

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949, Cost & Works Accountants Act, 1959 and the Company Secretaries Act, 1980)

Judgment delivered on: 07.11.2021

APPEAL NO. 15/ICWAI/2021

[Arising out of the Impugned Order dated 20.09.2020 passed by Board of Discipline (Constituted under Section 21A of the Cost & Works Accountants Act, 1959)]

Niranjan Mishra

....Appellant

Vs.

Rabindra Nath Das

....Respondent No. 1

Secretary, ICWAI

....Respondent No. 2

QUORUM:

Hon'ble Mr. Justice Shashi Kant Gupta

Chairperson

Hon'ble Mr. Praveen Garg

Member

Hon'ble Mr. Anand Mohan Bajaj

Member

Hon'ble Mr. B. M. Sharma

Member

Hon'ble Mr. Avijit Goswami

Member

For Appellant:

Mr. Rahul Malhotra, Advocate along with Appellant in person.

For Respondent(s):

Mr. Piyush Sharma along with Mr. Saksham Tyagi, Advocates for Respondent No. 1.

Mr. J. S Bakshi, Senior Advocate along with Mr. Bhaskar Bhardwaj, Mr. A. S Bakshi, Mr. Jagdeep Sharma, Mr. Nishit Agarwal, Advocates for Respondent No. 2.

JUDGMENT

Justice Shashi Kant Gupta (Former Judge), Chairperson (for himself, Praveen Garg and Anand Mohan Bajaj, Members)

1. The bench is convened through video conferencing.

2. This appeal has been filed against the composite impugned order dated 20.09.2020 of the Board of Discipline whereby the Appellant was held guilty of other misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Cost & Works Accountants Act, 1959 (hereinafter referred to as 'Act') and awarded punishment of Reprimand and a fine of Rs. 1,000/- (Rupees One Thousand Only).
3. At the very outset, Mr. Rahul Malhotra, the Learned Counsel for the Appellant contended that the complaint dated 02.03.2020 filed by CMA Rabindra Nath Das, Respondent No.1 against CMA Niranjana Mishra, Appellant before Director (Discipline) was not maintainable as it suffered from inherent lack of jurisdiction to adjudicate the dispute in connection with conduct of election, as such prayed that the question of maintainability of the complaint be decided as a preliminary issue.
4. Since the issue raised by the appellant is an issue of law only relating to the jurisdiction of the Board of Discipline, We, therefore, proceed to decide the issue as a preliminary issue pertaining to the maintainability of the complaint dated 02.03.2020 filed by CMA Rabindra Nath Das, Respondent No.1 against CMA Niranjana Mishra, Appellant before Director (Discipline) in connection with conduct of election.

FACTUAL MATRIX

5. The facts leading to the present appeal in nut-shell are as under:
 - 5.1 The Appellant, a candidate for Election to the Council of the Institute of Cost Accountants of India for the term 2019-23, was declared elected by the Returning Officer vide notification dated 8th July, 2019 by securing more than 700 first preference votes.
 - 5.2 A complaint against the Appellant was filed on 02-03-2020 by Respondent no.1 CMA Rabindra Nath Das before the Respondent No. 2 'The Institute of Cost Accountants of India', inter alia alleging therein that the Election Code of Conduct came into force from the date of issue of election notification by the Returning Officer on 26th March, 2019. The Appellant, a candidate for Election to the Council of the Institute of Cost Accountants of India for the term 2019-23, was declared elected by the Returning Officer vide notification dated 8th July, 2019. It is understood that the concerned candidate obtained more than 700 first preference

votes. Appellant herein adopted various unfair means by violating provisions of the election code of conduct including publishing his photograph beyond the prescribed size as laid down in the Election Code of Conduct. His deliberate and calculated projection of his image was aimed at solely to lure voters with claims of achievements by him so that they cast their vote in his favour. He had published his photograph with several Ministers and other dignitaries of the Government who were invited in various seminars of the Institute to give a misleading and false impression to the voters in particular and the members in general, that as if, the Ministers and dignitaries were campaigning for him and he had their support and encouragement for his candidature in the ensuing election that was held on 28th June, 2019. If he had followed the code of conduct and not made such calculated projections of his image, CMA Niranjan Mishra would not have got elected. Thus, according to the complainant, the Appellant herein violated the model code of conduct framed in connection with the conduct of election.

- 5.3 Based on the aforesaid complaint, disciplinary proceedings were initiated against the Appellant. The Board of Discipline thereupon by order dated 20.09.2020, held the Appellant guilty of other misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Act and awarded punishment of Reprimand and a fine of Rs.1,000/- (Rupees One Thousand Only). As a result of the order dated 20.09.2020, the Appellant stood removed from his seat as central council member by virtue of provisions of Section 13(2) of the Act.
- 5.4 By order dated 25.05.2021, this Appellate Authority stayed the operation of the composite Impugned Order dated 20.09.2020 till the disposal of the appeal. The aforesaid interim order dated 25.05.2021 was not challenged by the respondents, as such it attained the finality. Despite the order passed by this Appellate Authority staying the impugned order, the Appellant was not permitted to function as the member of the Central Council, as such, the Appellant filed an application dated 19.07.2021 before this Appellate Authority with the following prayers:
- (a) Pass an order allowing the present application; closing the right of the Respondents to file reply to the captioned appeal; and take up the present appeal for final hearing at the earliest;

- (b) Pass an order directing the Respondents to not prevent the Petitioner from attending future meetings of the central council of the Respondent No. 2; discharging other duties as a central council member; provide the Petitioner all the notices, agendas, etc. for the future meetings till the time the order dated 25.05.2021 is in force; and/or
- (c) Pass any such further orders as this Hon'ble Authority deems fit in the present facts and circumstances.

5.5 Appellate Authority, by order dated 04.09.2021, while disposing of the Application dated 19.07.2021 filed by the Appellant, inter-alia observed as hereunder:

"26. In view of the above, we are of the considered opinion that the submissions of the Learned Counsel for the Respondents that the stay granted by this Appellate Authority by order dated 25.05.2021, cannot be so extended as to include the stay of the operation of the findings of the guilt deserves rejection for the reason that the impugned order dated 20.09.2020 of the Board of Discipline is a composite order holding the Appellant guilty and punishing the Appellant with a fine of Rs.1,000/- (Rupees One Thousand Only) and reprimanding him. The Appellate Authority, by its interim order dated 25.05.2021, has already stayed the operation of the entire composite impugned order dated 20.09.2020. Thus, in view of the above, we clarify that after the passing of the interim order dated 25.05.2021, the Appellant would be entitled to participate in the central council meetings and function as a member of the central council. However, it is made clear that the interim order dated 25.05.2021 shall be subject to the final order which may be passed in this Appeal.

