

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1730 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
Yes
 2. To be referred to the Reporter or not? Yes :
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
No
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? No :

DINESH R SHAH

Versus

INSTITUTE OF CHARTERED ACCOUNTS OF INDIA

Appearance:

1. Special Civil Application No. 1730 of 1989
MR KH KAJI, SENIOR ADVOCATE, with MR SUNIL K SHAH,
advocate for Petitioner
MR SN DIVETIA for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 28/02/2003

ORAL JUDGEMENT

In instant petition, which is filed under

Articles 226 & 227 of the Constitution, the petitioner, who is a Chartered Accountant, has prayed to issue a writ of mandamus or any other appropriate writ, direction or order to quash the proceedings of Case No. 25-CA(54)/86 pending before the Council of the Institute of Chartered Accountants of India for considering the report dated September 9, 1988 submitted by the disciplinary committee holding the petitioner guilty of professional misconduct within the meaning of Section 21 read with Section 22 of The Chartered Accountants Act, 1949 and Clause (7) of Part-I of the Second Schedule to the Act, and also for other misconducts within the meaning of Section 21 read with Section 22 of the said Act. The petitioner has further prayed to quash Notice No.25 (CA) dated January 24, 1989 issued on behalf of the Council of the Institute of Chartered Accountants of India calling upon him to send his representation in writing so as to enable it to consider the report of the disciplinary committee in accordance with the provisions of Section 21(4)/21(5) of The Chartered Accountants Act, 1949.

2. The petitioner is a practising Chartered Accountant. Mr.G.R.Patwardhan, the then Chief Commissioner of Income-Tax (Admn.), Gujarat-I, Ahmedabad, filed a complaint dated August 18, 1986 before the Council of the Institute of Chartered Accountants of India ("the Council" for short) indicating that the petitioner was guilty of misconducts enumerated therein. A copy of the complaint is produced by the petitioner as Annexure-A to the petition. In accordance with the provisions of Regulation 11(5) of The Chartered Accountants Regulations, 1964, a copy of the complaint was forwarded to the petitioner along with the Institute's letter dated September 15, 1986, and the petitioner was asked to submit his written explanation. Accordingly, written explanation dated November 8, 1986 was sent by the petitioner to the Institute. After considering the complaint and the written statement, the Council on its 122nd Meeting held between February 12 and February 14, 1987, formed a prima-facie opinion that the petitioner was guilty of professional and/or other misconducts. It, therefore, referred the case to the disciplinary committee for inquiry. The disciplinary committee held inquiry and submitted its report dated September 9, 1988 to the Council for appropriate action. The Council has issued notice dated January 24, 1989 calling upon the petitioner to submit written representation so as to enable it to consider the report along with the written representation and oral submissions, if any, for taking decision in accordance with the provisions of Sections 21(4)/21(5) of the

Chartered Accountants Act, 1949 ("the Act" for short). The petitioner has submitted his written representation along with forwarding letter dated February 2, 1989, which is produced at Annexure-D to the petition. According to the petitioner, the report submitted by the disciplinary committee and the notice issued by the Council are without jurisdiction and illegal on the grounds enumerated in the petition. Under the circumstances, the petitioner has filed instant petition and claimed reliefs to which reference is made earlier.

3. On service of notice, Mr.M.C.Narsimhan, the Secretary of the Institute of Chartered Accountants of India, New Delhi, has filed reply affidavit on behalf of the Institute controverting the averments made in the petition, to which the petitioner has filed affidavit-in-rejoinder.

