



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

PR/154/2021/DD/01/2021/BOD/710/2023

ORDER UNDER SECTION 21A (3) OF THE CHARTERED ACCOUNTANTS ACT, 1949
READ WITH RULE 15 (1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF
INVESTIGATIONS OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT
OF CASES) RULES, 2007

IN THE MATTER OF:

CA. Manoj Kumar Jain (M. No. 075666)

C-1, 1st Floor, RDC, Raj Nagar

Ghaziabad-201002..... Complainant

Versus

CA. Nishant Agarwal (M. No. 437469)

Partner, M/s Amit S. Agarwal & Co., Chartered Accountants

SA-18/2, Shastri Nagar

Ghaziabad-201002 Respondent

[PR/154/2021/DD/01/2021/BOD/710/2023]

MEMBERS PRESENT (THROUGH VIDEO CONFERENCE):

CA. Rajendra Kumar P, Presiding Officer

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

Date of hearing and passing of Order: 15th July 2024

1. The Board of Discipline vide its Finding dated 30th May 2024 was of the view that CA. Nishant Agarwal (M.No.437469) is Guilty of Professional Misconduct falling within the meaning of Items (8) and (9) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.
2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against CA. Nishant Agarwal (M.No.437469) and communication dated 5th July 2024 was addressed to him thereby granting an opportunity of being heard on 15th July 2024 which was exercised by him being present through video conferencing. He confirmed receipt of the Findings of the Board.
3. Thus, upon consideration of the facts of the case, the consequent misconduct of CA. Nishant Agarwal (M.No.437469) and keeping in view his representation before it, the Board decided to impose a **fine of Rs.25,000/- (Rs. Twenty-Five Thousand only)** upon him.

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy

Sd/-

**CA. Rajendra Kumar P
(Presiding Officer)**

बिष्वा नाथ तिवारी / Bishwa Nath Tiwari
कार्यकारी अधिकारी / Executive Officer

अनुशासनात्मक निदेशालय / Disciplinary Directorate

इंस्टिट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया

The Institute of Chartered Accountants of India

आईसीआईबीसी भवन, विश्वास नगर, शाहदरा, दिल्ली-110032

ICAI Bhawan, Vishwas Nagar, Shahdara, Delhi-110032

Sd/-

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

CA. Manoj Kumar Jain (M. No. 075666) -Vs- CA. Nishant Agarwal (M.No.437469)

BOARD OF DISCIPLINE

(Constituted under section 21A of the Chartered Accountants Act 1949)

Findings under Rule 14 (9) of the Chartered Accountants (Procedure of investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

CORAM: (PRESENT IN PERSON)

**CA. Rajendra Kumar P, Presiding Officer
Ms. Dolly Chakraborty, (IAAS, Retd.), Government Nominee**

IN THE MATTER OF:

**CA. Manoj Kumar Jain (M. No. 075666), Chartered Accountants
C-1, 1st Floor, RDC, Raj Nagar,
Ghaziabad – 201002..... Complainant**

Versus

**CA. Nishant Agarwal (M.No.437469)
Partner, M/s Amit S. Agarwal & Co., Chartered Accountants,
SA-18/2, Shastri Nagar,
Ghaziabad- 201002Respondent**

**Date of Final Hearing : 07th May 2024
Place of Final Hearing : ICAI Bhawan, Indraprastha Marg, New Delhi**

PARTIES PRESENT:

Counsel for Complainant: CA. Sandeep Manaktala.
Respondent: CA. Nishant Agarwal along with his Counsel CA. Ankit Maheshwari.

FINDINGS:

BRIEF BACKGROUND OF THE CASE:

1. As per the version of the Complainant, he was the partner of M/s. Manoj Santosh & Co, Chartered Accountants and was appointed as statutory auditor of M/s Fortune Machines Private Limited (hereinafter referred to as the "Company") for the period from 01/04/2015 to 31/03/2020. The Complainant further stated that his appointment for Financial Year 2019-20 was ratified in the AGM which was held on 30/09/2019. The Complainant also stated that

neither his firm has been removed as statutory auditor nor he has resigned but the Respondent signed the audit report of the Company for Financial Year 2019-20 on **30th December 2020**.

CHARGES ALLEGED:

- 2.1 That the Respondent has accepted the appointment as the statutory auditor of the Company for the Financial Year 2019-20 without first communicating with the previous auditor (i.e., Complainant) in writing as required under Item (8) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.
- 2.2 That the Respondent has carried out the audit work for Financial Year 2019-20 and signed the audit report of the Company without verifying the provisions of Sections 139 and 140 of the Companies Act 2013 and Rule 7 (1) of the Companies (Audit and Auditors) Rules 2014. The Complainant further stated that his firm was neither removed as statutory auditor of the Company nor he has tendered any resignation. The Respondent has not ensured that the compliance of provision of Companies Act 2013, and the conditions prescribed under the Companies (Audit and Auditors) Rules 2014 were made by the Company. Thus, Respondent has allegedly violated the provision of Item (9) of Part-I of the First Schedule to the Chartered Accountant Act 1949.
- 2.3 The Respondent has connived and colluded with the Management of the Company to become the statutory auditor for the year 2019-20 and contravened the proviso of Item (6) of Part-I of the First Schedule to the Chartered Accountants Act, 1949. The Complainant also stated that Item (6) of Part I of First Schedule states that a member shall be deemed to be guilty if he "*Solicits clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means*". The Complainant alleged that the Respondent contravened the above Item by securing work through collusion with the Management of the Company and deliberately chose not to adhere to the various Items of the Code of Ethics.
- 2.4 The Respondent has signed the audit report of the Company after the extension of due date by the Ministry of Corporate Affairs vide Circular No.28/2020 dated 17.08.2020.