27. With the aforesaid observations, the application dated 19.07.2021 filed by the Appellant stands disposed of."

5.6 Being aggrieved by order dated 04.07.2021 of the Appellate Authority, Respondent No.2 herein filed W.P. (C) 10403/2021 in the High Court of Delhi challenging the order dated 04.09.2021. The Hon'ble High Court of Delhi, by order dated 17.09.2021, *inter alia* directed the Appellate

Authority to decide the instant appeal expeditiously, preferably on day-to-day basis w.e.f. 18.10.2021, the next date fixed for it.

SUBMISSIONS OF LEARNED COUNSEL

6. Mr. Rahul Malhotra, Learned Counsel for the Appellant made the following submissions in support of his contentions regarding non-maintainability of complaint dated 02.03.2020 filed by CMA Rabindra Nath Das, Respondent No.1 against CMA Niranjana Mishra, Appellant before Director (Discipline):

6.1 He first, took us through the scheme governing the election resolution disputes mechanism as provided in the Act and Rules framed thereunder. He submits that Sections 10A and 10B of the Act provide that an aggrieved person can only file a complaint of election dispute and the Tribunal constituted by the Government shall have the exclusive jurisdiction to decide such election dispute. He, further, elaborates that as per Rule 2 (b) of the Cost and Works Accountants (Election Tribunal) Rules, 2006 (Tribunal Rules), 'aggrieved' person means a person who contested that election to the Council to which the dispute pertains and in terms of Rule 2 (c) of Tribunal Rules, 'dispute' means a dispute raised by an aggrieved person arising out of the election to the Council of the Institute.

6.2 The Learned Counsel for the Appellant, further, submits that the subject matter of the complaint pertains to the election disputes and as such the Tribunal constituted under Section 10B (1) of the Act has exclusive jurisdiction to decide election disputes. Moreover, CMA Rabindra Nath Das, Respondent No.1, who filed the said complaint before Director (Discipline), had not contested the election in question, hence, in terms of Rule 2 (b) of the Tribunal Rules, Respondent No.1 does not fall in the definition of 'aggrieved person'. Resultantly, Respondent No.1, not being aggrieved person, was having no locus to file the said complaint even before Director (Discipline).

6.3 The Learned Counsel for the Appellant submits that the Tribunal so constituted only has exclusive jurisdiction to decide dispute arising out of election to Council. Thus, Board of Discipline does not have jurisdiction to decide election disputes. Mr. Rahul Malhotra, the Learned Counsel for the Appellant has, further, submitted that, for the reasons stated above, the Complaint dated 02.03.2020 filed by the Respondent No.1 before the Board of Discipline is not maintainable. He has also submitted that the Appellant

raised the plea of non-maintainability of the said complaint before the Board of Discipline and categorically states that he never abandoned this ground of challenge.

7. Per contra, Mr. Piyush Sharma, the Learned Counsel for the Respondent No. 1, has submitted that the Respondent No.1 (being not falling under the definition of aggrieved person) filed a complaint against the Appellant before the Disciplinary Directorate in pursuance of Rule 42 of the Cost and Works Accountants (Election to the Council) Rules, 2006 (Election Rules). The remedy under Rule 42 of the Election Rules for non-aggrieved persons is in addition to remedy provided to the 'aggrieved person' under Tribunal Rules. He, further submits, that prior to filing a complaint before the Disciplinary Directorate, the Respondent No.1 filed petition before the Secretary of the Institute to forward the same to the Election Tribunal which was not entertained. The Respondent No.1, therefore, filed a complaint seeking his remedy in terms of Section 21 of the Act read with the Cost and Works Accountants (Procedure of Investigation in Professional and other Misconduct and Conduct of Cases) Rules, 2007 read with Rule 42 of the Election Rules.
8. The Learned Counsel for the Respondent No. 1 has further submitted that Rules do not in any way create embargo on the rights of non-aggrieved persons or prohibits them from filing a complaint and rather by insertion of Rule 42 of the Election Rules, the legislature permitted non-aggrieved persons to raise their grievance before Disciplinary Directorate by way of filing a complaint.
9. The Learned Counsel for the Respondent No. 1 submits that as per the scheme of the Act and Rules made thereunder, any person is allowed to file a complaint and/or even information. He further submits that in case, a narrow interpretation is given that non-aggrieved person has no right to file a complaint in relation to the elections, the same will tantamount to render Rule 7 of the Cost and Works Accountants (Procedure of Investigation in Professional and other Misconduct and Conduct of Cases) Rules, 2007 redundant and also against the spirit of the Act.
10. The Learned Counsel for the Respondent No. 1 also submits that any prohibition which has not been specifically found mentioned in any of the provisions of the Act and/ or the Rules, cannot be inferred. Had it been the intention of the legislature, prohibition in filing of complaint by a non-aggrieved person, would have been specifically incorporated in the rules and in absence

of the same, it cannot be interpreted otherwise, as such there should have been an express bar.

11. The Learned Counsel for the Respondent No. 1 made further submissions that the Appellant raised the plea of non-maintainability of complaint only before the Disciplinary Directorate (i.e. before formation of prima facie opinion) and thereafter in his pleadings of next stage i.e written statement filed before Board of Discipline, five rounds of litigation before High Court and even in this present appeal before this Authority has never raised this ground which clearly establish that he has abandoned the said plea. It is settled law that once a plea has been raised and later on intentionally abandoned, aggrieved person loses his right to raise the same at a later stage.

12. The Learned Counsel for the Respondent No. 1 further put forth his submissions that earlier also the Appellate Authority in various appeals has dealt with the matter on merits arising out of the orders passed by Board of Discipline wherein the complaints under Rule 42 of the Election Rules were filed before Disciplinary Directorate, therefore, the same are binding precedents. On the strength of the aforesaid submissions, the Learned Counsel for the Respondent No. 1 finally urged that the Appellate Authority may, therefore, decide the issue of maintainability in favour of the Respondents and against the Appellant and proceed with the matter on merits.

13. Mr. J. S. Bakshi, Learned Senior Counsel representing Respondent No.2 made the following submissions opposing the contentions of Mr. Rahul Malhotra, the Learned Counsel for the Appellant and in support of maintainability of the complaint dated 02-03-2020 filed by Respondent no.1 CMA Rabindra Nath Das before the Respondent No. 2 'The Institute of Cost Accountants of India:

(a) He has submitted that in case any aggrieved person has to file a complaint pertaining to election dispute, the same can be referred to Election Tribunal under Section 10A of the Act. However, in case of any other person or to say the person not falling within the definition of 'aggrieved person', the law provides a remedy by way of filing a complaint under disciplinary mechanism in term of Rule 42 of the Election Rules. The statutory framework by way of insertion of Section 10A has not created any embargo or restriction on filing of complaint (i) by a person not falling under definition of 'the aggrieved person' (ii) or not entertaining a complaint under the disciplinary mechanism. In other words, the Election Tribunal can only deal with a complaint filed by 'the aggrieved person'. The person who is not 'the aggrieved person' cannot be left remediless and has

the remedy of invoking the remedy of 'complaint/ information' under Section 21 of the Act.

