

BEFORE THE APPELLATE AUTHORITY
(Constituted under the ICWAI Act, 1959)

APPEAL NO. 07/ICWAI/2015

Date of pronouncement of order: 5th August, 2016

IN THE MATTER OF

Rakesh Bhalla..... Appellant

Versus

1. ICWAI
2. Rakesh Singh..... Respondents

Appearances:

Appellant in person
Dr. S. Kumar, advocate for Respondent no.1 with Mr. Rajendra Bose, Director (Discipline) ICAI
None for respondent no. 2

CORAM:

HON'BLE THE CHAIRPERSON
HON'BLE DR. NAVRANG SAINI (MEMBER)
HON'BLE MR. B.M.SHARMA (MEMBER)

ORDER

The Institute of Cost and Works Accountants of India(now known as Institute of Cost Accountants of India) (hereinafter to be referred as 'the Institute') was a creation of an Act of Parliament, namely, Cost and Works Accountants Act,1959(hereinafter referred to as 'the Act of 1959'). This Institute was constituted to regulate the profession of Cost and Works Accountants. No person is entitled to practice the profession of Cost and Works Accountant in India unless he/she is a member of the

Institute of Cost Accountants of India and holds a Certificate of Practice issued by the Institute. For the management of the affairs of the Institute a Central Council is constituted as provided under Section 9 of the Act of 1959. The Council can constitute Regional Councils also for advising and assisting it on matters concerning its functions as provided under Section 23 of the said Act. Duration of the Regional Council is four years. The Council has to maintain a Fund the source of which primarily is from the money contributed by the members of the Institute in the form of membership fee etc. As well as as on account of tuition fee from students. The Funds of the Regional Councils come primarily from the grant-in-aid given by the Council and also from its own resources.

This case centres around the controversy regarding passing of a resolution by the office bearers of the Regional Council of North India known as Northern India Regional Council(NIRC) for the period 2007-2011 in its meeting held on 18th November, 2007 at its Delhi office whereby the Regional Council members were authorised to draw a fixed amount every month from the funds of the NIRC towards travelling/telephone expenses etc. spent while discharging duties of the NIRC without submission of any proof regarding those expenses. The Chairman was authorised to receive fixed amount of Rs. 5,000/- p.m. while other members were to receive Rs. 4,000/- p.m. The appellant, a cost and works accountant by profession, was Secretary-cum-treasurer of the NIRC during its four year term from 2007 to 20011 and during the same period Shri Sanjay Gupta, was Joint Vice Chairman. Shri B.L. Jain was the Chairman, Shri Rajeev Mehrotra was the Vice Chairman, Shri Vijender Sharma was the Jt. Secretary, S/Shri Chandra Wadhwa, Hari Kishan Goel and Balvinder Singh, Central Council members, were the nominee members from the Central Council. The meeting of 18th November, 2007, when the above referred impugned resolution was

passed was attended by all the above-named office bearers/members of NIRC, except Mr. Chandra Wadhwa and was chaired by Shri B.L.Jain.

The controversial resolution passed on that date was as under:

(i)	To fix the reimbursement for Miscellaneous Expenses	<p>As per prevailing practice NIRC members are getting the reimbursement for miscellaneous expenses such as use of personal cars & telephone, for professional purposes and other misc expenses like entertaining the official guests etc.</p> <p>After some discussion it has been approved that Rs. 5,000/- per month to the Chairman, NIRC and Rs. 4,000/- per month to each member of NIRC including Office bearers on account of above expenses i.e. use of personal car, telephone and other misc. expenses for entertaining official guest on behalf of NIRC, without submission of bills etc. will be reimbursed w.e.f. 8th August, 2007.</p> <p>However reimbursement of expenses against production of bills will be continued as per prevailing practice.</p>
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This resolution was approved by the NIRC in its next meeting on 2nd February, 2008.

On 27th August, 2009 the respondent no.2, who is also a cost and works accountant by profession and at one time he was member of Central Council of ICAI and also Chairman of NIRC, lodged a complaint dated 25th August,2009 with the Disciplinary Directorate of the Institute against the appellant (which was registered as Complaint No.Com/21-CWA (6)/2009) for an act of misconduct falling under Clause(1), Part II of IInd Schedule to the Act of 1959 for having passed the impugned

resolution and drawing money from the funds of NIRC on the strength of that resolution dated 18th November, 2007. It was claimed that that resolution was passed in violation of Regulation 132 of the Cost and Works Accountants Regulations, 1959.