4. At the time of hearing of the petition, Mr.K.H.Kaji, learned Senior Advocate of the petitioner, raised 6 points for consideration of the Court viz. (i) in view of the conviction on admission of Mr. H.J.Golecha in criminal proceedings during the pendency of the petition, the petition should be accepted; (ii) the disciplinary committee had not framed charge against the petitioner informing him as to which misconduct was committed by him nor any charge is framed under Section 22 of the Act, and as this lapse on the part of the disciplinary committee has resulted into prejudice, the report of the disciplinary committee should be quashed; (iii) the complainant was not examined during the course of disciplinary action and, therefore, the finding recorded by the disciplinary authority to the effect that the petitioner is guilty of misconduct deserves to be set aside; (iv) the petitioner was not allowed to cross-examine Mr.Nigam, who was an Income-tax Officer and who was responsible for giving refund cheques to Mr.Golecha, which has resulted into miscarriage of justice and, therefore, reliefs claimed in the petition should be granted; (v) the disciplinary committee has not recorded any finding in its report that the petitioner was negligent and what is attributed to the petitioner is carelessness and perfunctoriness and, therefore, the petition should be allowed; (vi) by notice dated January 24, 1989, the petitioner is called upon to submit written representation and informed that the petitioner would be entitled to appear before the Council, either in person or through a member of the Institute, but the petitioner is not informed that he is entitled to be represented through a Lawyer though the petitioner was permitted to be represented through a Lawyer before the disciplinary

committee, and as the notice violates basic principles of natural justice, the same deserves to be quashed.

5. Mr. Samir N.Divetia, learned counsel of the respondent, has raised the contention that in view of the special scheme envisaged under the Chartered Accountants Act, 1949, the petition should not be entertained and the Council of the Institute of Chartered Accountants of India should be permitted to deal with the matter in accordance with law.

6. The Court has taken into consideration the submissions advanced at the Bar, the documents forming part of the petition and relevant statutory provisions. The Scheme envisaged by Section 21 of the Act is such that on receipt of opinion or of a complaint made to it, the Council is entitled to refer the case to the disciplinary committee, if it is, prima-facie, of the opinion that any member of the Institute has been a guilty of any professional or of other misconduct. On reference being made by the Council, the disciplinary committee is obliged to hold inquiry and submit its report to the Council for further action. Sub-section (2) of Section 21 of the Act envisages that if the Council, on consideration of the report, finds that the member of the Institute is not guilty of any professional or other misconduct, it has to record its findings accordingly and pass an order for filing the proceedings and/or for dismissing the complaint. However, sub-section (3) of Section 21 provides that if on consideration of the report of the disciplinary committee the Council finds that the member of the Institute is guilty of any professional or of other misconduct, it has to record findings accordingly and proceed in the manner laid down in sub-sections (4) & (5) of Section 21 of the Act. Sub-section (4), inter alia, provides that where the finding recorded by the Council is that a member of the Institute has been guilty of professional misconduct specified in the First Schedule, the Council has to afford to the member an opportunity of being heard before passing any order against him, and thereafter may reprimand or remove his name from the Register for such a period not exceeding five years. Proviso to sub-section (4) of Section 21 stipulates that if the Council is of the opinion that the case is one in which name of the member ought to be removed from the Register for a period exceeding five years or permanently, it has to forward the case to the High Court with its recommendations thereon. Further, sub-section (5) of Section 21 envisages that where the misconduct in respect of which the Council has found any member of the Institute guilty,

is misconduct other than any such misconduct as is referred to in sub-section (4), it has to forward the case to the High Court with its recommendations thereon.

7. As noticed earlier, the disciplinary committee has submitted its report to the Council, and the Council has called upon the petitioner to submit written representation to enable it to decide the matter in accordance with the provisions of Sections 21(4) & 21(5) of the Act. The petitioner has already submitted his written explanation, but, the Council has not yet passed any final order, either under sub-section (4) or sub-section (5) of Section 21 of the Act. Even if any adverse order is passed by the Council under proviso to sub-section (4) of Section 21 or sub-section (5) of section 21, the Council shall have to make reference to the High Court and the reference, which may be made to the High Court, will have to be decided in the light of the provisions of sub-section (6) of Section 21 of the Act, as interpreted by the Supreme Court in the Institute of Chartered Accountants v. B. Mukharjea, reported in AIR 1958 SC 72. If any order adverse to the petitioner is passed under the main provisions of sub-section (4) of Section 21 of the Act, the petitioner will have a right to approach the High Court by filing an appeal as provided under Section 22-A of the Act. Thus, the points, which are sought to be agitated by the petitioner in instant petition, can very well be agitated before the Council. On consideration of material, the Council may exonerate the petitioner and if any punishment is imposed on the petitioner, he can very well urge the points raised in the petition before the High Court, either in reference or in appeal. The learned counsel for the petitioner has stated at the Bar that the petitioner does not propose to challenge the report of the disciplinary committee on merits in this petition and would agitate the same before the Council, if need arises i.e. if the petition is dismissed. Such a statement is made obviously for the reason that the matter is yet not decided on merits by the Council. This Court is of the opinion that the petitioner cannot be permitted to adopt such a course. Permitting the petitioner to urge only some of the technical pleas and considering the same in a petition filed under Article 226 of the Constitution and at the same time, reserving liberty to the petitioner to agitate the points on merits before the Council, would not be conducive to justice delivery system. Such a course will result into delay in disposal of matter and would be contrary to the scheme envisaged by Article 226 read with the provisions of the Chartered Accountants Act, 1949. Neither Article 226 nor the provisions of the