(b) He has, further, submitted that it could never be the intent of the legislature to debar any person from filing a complaint against any member of the Institute as the Act itself was promulgated for making provisions for the regulation of the profession of cost and works accountants. The same view is also fortified with by the fact that Cost and Works Accountants (Procedure of Investigation of Professional and other misconduct and Conduct of Cases) Rule, 2007 governing the disciplinary mechanism also allows entertaining of an 'information' which has been in turn interpreted to be a suo-moto power as held by this Authority in the matter of P. Siva Prasad vs Institute of Chartered Accountants of India. Once the legislature has given suo motu powers and specifically allows receipt of information, it is beyond comprehension that it would have restricted filing of complaint in the election related matter only to the aggrieved persons under Section 10A of the Act and it could never be the intention of the legislature that 'non aggrieved persons' cannot file a complaint under Section 21 of the Act and would thus be remediless. In fact, statutory mandate is that 'the aggrieved persons' have to take the 'election tribunal route' and all others, the complainants/informants route under Section 21 of the Act.

(c) He has, further, submitted that in case the legislature intended to restrict the right of filing of complaint to only by the aggrieved person before the Election Tribunal then it could have carved out such restriction specifically and the same cannot be read into the statute when the legislative direction is that the misconduct under first schedule, Part IV, Clause (2) alone, is only to be dealt with by the Board of Discipline under Section 21A of the Act in accordance with Misconduct Rules.

(d) He has, further, submitted that as far as establishment of Election Tribunal, an expert body to deal with the complaint is concerned, it may be considered that Election Tribunal is not a full time Tribunal and therefore, the same remedy is provided only to 'the aggrieved persons', only for limited purpose.

(e) He has submitted that in so far as having two different set of remedies, one for aggrieved person(s) and other for non-aggrieved person is concerned, the same is the case for filing an appeal before this Authority. He has drawn our attention to Section 22E of the Act which provides that only a member

against whom an order of punishment has been passed may file an appeal. Further, he has pointed out that while dealing with issue of interpretation of Section 22E of the Act, this Authority in its orders has held that intent of legislature was to permit this remedy only to the members who has been handed over with a punishment and not to anyone else and therefore in case the complainant has any grievance against the orders passed by Board of Discipline and/ or Disciplinary Committee, he shall approach High Court by way of filing a Writ Petition. Therefore, Rule 42 of the Election Rules gives an inclusive right and the same cannot be read in any way to exclude the right of 'the non-aggrieved person' to file a complaint before the Disciplinary Directorate.

- (f) He has, further, submitted that since Rule 42 of the Election Rules which is an enabling provision provides for disciplinary action for contravention of the provisions, therefore till the time same exists in the statute books, filing of a complaint by 'the non-aggrieved' person under Section 21 of the Act cannot be treated as non-maintainable.
- (g) He has, further, submitted that once the legislature has given power to the Disciplinary Directorate to even entertain 'information' in such a situation leaving apart only complaints, it may not be in the fitness of the things to take an interpretation which on the face of it is averse to the language and intent of Rule 42 of the Election Rules.
- (h) He has, further, submitted that it can never be an intent of legislature to discard the rights of 'the non-aggrieved person' by not making appropriate provisions providing them some remedy under law.
- (i) He has, further, submitted that there is no provision in the Act or the Rules made thereunder wherein the legislature has indicated that the locus of the complainant is required to be gone into or proved for filing a complaint under Section 21. The crucial words being used are 'any information or complaint' received by it.
- (j) He has pointed out that Appellant has never raised the plea of maintainability of the Complaint filed by Respondent No.1 herein either before the Board of Discipline or before the Hon'ble High Court of Delhi in his five rounds of litigation or before this Authority, and therefore the Appellant is estopped from raising such a plea at this stage having abandoned the said plea. Moreover, once the same has not been pleaded

before the Board of Discipline, the Appellant cannot seek a finding on the said issue. It is an admitted fact that the Appellant has raised the plea before the Director Discipline but once the same plea has not been raised / pressed before any forum the only inference bound to fall is that he has given up that plea intentionally before the Hon'ble Writ Court. Even otherwise the Appellant in his written statement filed before the Director Discipline on one hand has stated that the matter should be taken to Election Tribunal and in the same breath also submitted that the Complainant is not an aggrieved party. The remedy available to Respondent No 1 under Rule 42 of the Election Rules cannot be denied to him. He has placed reliance on the judgment of the Hon'ble Supreme Court in Civil Appeal 1537-1538 of 2019 in the case of Deepak Tandon &Anr vs Rajesh Kumar Gupta and submitted that the complaint dated 02.03.2020 filed before the Director (Discipline) is maintainable. In this regard, he has further placed reliance on the judgment in the case of Premchand Manik Chand vs Fort Gloster Jute Manufacturing, AIR 1959 Cal 620. We will deal with these judgments later.

14. We have heard the Learned Counsel for the parties and perused the record. In order to appreciate the rival contentions raised by the learned counsel for the parties and before proceeding with the discussion on merits of this case, it would be apposite to extract the relevant provisions of law which the parties have relied on.

RELEVANT PROVISIONS OF LAW: For ready reference, relevant provisions of law are extracted herein below: -

(a) Rule 42 of the Cost and Works Accountants (Election to the Council) Rules, 2006 provides for disciplinary action against the member in connection with conduct of elections and the same reads as under:

42. Disciplinary action against member in connection with conduct of election. –

(1) A member shall be deemed to have brought disrepute to the Council under item (2) of Part IV of the First Schedule of the Act if, in connection with an election to the Council of the Institute, he is found to have contravened the provisions of sub-rule (2) or all or any of the clauses of sub-rule (3) or sub-rule (4) of this rule.

(2) *Only one manifesto or circular shall be issued by a candidate in relation to the election in the period commencing from the date of issue of final list of nominations to the candidates.*

(3) *A manifesto or Circular issued shall conform to the following requirements in the interest of maintaining dignity in the election, namely :-*

(a) *A manifesto or circular shall contain information regarding the candidate himself and shall not make any reference, directly or indirectly, to any other candidate;*

(b) *The information, which a candidate may furnish in a manifesto or Circular regarding himself, shall not differ in any material respect from the information furnished by the Institute to the voters under rule 9. A candidate may, however, include in such manifesto or circular, any additional information not contained in the information furnished under rule 9;*

(c) *A manifesto or circular shall neither contain any appeal to the voters on the basis of caste or on communal, religious, regional or sectional lines nor any tall claim;*

(d) *The distribution of a manifesto or circular shall be restricted only to the members of the constituency concerned;*

(e) *A certified copy of such manifesto or circular shall be sent to the Returning Officer by speed/registered post within 15 days of its issue;*

(f) *While a candidate may repeat, in any form, the manifesto or circular issued under sub-rule (2) of this rule without changing its contents, however, he shall not issue more than one manifesto or circular.*

(4) *A member shall not adopt one or more of the following practices with regard to the election to the Council, namely :-*

(i) *Bribery, that is to say, any gift, offer or promise of any gifts or gratification to any person by a candidate or any other person, with his connivance, with the object directly or indirectly of :-*

(a) inducing a member to stand or not to stand as a candidate at an election or rewarding him for act or omission; or

(b) inducing to withdraw his candidature or rewarding such withdrawal; or

(c) inducing a voter to vote or not to vote at an election, or as a reward for act or omission;

Explanation - For the purpose of this clause, the term "gratification" is not restricted to pecuniary gratification or gratifications estimable in money, and it includes organising parties or providing any other form of entertainment, and all forms of employment for reward; but it does not include the payment of any expenses bonafide incurred at or for the purpose of any election.