Regulation 132 of the Regulations of 1959 which is alleged to have been violated by all the members of NIRC which had passed the impugned resolution reads as under:-

“The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned.”

The misconduct allegedly committed by the appellant as provided in Clause(1) Part–II of the Second Schedule to the Act of 1959 is defined as under:-

“A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he:

- (1) contravenes any of the provisions of this Act or the regulations made thereunder.”

The complaint of the respondent no.2, reply of the appellant and other material brought on record by them was examined by the Director(Discipline) of the Institute for the formation of a *prima facie* opinion as to whether the professional against whom allegations of misconduct had been made appeared to have committed the same or not, as provided under Section 21(2) of the Act of 1959. The appellant had denied that he had committed any misconduct. The complaint against him was alleged to be politically motivated. It was claimed by the appellant that the complainant had filed complaint only against two

members out of seven members of NIRC who had unanimously passed the impugned resolution of 18th November,2007 which showed that the complainant was targeting him to malign his(appellant's) stature. The *mala fides* in the lodging of the complaint was also clear from the fact that the complaint was lodged more than a year after the passing of the impugned resolution. The complainant reiterated in his rejoinder the allegations against the appellant and regarding the charge of selectively targeting two members of NIRC only his response was that even if the impugned resolution was passed unanimously by seven members of NIRC it was his prerogative and choice to complain against either or one or all. The complaint was alleged to have been filed within the required time.

Director (Discipline) on 23rd December,2009 after referring in detail in his eleven pages order to the complaint, reply submitted by appellant herein, rejoinder of the complainant passed only a one line order: "Accordingly, the complaint may be pursued in accordance with law." and then the matter came to be referred to the Disciplinary Committee for appropriate orders as provided under Section 21(3) of the Act of 1959 which reads as under:

"21(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.."

Since the complaint and other record of Director(Discipline) was placed before the Disciplinary Committee as provided under Rule 9(1) of the Cost and Works Accountants(Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

it can be safely inferred that the Director(Discipline) was actually of the view that *prima facie* there appeared to be a violation of Regulation 132 by members of NIRC which had passed the impugned resolution and it was a case of commission of misconduct falling under Clause I of Part II of the Second Schedule to the Act,1959. The appellant's grievance, however, is that the one line order passed by the Director(Discipline) did not amount to any opinion much less a *prima facie* one as contemplated under Section 21(3).

It also appears to us that the Disciplinary Committee also found a *prima facie* case of misconduct justifying further enquiry as provided under Rule 9(2)(a) of the Cost and Works Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. Rule 9 reads as under:-

"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."

In the present case the matter was examined by the Disciplinary Committee upon getting referred to it by the Director(Discipline). The appellant was once again in October, 2010 called upon to submit his

response to the above-referred allegation of misconduct levelled against him by the complainant Rakesh Singh. The appellant had submitted his defence before the Disciplinary Committee also denying all the allegations of misconduct levelled against him by the complainant-respondent no.2 as was done in his reply before the Director(Discipline). Some additional pleas were also raised by him. It was claimed that the passing of the impugned resolution did not constitute any professional misconduct and in fact was passed with the pious object of ensuring that no member of NIRC got reimbursements of expenses incurred by them without any limit and without production of any supporting documents as was the prevalent practice in NIRC since long. It was further alleged that the impugned resolution having been passed by NIRC and not by any individual no proceedings could have been initiated against the appellant for committing misconduct of having acted in contravention of Regulation 132.

The Disciplinary Committee passed final order on 6th February,2015, which was after a lapse of almost five years in a matter of this kind where neither any evidence was recorded nor was required in view of the fact that facts were not in dispute and came to the following conclusion:

“Shri Rakesh Singh (M/10111) filed a complaint dated 25th August, 2009 against Shri Rakesh Bhalla (M/9442) in Form I along with requisite fee of R. 2500/- which was registered vide Complaint No. Com/21-CWA (6)/2009. The complaint was made on the ground of passing a resolution and/or withdrawal of Institute money in contravention of Regulation 132 of CWA Regulations,1959.

Prior to the amendment of Cost and Works Accountants Regulations, 1959 in 2012, regulation 132 which deals with Expenditure from Fund is reproduced below:

“The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned.”

In the instant case, NIRC in one of its Council Meetings fixed the reimbursement amount of Miscellaneous Expenses. As per the Minutes of the said meeting held on November 18, 2007, NIRC approved fixed amounts of Rs 5000/- per month to the Chairman and Rs 4000/- per month to each member of NIRC including Office Bearers for various miscellaneous expenses, which shall be paid on a monthly basis and without submission of bills.