Act can be construed to mean that a member of the Institute is entitled to agitate technical points separately in a petition under Article 226 and urge the points on merits before the Council. If the points raised in instant petition are decided either way, the aggrieved party would, in all probability, file Letters Patent Appeal before the High Court and also Special Leave Petition before the Supreme Court, which would certainly result into delay in disposal of the matter. Powers under Article 226 cannot be exercised in a manner so as to cause delay in disposal of matter. It is true that the petition is pending in the Court since 1989 and it may not be proper for the Court to nonsuit the petitioner on the ground that the petitioner must show cause before the Council and avail of the remedy provided under the statute. However, it is to be noticed that the scheme of the Act is such that an aggrieved member of the Institute will have an opportunity before the High Court, either in reference or in appeal, as the case may be, to agitate all the points and the High Court has wide powers to pass appropriate orders to do complete justice between the parties. Under the circumstances, a question arises whether would it be prudent for the High Court to exercise powers at this stage under Article 226 of the Constitution. The Court finds that not only alternative effective statutory remedy is available under the Act, but, the petitioner can very well redress his grievance before the High Court itself, either in reference or in appeal and, therefore, it would not be sound exercise of discretion under Article 226 of the Constitution to interfere at this stage. Article 226 is not intended to circumvent statutory procedures. Hence, where statutory remedies are available, a petition under Article 226 should not be entertained, unless the statutory remedies are ill-suited to meet the demands of an extraordinary situation e.g. (i) where the very vires of the statute is in question, or (ii) where private or public wrongs are so inextricably mixed up and prevention of public injury and the vindication of public justice require that recourse may be had to Article 226, or (iii) the alternative remedy is not effective or adequate. The petitioner has failed to convince the Court that the scheme and procedure provided under the Act is either illusory or ill-suited or that the remedy is not effective and adequate. Entertaining the petition at this stage would amount to bypassing the whole procedure including the provisions of reference and/or appeal to the High Court made in a self contained Code, and such a course is not warranted in the facts of the case. Therefore, it is not necessary for the Court to decide the points urged on behalf of the petitioner on merits

and accordingly, they are not decided. The petition, therefore, deserves to be disposed of, of course, with certain directions.

8. As noticed earlier, the petitioner has filed his written representation along with his forwarding letter dated February 21, 1989. Having regard to passage of time, it is clarified that he would be entitled to submit further representation incorporating more points, if so advised. It would be open to the petitioner to agitate not only 6 points, which have been enumerated in the earlier part of this judgment, but, also other points which have been mentioned in the petition and/or written representation and which may be taken at the time of hearing of the matter before the Council and the Council is hereby directed to decide the same on merits and in accordance with law. So far as the grievance of the petitioner that he should be permitted to be represented through a Lawyer before the Council is concerned, the Court finds that the petitioner has made such a request to the Council by letter dated February 21, 1989, which is produced at Annexure-D to the petition, but, the Council has not rendered any decision thereon. Therefore, it would be appropriate to direct the Council to consider the said application on merits. Under the circumstances, the Council is directed to decide the said application having regard to the attending circumstances including the fact that the petitioner was permitted to be represented through a Lawyer before the disciplinary committee.

Subject to the above-referred to observations and directions, the petition is disposed of. Rule is discharged. There shall be no order as to costs. Interim relief granted earlier is hereby vacated.

(J.M.Panchal,J.)

(patel)