(ii) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or any other person, with his connivance, with the free exercise of any electoral right;

(iii) The publication by a candidate or by any other person, with his connivance, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election;

(iv) The obtaining or procuring or abetting, or attempting to obtain or procure, by a candidate or by any other person, with his connivance, any assistance for the furtherance of the prospects of the candidate's election from any person serving under the Government of India or the Government of any State, other than the giving of vote by such person, if he is a member entitled to vote;

(v) The hiring or procuring, whether on payment or otherwise, of a vehicle by a candidate or by any other person, with his connivance, for the conveyance of voters;

(vi) Resorting to disorderly behavior or misbehavior within the zero tolerance zone to be determined by the Returning Officer of the polling booth and/or venue for counting of votes;

Explanation. - For the purpose of this clause, canvassing for votes, distribution of visiting cards, pamphlets, manifestos, letters, hand-outs, circulars and the like, erection of any stall and display of any banner shall be treated as disorderly behavior/misbehavior.

(vii) Exhibiting or placing any notice or sign board relating to the election by a candidate or by any other person with the connivance of the candidate at any time and any where during the election period including on the date/s of polling within a distance of 200 meters from the polling booth;

(viii) Non-compliance with any of the directives or Circulars or instructions issued by the Returning Officer under these Rules in any matter relating to elections;

(ix) Contesting the election representing a political party or on political lines;

(x) Any act specified in clauses (i) to (ix) when done by a member, who is not a candidate, but is acting with the concurrence or connivance of a candidate;

(xi) The receipt by a member or an agreement by a member to receive any gratification: -

(a) as an inducement or reward for standing or not standing as a candidate; or

(b) as an inducement or reward for withdrawing his candidature; or

(c) as an inducement or reward for himself or any other person for voting or refraining from voting; or

(d) as an inducement or reward for inducing or attempting to Induce any voter to vote or refrain from voting; or

(e) inducing or attempting to induce any candidate to withdraw his candidature;

(xii) Contravention or misuse of any of the provisions of these Rules or making of any false statement knowing it to be false or without knowing it to be true, while complying with any of the provisions of these Rules.

(b) Section 10A and 10B of the Act provide for settlement of disputes regarding election and establishment of Tribunal and read as under:

10A. Settlement of disputes regarding election.--In case of any dispute regarding any election under clause (a) of sub-section (2) of section 9, the aggrieved person may make an application within thirty days from the date of declaration of the result of election to the Secretary of the Institute, who shall forward the same to the Central Government.

Establishment of Tribunal. 10B. (1) On receipt of any application under section 10A, the Central Government shall, by notification, establish a

Tribunal consisting of a Presiding Officer and two other Members to decide such dispute and the decision of such Tribunal shall be final.

(c) Further, the Central Government, in exercise of the powers conferred by clause (b) of sub-section (2) of section 38A, read with sub-section (3) of section 10B of the Cost and Works Accountants Act, 1959 notified The Cost and Works Accountants (Election Tribunal) Rules 2006.

(d) Rule 2(b) of the Tribunal Rules defines "aggrieved person" as follows:

(b) "aggrieved person" means a person who contested that election to the Council to which the dispute pertains

Further Rule 2(c) of the Tribunal Rules defines 'dispute' which reads as follows:

(c) "dispute" means a dispute raised by an aggrieved person arising out of the election to the Council of the Institute

(e) Section 21 of the Act provides for establishment of Disciplinary Directorate for making investigations in respect of any information or complaint received by it regarding any alleged 'misconduct' and the said provision reads as under:

21. Disciplinary Directorate. —

(1) The Council shall, by notification, establish a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it.

(2) On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct.

(3) Where the Director (Discipline) is of the opinion that a member is guilty of any 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.

(4) In order to make investigations under the provisions of this Act, the Disciplinary Directorate shall follow such procedure as may be specified.

(f) That clause (2) Part IV of the First Schedule reads as follows:

Part IV

Other Misconduct in relation to members of the Institute generally

A member of the institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if –

(1).....

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

ANALYSIS

15. From the perusal of the statutory provisions as given above, the legal position emerges that in terms of Section 10A of the Act, an aggrieved person may file complaint of any dispute pertaining to the election to the Council within **30 days** from the declaration of result of the election to the Secretary of the Institute, who shall forward it to the Central Government. On the receipt of complaint pertaining to alleged election dispute, the Central Government shall, under Section 10B (1) of the Act, shall establish a Tribunal to decide such election dispute. The decision of the Tribunal shall be final. As per Rule 2 (b) of the Tribunal Rules, 'aggrieved' person means a person who contested that election to the Council to which the dispute pertains and in terms of Rule 2 (c) of the Tribunal Rules, 'dispute' means a dispute raised by an aggrieved person arising out of the election to the Council of the Institute.

16. Further, it is not in dispute that the subject matter of the complaint pertains to the election dispute and as such the Tribunal constituted under Section 10B (1) of the Act has exclusive jurisdiction to decide election disputes. Moreover, CMA Rabindra Nath Das, Respondent No.1, who filed the said complaint, had not contested the election in question, hence, in terms of Rule 2 (b) of the Tribunal Rules, Respondent No.1 does not fall within the definition of 'aggrieved person'. Resultantly, Respondent No.1, not being an aggrieved person, was having no locus to file the said complaint before the tribunal.

17. The provisions, as contained in Section 10A and 10B (1) of the Act, with regard to resolution of disputes pertaining to the election to the Council by the

Tribunal has been inserted in the Act by the Cost and Works Accountants (Amendment) Act, 2006, with a view to provide efficacious and speedy resolution of the election dispute to the aggrieved parties within a time-bound manner, i.e. within a period of six months, therefore, Tribunal has been enjoined to decide the dispute within the time of six months as provided in the statute. It is evident from bare perusal of the provisions of Section 10A and 10B that the Tribunal has exclusive jurisdiction to decide the dispute. It appears that the intent of the legislature is clear that all the disputes in connection with conduct of election must be resolved within a time bound period i.e. six months, so as to ensure healthy and efficient working of the Council. That is why, it has been provided that the Tribunal shall decide the dispute within six months and the decision of the Tribunal shall be final and for that purpose limitation of 30 days period is also provided to file election petition before the tribunal, on the other hand limitation for filing any complaint under Rule 12 of the Cost and Works Accountants (Procedure of Investigation in Professional and other Misconduct and Conduct of Cases) Rules, 2007 is seven years and the tenure of the member of council is four years.