There is no doubt that under Regulation 132 of the Cost and Works Accountants Regulation, 1959, the Regional Council has the power to sanction expenditure from funds. However, such power is to be exercised keeping the proviso to the said Regulation In mind. As per the said Proviso, no fund shall be applied, directly or indirectly, for payment to any member of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned. The proviso prohibits use of the fund except for in the manner prescribed therein, meaning only for reimbursing them for any expenses incurred by them. Neither the Regulation nor its proviso permits the sanctioning of fixed monthly amounts, irrespective of the actual expenses incurred, and the sanctioning of such fixed monthly amount operates like a monthly allowance which is to be paid irrespective of the fact that the said expenditure has been made or not. The proviso is a clear bar to such practice which permits reimbursement only of ‘expenses incurred’ .Thus, the resolution dated 18th November 2007 of NIRC is void ab initio and has no legal basis.

In view of the above, the following order is passed:-

- (i) The Resolution dated 18th November 2007 passed by Northern India Regional Council (NIRC) is void ab initio since the resolution is in violation of Regulation 132 of Cost and Works Accountants Regulations, 1959 which approved payment of fixed amounts of Rs. 5000/- to the Chairman and Rs 4000/- per month to each member of NIRC on a monthly basis without submission of bills.
- (ii) Letter of caution should be issued to Shri Rakesh Bhalla for drawal of money from NIRC on the strength of the resolution dated 18th November 2007.

- (iii) Shri Rakesh Bhalla and any other elected member of NIRC who had drawn money on the basis of the resolution dated 18th November 2007 are required to deposit the exact amount that they had drawn on the strength of the resolution dated 18.11.07, with NIRC within a period of 30 days from the date of receipt of the order.
- (iv) The Order stated in (iii) above shall apply mutatis mutandis in respect of all members of Council of NIRC who had drawn money on the basis of the resolution in question.
- (v) All elected representatives of Council of NIRC be informed to desist themselves from passing any such resolution which is in violation of the Cost and Works Accountants Act, 1959 and the rules regulations framed thereunder.
- (vi) The aforesaid decision is to be communicated to all who were members of Council of NIRC during the period 2007-2011.

Sd/-

(Dr. A.S. Durga Prasad)
Presiding Officer”

The appellant has returned to NIRC the money which he had received on the strength of the impugned resolution dated 18th November, 2007 and has filed the present appeal challenging the aforesaid order of the Disciplinary Committee. In the appeal filed by the appellant, challenging the Orders of Disciplinary Committee holding him guilty of misconduct and directing him to refund the money which undisputedly he had drawn from the funds of NIRC on the strength of the Impugned resolution, he also prayed for refund of that amount which he claimed to have deposited under protest.

This appeal has been contested by the respondent-Institute. Though after receiving the notice of this appeal the complainant, respondent no.2 herein, appeared before this Authority in person once

and filed brief written submissions also but thereafter he chose not to be present at the time of final hearing of this appeal.

The appellant presented his case in person and submitted detailed written submissions also. The Institute has supported the decision of the Disciplinary Committee and on its behalf also written submissions were submitted.

The appellant reiterated before this Authority during the course of oral submissions as well as in his written arguments the pleas which he had raised before the authorities below. Additionally a plea of bias against one of the members of the Disciplinary Committee was also raised before this Authority.

We have given our due consideration to the rival submissions and have also perused the records of the case produced before us by the Institute in compliance of our direction to that effect.

The undisputed position which emerges out is that on 18th November, 2007 the then members/office bearers of NIRC assembled in Delhi office for holding a meeting of NIRC to discuss various items included in the Agenda. During the course of that meeting the members of NIRC decided to examine the question, which was not in that meeting's Agenda, of reimbursement of money to members spent by them in connection with the business of NIRC and then took a decision that day which has already been extracted in the earlier part of this order and it is that decision which has given rise to this legal fight between two members of the Institute one of whom is the appellant, an elected member of NIRC during that period and the other one during those days

