief of the Committee, at this hearing, would only be to decide the preliminary objection of the petitioners, on the issue of whether the enquiry proceedings could have been initiated, at all, and would not extend to examining the manner in which the proceedings are being conducted thereafter, the procedure that has been followed while conducting the enquiry, or the objections of the petitioners in that regard.

(iii) The Disciplinary Committee is directed to pass a speaking and reasoned order, on the aforesaid preliminary objection of the petitioners, at least one week prior to the next date of hearing. The respondents are directed to file the said order, as and when passed, before this Court, under cover of an appropriate index, after service of an advance copy, thereof, on learned Counsel for the petitioners.

(iv) In arriving at its finding, the Committee would be guided by the observations made by me hereinabove.

46. It is made clear that the time schedules fixed, for filing of response to the stay applications by the respondents, rejoinder, thereto, by the petitioners, and for passing of order, by the Committee, on the aforesaid preliminary objection of the petitioners, are to be strictly followed, and that no relaxation of extension thereof would be granted under any circumstances.

47. The stay applications filed by the petitioners would be taken up for further consideration by this Court, after having, before it, the counter-affidavit of the respondents thereto, the rejoinder of the petitioners, if any, and the order of the Committee, on the aforementioned preliminary objection of the petitioners.

48. List these stay applications for further consideration on 10th April, 2019.

49. Dasti.

C. HARI SHANKAR, J FEBRUARY 25, 2019 dsn