18. We now come to the judgments relied upon by the Respondent No.2. Decision of the Hon'ble Supreme Court in Civil Appeal 1537-1538 of 2019 in the case of Deepak Tandon & Another vs Rajesh Kumar Gupta is not applicable to the facts of this case. Here, the Appellant has specifically pleaded (in writing) before the Director (Discipline) and has specifically raised the issue regarding the maintainability of the complaint before us, i.e. First Appellate Authority. Since the question involved in the present case is with regard to the inherent lack of jurisdiction to entertain the complaint by the Director (Discipline), it can be examined by us as a preliminary issue in the light of Order 14 Rule 2 CPC, as the issue involved is a pure question of law. Perusal of the record shows that the earlier writ petitions were filed by the Appellant before the Hon'ble High Court, before the passing of the impugned order, mainly for the violation of principle of natural justice.

19. The case of Premchand Manik Chand vs Fort Gloster Jute Manufacturing, AIR 1959 Cal 620 is also neither applicable to the facts to the present case nor relevant to the issue in hand.

20. Having noted and analyzed the relevant statutory provisions and the judgments relied upon by the respondents, we may, now, advert to deal with the contentions of the parties.

21. It is not in dispute that only aggrieved person can file a complaint in connection with conduct of election before the Tribunal established under Section 10B of the Act which has been conferred the exclusive jurisdiction to decide such dispute. The decision of the Tribunal shall be final. Meaning thereby, no forum other than the Tribunal so constituted shall entertain and decide such election dispute.
22. It is the case of the Respondents herein that non-aggrieved person can not be left remediless and therefore, legislature has provided remedy to the non-aggrieved person to prefer complaint under Rule 42 of the Election Rules and further, contend that remedy under Rule 42 of the Election Rules for non-aggrieved persons is in addition to remedy provided to the 'aggrieved person' under Tribunal Rules.
23. Having given careful considerations to the submissions made by learned counsel for the Respondents and relevant statutory provisions, the contention of the Respondents that remedy under Rule 42 of the Election Rules for non-aggrieved persons is in addition to remedy provided to the 'aggrieved person' under Tribunal Rules is misconceived and liable to be rejected. We say so for the following reasons:
- (a) Rule 42 of the Election Rules enumerates the model code of conduct in its sub-rules (2), (3) and (4), which a candidate to the election to the Council is expected to observe and any infraction thereof shall, in terms of Rule 42 (1) Election Rules be deemed that the member concerned has brought disrepute to the Council under item (2) of Part IV of the First Schedule of the Act. A bare reading of the provisions of Rule 42 of Election Rules makes it evident that infraction of any/or all provisions as contained in sub-rule Rule (2), (3) and (4) of Rule 42 of Election Rules shall form the subject matter of the complaint in connection with conduct of election to the Council and such complaint shall be sent to the Secretary of the Institute, who shall forward it to the Central Government and on receipt of such complaint, the Central Government shall establish a Tribunal which shall decide the election dispute so referred to it and its decision shall be final. Once the Tribunal so constituted arrives at the finding that the member concerned has contravened any/or all provisions of sub-rule (2), (3) and (4) of Rule 42 of Election Rules may pass order under Rule 8 (3) of the Tribunal Rules. Thus, Firstly the matter in connection with conduct of election has to be adjudicated by the election Tribunal. Non-aggrieved person only thereafter is

entitled to file complaint with the Director (Discipline) under Section 21 of the Act read with Rule 42 of Election Rules for taking disciplinary action or even Director (Discipline) may take suo-moto action.

(b) It is thus evident that the scheme of the Act and Rules provides that only aggrieved person can file a complaint in connection with conduct of election before the Tribunal, having exclusive jurisdiction to decide such dispute. It is not the scheme of the Act and Rules framed thereunder that one complaint can be filed by the aggrieved person before the Tribunal and another complaint on the same/similar set of facts/allegations is filed by the non-aggrieved person in connection with the conduct of election before the Director (Discipline). It may happen that in the given case, the decisions of Tribunal and Board of Discipline may be at variance. Such a situation will lead to absurdity and illogical results making the creation of election Tribunal nugatory which certainly, does not appear to be the intent of the legislature. We are of the considered opinion that first, the dispute in connection with the conduct of election has to be heard by the tribunal, in case the tribunal holds the candidate guilty of violating code of conduct etc, it can pass the order as provided under the Tribunal Rules against the candidate, thereafter only, the complaint can be filed by the non-aggrieved person before the Director (Discipline) under Section 21 of the Act for taking disciplinary action or the suo moto powers can be exercised by the concerned disciplinary authority against the candidate against whom the order was passed by the Tribunal. Thus, the non-aggrieved person is not remediless, but will have to wait for the order of the Tribunal passed under Rule 8(3) of the Tribunal Rules, however, he will be entitled to file complaint under section 21 of the Act only if the Tribunal holds the candidate guilty in connection with the conduct of election.

(c) This legal position is further reinforced by the premise that the limitation period to file complaint regarding election dispute before Tribunal is 30 days from the date of declaration of result of election and the Tribunal is enjoined to decide the dispute within six months. Whereas the complaint for professional and other misconduct against a member can be entertained by the Director (Discipline) at any time before the expiry of seven years. It appears that by way of amendment in the Act in 2006, the legislature, with an intent to dispose of the dispute pertaining to election to the Council expeditiously, has made the provisions in the Act for establishment of an election Tribunal having exclusive jurisdiction to decide the dispute in connection with the conduct of election in the time bound manner so as to

provide efficacious and speedy remedy to ensure healthy and efficient working of the Council, and to achieve this very objective, provision has also been made in the Act by inserting section 10A therein which permits only the aggrieved person to file the complaint challenging the election to the Council, and barring the non-aggrieved persons including the BUSY-BODIES to challenge the election. However, disciplinary action may be taken against the member concerned based on the adverse finding of the Tribunal against the candidate. Hence, the contention of the Respondents that remedy under Rule 42 of Election Rules for non-aggrieved persons is in addition to remedy provided to the 'aggrieved person' under Tribunal Rules does not find favour with us.

24. Next, we may deal with the contention of the Respondents that Appellant has never raised the plea of non-maintainability of the Complaint filed by Respondent No.1 before the Director (Discipline). It is evident from the perusal of record that the Appellant, in his written statement dated 18.07.2020 filed by him with the Director (Discipline), raised the plea of non-maintainability of the Complaint. Para 2 of the aforesaid written statement is extracted hereunder:

"As per the Section 10A of the Cost and Works Accountants Act, 1959, any matter relating to dispute regarding election is to be referred to the Secretary of the Institute. Thus, the disputes regarding election are beyond the scope of the Board of Discipline or Disciplinary Committee..."