was a member of Central Council of the Institute. By way of the impugned resolution the members of NIRC had made themselves entitled to get fixed amount of money every month towards expenses on account of conveyance, telephone bills etc. in connection with the affairs of NIRC and which decision, according to the Disciplinary Committee, amounted to fixing a monthly allowance for the members irrespective of the fact whether any expense was incurred or not and that decision was thus taken in contravention of statutory Regulation no.132 (which has been reproduced already). The appellant's argument is that that decision was taken with the *bona fide* intention of curbing the ongoing practice in NIRC of reimbursing to its members limitless expenses and that too without production of any proof of expenses. In our view the object behind passing of the impugned resolution might have been this but the fact remains that such like decision was not permitted to be taken in connection with the Funds of NIRC. It has been rightly observed by the Disciplinary Committee that such a self beneficial decision amounts to fixation of fixed monthly allowance for the members of NIRC and that exactly is not permitted in law and contravenes Regulation 132 which admittedly governs the utilisation of NIRC's money which belongs to every member and not to the office bearers of NIRC alone who can spend it in any way they like. It was rightly pointed by the learned counsel for the Institute that the resolution did not restrict the spending of NIRC money by its members to Rs.5000/- by Chairman and Rs.4000/- p.m. by others in NIRC which decision in fact entitled them to have fixed amounts every month and additionally they could also claim actual money spent them meaning thereby that the members were to have cake and eat it too. In our view, if there was a wrong practice prevalent in NIRC for the reimbursements of money to members without any limit and without production of proof of expenses steps could have been

taken to curb and regulate that practice by and also by proceeding against those officials who were instrumental in sanctioning the reimbursements without supporting documents. Here what was done by the members of NIRC who had taken over the management only in August, 2007 showed undue haste in fixing a sort of monthly allowance for themselves in November, 2007. Unfortunately, those who passed the unanimous resolution included nominees from the Central Council also who are included in NIRC as watchdogs to ensure that no irregularities take place in financial matters in the Regional Councils which are set up away from the Headquarter of the main Institute. We are also of the view that there can be no justification for contravention of statutory provisions. If there is a bar for spending NIRC money by reimbursing money claimed by members on account of expenses unless money is actually shown to have been incurred any decision taken ignoring that bar becomes questionable and no explanation for the contravention and howsoever good intentions may be behind that decision, the decision cannot be approved of by anyone. Good intentions behind any decision which is prohibited under law cannot wipe off the consequences of contravention of the statutory provision like Regulation 132 in this case. In fact, when law is broken while taking some decision absence of *bona fides* has to be presumed. In reply to the grounds of appeal filed by the Institute the Institute has taken a plea that the members of the NIRC who had passed the impugned resolution had acted dishonestly. Thus, in these circumstances the appellant cannot even invoke Section 36 of the Act of 1959 which was also pressed into service by the appellant. This provision of law protects the officials of Institute, Committees constituted under the Act etc. against any action taken in good faith. No action taken in the teeth of legal provision like Regulation 132 can be said to have been taken in good faith.

Under Clause 1 of Part II of the second schedule to the Act of 1959 it is clearly provided that a member of the Institute, whether in practice or not, is deemed to have committed professional misconduct if contravenes any provision of the Act of 1959 or regulations framed thereunder. In the present case the members of NIRC, who are Cost Accountants and members of the Institute, contravened statutory Regulation 132 and so were deemed to have been guilty of misconduct and the Disciplinary Committee's decision cannot be faulted with.

The appellant came out with an argument that since the decision in question was not taken by him alone and was in fact taken by NIRC, which is not a member of the Institute, no misconduct can be said to have been committed by him personally and, therefore, the entire proceedings held against him need to be quashed. This submission, in our view, is also not acceptable at all. In the present case members of the Institute who were part of NIRC which had taken the impugned decision were simply working under the umbrella of collective body called NIRC and, therefore, it cannot be said that no member had committed misconduct. NIRC has to function through individual members and so each and every member participating in any decision making process in contravention of law can be said to have committed misconduct falling under Clause (1) of Part II of the Second Schedule which we have already quoted. And this is what the Disciplinary Committee has also concluded while declaring that the decision taken by the members of NIRC (without referring to any particular member) had no legal basis. What the Disciplinary Committee wanted to convey was that the newly elected members of NIRC had sought to create a private fiefdom by making a self beneficial Rule for payment of fixed amounts of