From the above, it is apparent that the contention of the Respondents that Appellant never raised the plea of non-maintainability of the complaint is baseless and unfounded, hence rejected. On the other hand, it is established beyond doubt that Appellant, in the first instance, raised the plea of non-maintainability of the said complaint before the Director (Discipline) and still maintains that he had never abandoned it. There is one more aspect that needs consideration at this stage. The scheme of the Act shows that the Board of Discipline under section 21A of the Act is merely an off shoot of Disciplinary Directorate constituted under section 21 of the Act. The facts pleaded by a member against whom the complaint is filed before the Director (Discipline) gets merged in the pleadings taken by member before the Board of Discipline, therefore, a member cannot be estopped from challenging the maintainability of the complaint. Moreover, it is settled position of law, that legal question pertaining to inherent lack of jurisdiction can be entertained at any stage of the proceedings. In the present case, the question of maintainability was pleaded unequivocally (in reply to the complaint) initially before the Director (Discipline), however, the disciplinary authorities below ignored the contention of the


Appellant herein and now the issue of maintainability has been raised vehemently before us (Appellate Authority). Here, in the present case, question raised with regard to maintainability of complaint on the ground of inherent lack of jurisdiction is purely a legal question and it does not involve adjudication of disputed questions of facts requiring any investigation.


25. Admittedly, the subject matter of the complaint in question was pertaining to the election. Only Tribunal constituted by the Central Government under Section 10B has exclusive jurisdiction to decide the dispute in connection with conduct of election to the Council, as such ousting the jurisdiction of any other forum including Board of Discipline is fully justified. It may be noted that in the complaint filed by the Respondent no.1, the allegations made against the appellant is only with regard to violation of model code of conduct relating to election. Hence, the Board of Discipline erred in entertaining and deciding the complaint in connection with conduct of election.

26. We, therefore, are of the opinion that the Complaint dated 02.03.2020 filed by the Respondent No.1 before the Director (Discipline) was not maintainable as it lacked inherent jurisdiction to entertain the complaint in connection with conduct of election, thus, as sequel thereto, the impugned order dated 20.09.2020 of the Board of Discipline is illegal, unwarranted and without jurisdiction.

27. In view of the above, the present appeal is allowed and the impugned order dated 20.09.2020 passed by the Board of Discipline is set aside. As we have held the complaint not maintainable, we need not to go into other issues involved in the matter.


Justice Shashi Kant Gupta (Former Judge)
Chairperson


Praveen Garg
Member


Anand Mohan Bajaj
Member

CERTIFIED TO BE TRUE COPY

November 7, 2021


Dr. Surendra Singh
Registrar, Appellate Authority

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949, Cost & Works Accountants Act, 1959 and the Company Secretaries Act, 1980)

APPEAL NO. 15/ICWAI/2021

[Arising out of the Impugned Order dated 20.09.2020 passed by Board of Discipline (Constituted under Section 21A of the Cost & Works Accountants Act, 1959)]

Niranjan Mishra

....Appellant

Vs.

Rabindra Nath Das

....Respondent No. 1

Secretary, ICWAI

....Respondent No. 2

JUDGMENT

Avijit Goswami, Member (for himself and Brij Mohan Sharma, Member)

1. The Bench has been convened through video conferencing.
2. The appellant has preferred this appeal against the impugned order dated 20.9.2020 passed by the Board of Discipline of the Institute of Cost Accountants of India, holding the appellant guilty of 'other misconduct' under clause (2) of Part IV of the First Schedule to the Cost & Works Accountants Act ('Act' for short) on various grounds.
3. When the appeal was taken up for hearing on 18.10.2021, the appellant had not raised the issue of maintainability of complaint filed by Respondent No.1 to entertain the complaint of respondent no. 1 before the Disciplinary Directorate. However, some members were of the opinion that the issue of maintainability be heard first. We consider that the issue of maintainability could have been addressed by the appellant along with the appeal on merits, if permissible under law, and the Appellate Authority should have decided the issue of maintainability simultaneously. However, since the

Appellate Authority heard arguments on the issue of maintainability, the facts relating to merits of the appeal are not being discussed in this order and only arguments on issue of jurisdiction have been considered.

4. Briefly stating, the appellant was a candidate for election to the Central Council of the institute held on 28.6.2019. The respondent no. 1 was a member of the Institute and a voter in the election, who initially filed a complaint against the appellant for violation of the Code of Conduct of election before the Secretary of the Council for forwarding the same to the Election Tribunal. The Secretary, however, vide his order dated 2.9.2019 refused to entertain the complaint on the ground that he was not an aggrieved person. His order referred to Section 10A of Cost and work Accountants Act and Rule 2(b) of CWA Election Tribunal Rules, 2006. Rule 2(b) defines aggrieved person as under:-

"Aggrieved person means a person who contested that election to the Council to which the dispute pertains."

5. Since the Secretary refused to forward the complaint of the respondent no. 1 to the Central Government for constitution of Election Tribunal, the respondent No. 1 having no other remedy, filed a complaint before the Director Discipline under Rule 42 of the Election Rules read with Section 21 of the CWA Act which provided for disciplinary action against the member in connection with conduct of election which brings disrepute to the Council. Rule 42(1) is a deeming clause and provides that in case a member, in connection with the election to the Central Council of the Institute contravenes the provisions of sub rule 2 or all or any of the clauses of sub rule 3 or sub rule 4, he shall be deemed to have brought disrepute to the Council. Sub Rule 2 and 3 enlist the various Code of Conduct which a candidate has to follow.

6. The issue being considered by the Appellate Authority is whether an ordinary member i.e. a voter in the election of Council has a right to make a complaint at all and/or before the Disciplinary Directorate in connection with the conduct of election. For any reason if he is not an aggrieved party under Rule 2(b).

7. The appellant during the course of his submissions has stated that though he has challenged the legality of prima facie opinion formed by the Director Discipline which means and includes that he has challenged the validity of the complaint as well. He has further stated that legislature has inserted Section 10A of the Act and therefore any aggrieved person has to approach Election Tribunal. Further, Election Tribunal Rules are complete and exhaustive and give ample power to Election Tribunal. It has further been canvassed that to initiate any disciplinary action being aggrieved by the conduct of member a finding from the Election Tribunal is required that a candidate has

contravened with the applicable provisions. It is an admitted fact that the complaint before the Directorate has been filed under Rule 42 read with Section 21 of the Act. Further Rule 42 stipulates that a 'member who has been found to have contravened'.