money to each member every month irrespective of whether some money was actually spent by them or not from their own pockets. Lot has been said by the appellant about the past practice of members of NIRC claiming and getting limitless reimbursements and that too without submission of any proof of expenditure incurred and the intention behind passing the impugned resolution to curb that practice. The appellant had sought to highlight that even the complainant Rakesh Singh was also indulging in that practice as also another member of the NIRC namely Shri Hari Krishan Goel. However, nothing turns around this stand taken by the appellant since it is not the case of the appellant that reimbursements were being made in the past by the sanctioning authority without being satisfied that money being claimed any member was actually spent or not. Counsel for the Institute submitted that wherever money was being reimbursed without documentary proof the concerned member used to give a self declaration of money having actually being incurred and unless any suspicion was there about the genuineness of the claim the payments were being cleared. It was sought to be illustrated that if any member claims taxi fare it is not expected of him to give documentary proof of that expense as normally taxi drivers do not issue receipts and this fact can be taken notice of by anyone. We do not find this submission on behalf of the Institute to be unjustified. So, that practice in the past did not justify taking a decision in contravention of Regulation 132 by fixing monthly amounts for members of NIRC without justifying actual expense in addition to reimbursements on the basis of proof of expenditure.

The other argument raised by the appellant was that the complainant had been selective in proceeding against him alone when the impugned resolution was passed unanimously by seven members of

NIRC and therefore the Disciplinary Committee should have held the complaint of Rakesh Singh to be *mala fide* and motivated one. This grievance of the appellant is also not justified in the facts and circumstances of the case. The complainant was right in his stand that it was his choice whether to lodge formal complaint against one or all guilty of misconduct. However, a bare reading of the impugned order of the Disciplinary Committee shows that it had struck down the decision of NIRC as void *ab initio* holding that by passing this kind of a resolution NIRC members had fixed monthly allowance for themselves which decision had no legal basis. Thus, everyone had been indicted and painted with same brush and criticised with same force and the appellant alone was not held to be instrumental in contravention of Regulation 132. Every member was directed to return the money if drawn on the strength of the impugned resolution. That direction was in the nature of a fine which could also be imposed under Section 21(3) of the Act of 1959. So, this grievance of the appellant stood taken care of by the Disciplinary Committee itself which was not bound by the choice of the complainant in choosing the delinquent Cost Accountants. The Disciplinary Committee was free to indict everyone involved in the passing of the impugned resolution and not to restrict its criticism against the appellant alone despite the fact that the complainant had chosen not to name any other member of NIRC in his complaint. The appellant can thus have no grievance on this count.

Finally the appellant pressed into service the plea of bias and questioned the constitution of the Disciplinary Committee which included the complainant Rakesh Singh himself also as one of the members. It is undisputed that the complainant of this case, respondent no.2 herein, was a member of the Disciplinary Committee at the relevant time when

the complaint against the present appellant was being looked into after the Director(Discipline) had referred the matter to it. This fact was brought to our notice during the course of hearing of the appeal by the appellant and was admitted by the counsel for the Institute and the learned counsel had submitted that in the meetings of the Committee whenever this matter was taken up Mr. Rakesh Singh had been recusing himself and walking out of the room where enquiry proceedings were being conducted. On our directions he produced the copies of the minutes of the meetings of the Committee whenever the present matter was taken up and those minutes did show that the complainant Rakesh Singh had gone outside the room when this matter was being taken up. Counsel for the Institute submitted that as per the practice Disciplinary Committee is constituted by the Central Council not for any individual complaint but for looking into complaints in general against many Cost Accountants and it is not that for this case only the Committee comprising of Rakesh Singh was constituted. He also submitted that in any case the appellant never raised this objection of bias when the enquiry was going on and had he done so the other remaining members might have taken some decision on that objection and, therefore, this Appellate Authority need not entertain this objection. These documents were produced on 25/05/16 but on that date the appellant did not turn up and instead sent a request for adjournment. We had then adjourned the hearing to 26/05/16. However, on that day also the appellant sent a request for adjournment by email but had also written in his email that if further adjournment was not acceptable then the appeal could be disposed of by considering his grounds of appeal and written arguments submitted already. He had made some points in his email also. Since we were not inclined to adjourn the hearing any more we closed the proceeding after hearing the counsel for the Institute. So, from the side

of the appellant there was no response to the aforesaid submissions of counsel for the Institute regarding his objection against the complainant Rakesh Singh being one of the members of the Disciplinary Committee.

We are of the view that considering the fact that the complainant Rakesh Singh had been recusing himself from the proceedings against the appellant and the fact that no objection in any case was raised in this regard before the other members of the Committee this plea of bias also needs to be rejected.

This appeal, thus, being devoid of any merit is hereby dismissed with cost of Rs. 20,000/- which shall be deposited in the Member's Benevolent Fund which is maintained by the Institute of Cost Accountants of India.

Justice P.K. Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

B. M. Sharma
Member

5th August, 2016