8. On the other hand, the respondent in their submissions has brought to the notice of the Authority that though he was not an aggrieved person as per rule 2(b), but he had a right to make a complaint under rule 42 read with section 21 before the Disciplinary Directorate and his complaint deserved to be considered on merits. He referred to the previous three appeals decided by the Appellate Authority in this respect, being appeal Nos.:-

- i. Appeal no.2/ICSI/2013 titled Pradeep K.Mittal vs. ICSI
- ii. Appeal No. 1/ICSI/2013 titled Rakesh Kumar Srivastava vs. ICSI
- iii. Appeal no. 3/ICSI/2013 titled Dr. Baiju Ramachandran vs. ICSI

9. It has been submitted that the Appellate Authority was bound by its previous precedents. The Respondent No. 2 also in its written submissions had submitted that the complaint made by respondent No. 1 was rightly entertained by Disciplinary Directorate of Institute and was decided by it because the Disciplinary Directorate is having jurisdiction and is within its rights to decide the complaint. The respondent No. 2 referred to Rule 42 of Election Rules, Section 10A of CWA Act and submitted that Respondent No. 1 had approached Election Tribunal in the first instance, but his complaint was returned as he was not an aggrieved person within the meaning of Rule 2(b) (supra). It was also submitted that the appellant initially raised the issue of maintainability before Director Discipline when he was served a notice of the complaint before forming a prima facie opinion but subsequently, he abandoned the plea of maintainability in his pleadings. The appellant did not raise the issue of maintainability either before the Board of Discipline during conduct of proceedings after formation of a prima facie opinion nor he raised this issue in any of the writ petitions filed by him before the Hon'ble Delhi High Court. Also, the plea of maintainability of complaint before Disciplinary Directorate is not a ground taken in the present appeal as well. It was also canvassed that the jurisdiction of Election Tribunal and Board of Discipline are distinct and separate. The Board of Discipline cannot set aside the election which is the jurisdiction of Election Tribunal. The Board of Discipline can only pass such orders for which it is competent to pass under the Act sans setting aside the election. The Election Tribunal cannot punish a member for bringing disrepute to the institution by violating the code of conduct. Another contention which has been raised on behalf of the Respondents are that section 10A of the Act cannot read in a way that it creates a bar from filing of complaint by persons other than the one covered under Rule 2(d) and especially when Rule 42 of Election to the Council Rule provide for such remedy specifically.

10. The Respondent has also asserted that in section 22E of the Act where the right to file an appeal before this Authority has been given only to the 'member' who has been imposed penalty under section 21A (3) or 21B(3). However, that does not create a bar on the rights of complainant from approaching to another forum in absence of any specific provision. Whereas in the present circumstances Rule 42 specifically provides remedy of disciplinary action against errant candidates and therefore section 10A cannot read in a way that the individuals other than the ones covered under the definition of Rule2(b) are barred from putting the disciplinary machinery into motion.

11. It has been emphasised upon that Election Tribunal Rules do not in anyway create embargo on the right of non-aggrieved persons or place any prohibition from filing complaint by the persons other than stated to be aggrieved person. Further, the scheme of the Cost & Works Accountants Act is inclusive mechanism which gives suo-moto power to initiate proceedings. If such an interpretation is given that will amount to render Rule 7 of Cost Accountants (Procedure of Investigations in Professional and Other Misconduct and Conduct of Cases) Rule 2006 infructuous.

12. Lastly, it has been submitted once a plea of maintainability has been raised before Director Discipline and later on abandoned in subsequent proceedings before Board of Discipline, four rounds of litigation before Hon'ble Delhi High Court, the appellant has been estopped from raising the plea in appeal. Reliance has been placed upon the judgement in the matter of Deepak Tandon and other vs. Rajesh Kumar Gupta passed by the Hon'ble Supreme Court of India and Premchand Manik Chand vs Fort Gloster Jute Manufacturing passed by Calcutta High Court.

13. We have heard the parties orally as well. Further, the parties have also filed their respective written submissions. The only issue which we intend to address in this order is in respect of the maintainability of the complaint by the Disciplinary Directorate against the appellant.

14. A question arises whether the candidates for the elections are free to breach the Code of Conduct as per their wishes and an ordinary member of the Institute has to be a mere spectator or he has a remedy, since he has no right to approach the Election Tribunal.

15. Another question to be answered is whether the Appellate Authority can address to itself the issue of maintainability of the complaint before the Disciplinary Directorate when no such issue has been raised by the parties and what is the jurisdiction of the Appellate Authority in hearing the appeals against the orders of the Board of Discipline.

16. The respondent no.1 is a member of the Institute. The members of the Institute have a right to elect a Central Council of members so that the Institute is run in accordance with the Act and the Rules framed by the legislature. Every member has an interest in the proper functioning of the Institute and has also an interest that the members who are elected to the Central Council are not themselves the breacher of the rules, because they have to ensure that the institute is run in accordance with the Act and the Rules. The member's right to question any other member or a candidate in the election of the Council for breach of rules or for misconduct cannot be denied because he was not a candidate in the election and because only being a member of the institute. A non-member of the Institute cannot contest the election of the Central Council of the Institute. Thus the basic issue is if every member of the Institute must conduct himself in such a manner that he does not bring disrepute to the Institute and follows all rules & regulations only while conducting himself as a professional and he is also bound to follow all rules and regulations even while contesting election of the Central Council because of being a member. We consider that a person is entitled to contest election only because of being a member. While contesting election his obligations of following rules and regulations do not come to an end.

17. We have no hesitation in saying that a member of the Institute, who is a voter in the election, has a supreme and primary right to see that elections are conducted in a fair and democratic manner and every candidate contesting the election follows the code of conduct. If the candidates commit breach of the code of conduct, any member of the Institute who is not contesting the election cannot be a mute spectator merely because he is not contesting the election. Whether or not he contested the election, the result of election affects him. If wrong persons, who have no respect for the rules and code of conduct of the election are elected, he has a right to think that this will be injurious to the health of the Institute and has a right to raise his voice and make a grievance against this. This is what the Appellate Authority had been holding so far. We do not find a reason to deny the right to a member to file a complaint before the Disciplinary Directorate for breach of the rules and Code of Conduct. Rule 42 specifically provides that if any candidate does not conduct himself in accordance with the Rules or in breach of the rules, then he is deemed to have brought disrepute to the Council and is liable for disciplinary action and any member of the Institute who has a grievance regarding breach of rules and code of conduct can make a complaint. We are also of the considered view that section 10A does not in any way govern and/ or put any restriction on filing of complaint by any individual other than the one defined as aggrieved person under Rule 2(d). Therefore, as per the scheme of the Act and Rules so framed sets a procedure that a complaint or information received by the Disciplinary Directorate whether filed by a member or otherwise is deemed to be

a process where the complainant brings to the notice of the Institute that there has been some contravention or breach on the part of a member of the Institute of any provision which governs all members of the Institute. It is then the Institute sets into motion the process of conducting an inquiry after following due process as laid down under the Act and applicable Rules and it thereafter decides whether such member is guilty of alleged misconduct or not.

18. The appellant knew it very well that the sphere of action of Board of Discipline and Election Tribunal are altogether different. While Election Tribunal is a Tribunal confined only to the disputes between the contesting candidates in respect of election, the Board of Discipline has a wider authority to entertain a complaint of any member of the Institute regarding breach of the rules of election and if breach is proved, it has authority to impose such punishment as was prescribed under the law. However, Board of Discipline cannot set aside the election nor can declare any other person as elected, whereas the Election Tribunal has a right to set aside the election. That is why Rule 2(b) of the Election Rules limits the persons who can approach the Election Tribunal whereas Rule 42 does not lay down such limit.

19. Consider a situation where all candidates for election to the Central Council join hands in violation of the rules and come to an understanding of violating the rules regarding canvassing, advertisement, issuance of manifestos etc. Since all of them have formed a cartel, no one would make a complaint against the other. In this situation the members would be influenced by various means including corrupt practices. Would the Institute or the members be so helpless that in case of such cartelization, they would not be able to act against any of the contesting candidates? Our answer is No. Every member of the Institute has a right to raise his/her voice against the corrupt practices or breach of Code of Conduct being resorted to by the candidates and can set the disciplinary machinery of the institute in motion. The rationale behind providing a Code of Conduct and make it public is to ensure that members be the watch dogs of the election and even if candidates do not complain against each other for breach of code of conduct, the members should come forward and make a complaint to the disciplinary authority. Candidates have only interest in being elected or pulling down the elected members but a member has interest that the reputation of the institute should not suffer at the hands of such candidates who blatantly violate the code of conduct.

20. Further, the word 'found' in Rule 42 has to be read in conjecture with the scheme of the Rule itself and not in isolation. The argument of the appellant on this count is totally misplaced. If we see whenever the legislature considered such, the word used is 'finding' and any person if found a candidate in violation of the applicable Rule, he may

make a complaint and therefore the word 'found' has been used instead of 'findings' as mentioned in Rule 14 (9) of the Procedure Rules.

21. The Appellate Authority constituted under the act is like any other appellate court in the hierarchy of judiciary. The Appellate Authority's powers are not unlimited, and it is bound to follow the general principles of deciding appeals as are followed by other appellate courts. Although this Authority is not bound by Code of Civil Procedure and has to lay down or evolve its own procedure but the procedure being followed by the Appellate Authority has to be the procedure available to any other reviewing/ appellate authority. While reviewing the order of lower authority, the Authority has to confine to the pleadings raised by the parties before the lower authority and the appellate authority. The appellant herein did not raise the issue of maintainability before the Board of Discipline, once his plea of lack of maintainability did not find favour with the Director Discipline while forming the prima facie view. He contested the matter on merits. During the pendency of the proceedings before the Director Discipline and before filing of this appeal, he had approached High Court at least four times. In none of his writ petitions or LPA, he raised the issue of maintainability before the Board of Discipline being not there in view of section 10A of the Act. He did not challenge the prima facie view taken by the Director Discipline to proceed on the complaint of respondent no. 1 in view of Rule 42 read with Section 21. Such stand has not been taken before Board of Discipline and having abandoned the plea. In appeal also, the appellant had not taken the stand that the Disciplinary Directorate had no jurisdiction to entertain the complaint in view of Section 10A of the Act read with rule 2(b) of the Election Rules. It simply means that the point in issue was never raised nor pleaded nor addressed by the appellant at any of such proceedings. It is a lauded principle of law that justice should not only be done but should also seem to have been done. The Authority should desist from entertaining such issues which were not part of the pleadings and proceedings which can be taken otherwise. The appellant in this case in the appeal has taken about 100 grounds but in none of the grounds he has taken the stand that the maintainability of complaint before Disciplinary Directorate was barred in view of section 10A read with Rule 2(b). In the absence of any ground qua the maintainability of the complaint before this Authority, the appeal would have been examined on merits as to record a definite finding on merits.

22. In Premchand Manik Chand vs Fort Gloster Jute Manufacturing AIR 1959 Cal 620, Calcutta High Court while deciding the appeal held that it was not open to the appellant to urge a ground of law particularly one which goes to the legal authority of the entire proceedings for the first time at appeal stage, more so when a party had raised a ground and then deliberately abandoned it. In the present case also, the appellant raised the ground of maintainability before the Director Discipline at the time

of prima facie view but later on he abandoned it before the Board of Discipline as well as did not raise it before the High Court in any of the proceedings.

23. Further, in *Deepak Tandon and other vs. Rajesh Kumar Gupta*, Civil Appeal no. 1537-1538 of 2019, the Hon'ble Supreme Court categorically held that if a party had not raised the plea of maintainability, the prescribed authority was not bound to decide the question either way and if the party again did not raise the plea of maintainability, the appellate court was right in not deciding the question either way. The Supreme Court further held that it is settled law that if a plea was not taken in pleadings by the parties and no finding was recorded, then such plea cannot be allowed to be raised by the appellant for the first time whether in appeal, revision or writ.


24. It is relevant to note that the Appellant in his written submission or during the course of his arguments has not placed any pronouncement on record in support of his contention or non-applicability of the above judgements on the facts of the present case relied upon by the respondents.

25. The law does not give uncontrollable powers to an Appellate Authority. Only High Court under article 227 has the unlimited power of setting aside an order in its supervisory power but the Appellate Authority has limited powers of hearing the appeals in accordance with the law. The Appellate Authority constituted under the Act is not equivalent to High Court and does not have unlimited powers to entertain a issue not agitated or taken up in the appeal or before the forum below. It is inherent in adversarial system being followed in this country that the courts are not descending into the arena not advocated before it and not pleaded before it. This prevents the hallowed robe of impartiality from being soiled. In *Sita Ram vs. Radha Bai* AIR 1968 SC 538, the Hon'ble Supreme Court observed that the trial judge was not to determine an issue which did not arise out of pleadings.

26. Not only this, it is also a settled proposition of law that neither the trial court nor the appellate court can go beyond the pleadings. We, therefore, for the reasons recorded above, do not find ourselves in agreement that anyone other than the aggrieved person cannot set the disciplinary process into motion against a candidate who seems to have been found violating the Rules in force. Otherwise, also the plea of maintainability is not available for the appellant to be raised at this stage after submitting himself to the jurisdiction of Board of Discipline without raising this plea. Therefore, the Board of Discipline did not act beyond its jurisdiction. The issue of jurisdiction which was never raised before the Board of Discipline and therefore this Authority cannot decide the appeal on this issue.

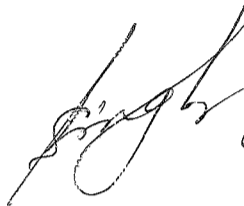
27. Let the matter now be decided for arguments on merits.


Avijit Goswami
Member


Brij Mohan Sharma
Member

November 7, 2021

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 08/11/2021

Surendra Singh
Member, Appellate Authority