BRIEF OF THE PROCEEDINGS HELD:

3. The details of the hearings fixed and held in the said matter, are given as under:

S. No.	Date of Hearing	Status of Hearing(s)
1	10 th April 2024	Adjourned at the request of the Respondent.
2	7 th May 2024	Matter is heard and hearing is concluded



BRIEF SUBMISSIONS OF PARTIES:

4. The Respondent vide letter dated 16th October 2023 submitted as under:
 - 4.1 That the Respondent affirmatively asserts that his appointment as the auditor of the Company was conducted in accordance with the provisions delineated under Section 139 of the Companies Act 2013. Further, all requisite documentation mandated by Rule 4 (1) of the Companies (Audit & Auditors) Rules, 2014, was duly submitted to the Company's Board prior to the said appointment.
 - 4.2 Respondent submits that since the Complainant had his personal grievance against one of the Partners of the Firm, the Complainant exhibited non-cooperation in furnishing the NOC. Given the absence of any discernible red flags and the absence of outstanding audit fees, the Respondent deemed the account settlement to be in order. Further, the Respondent's acceptance of the appointment was facilitated by the absence of adverse communication from the Complainant.
 - 4.3 Respondent submits that prior to accepting the appointment, the Respondent diligently pursued avenues to establish effective communication with the Complainant. Recognizing the importance of adherence to proper procedures, the Respondent made numerous conscientious efforts, engaging in multiple phone calls, and actively seeking meetings with the Complainant. These actions were undertaken in a genuine attempt to fulfil the necessary requirement of communication.
 - 4.4 Respondent also submits that in the instant case, the Respondent proactively transmitted the No Objection Certificate (NOC) to one of the employees of the Company. While the Respondent diligently endeavoured to obtain a signed copy of the NOC from the Complainant, it regrettably proved unattainable. It is crucial to note that Respondent had every intention of promptly communicating this situation to the Director (Discipline). However, due to unforeseen circumstances, the Respondent was unable to convey this crucial piece of information. To strengthen the case and to substantiate his assertions, the Respondent is ready to present the aforementioned Company employee as a credible witness. This witness will testify to the fact that the Respondent did, indeed, engage in written communication on behalf of the Respondent. His testimony will serve to confirm the earnest efforts made by the Respondent in fulfilling the responsibilities and complying with the necessary written communication requirements.
 - 4.5 Besides above, the Respondent submits that under the circumstances where the previous auditor is uncooperative and the expectation of receiving communication from him is unlikely, combined with the existing delay in the audit timelines, he opted to evaluate any potential concerns before accepting the appointment, instead of continuously following up with the Complainant.



Consequently, the Respondent proceeded with the assignment. Therefore, failure to communicate in writing with the previous auditor prior to accepting the audit assignment constitutes a procedural oversight. Such an oversight does not compromise the principles articulated in the Code of Ethics; it assumes the character of an inconsequential procedural error.

- 4.6 With respect to the Second allegation, the Respondent affirms that the audited accounts of the Company for the FY 2019-20 were attested on 30th December 2020. It is asserted that while signing the audit report, the Respondent adhered to the provisions of the Companies Act 2013, which distinctly delineates the powers and duties of auditors. Furthermore, the Respondent emphasizes that the signing of the audit report does not necessitate compliance with the provisions of Section 139 and Section 140 of the Companies Act 2013, as these sections primarily pertain to the appointment and removal of the auditor and are unrelated to the act of signing the audit report.
- 4.7 The Respondent, serving as an incoming auditor, has not violated the provisions stated under Section 139 (Appointment of Auditors), Section 140 (Removal of Auditor), and Section 141 (Eligibility, Qualifications, and Disqualification of Auditors) and Rule 4(1) of Companies (Audit and auditors) Rules 2014. In the instant case the Company made the Respondent's appointment as the auditor for FY 2019-20 during a Board Meeting held on 3rd October 2020, and the letter of appointment was issued to the Respondent on 3rd October 2020 too. Prior to providing his consent, the Respondent diligently reviewed the provisions outlined in Section 141 concerning the qualifications for being appointed as an auditor in the Company, and also adhered to the requirements pertaining to the appointment of auditors as stipulated under Section 139 of the Companies Act 2013. Subsequently, the Respondent submitted his consent to serve as the statutory auditor of the Company.
- 4.8 Respondent submits that since in the present case, following observations have been made in the PFO:
- 4.8.1 That the auditor appointed u/s 139 can only be removed by the Special Resolution of the Company. Special Notice shall be required for a resolution at an AGM appointing as auditor of a person other than the retiring Auditor.
- 4.8.2 That the Appointment of Respondent as statutory auditor was approved subsequently by the Company in the EGM held on 20-01-2021. The Respondent signed the Financials for the Financial Year 2019-20 before his appointment in the EGM.

Therefore, in response, the Respondent submitted that the retiring auditor was not removed from the post of statutory auditor. He drew attention to



the fact that the Complainant was appointed as statutory auditor in the AGM held on 30-09-2015 for the term of 5 consecutive years i.e. till the conclusion of AGM for FY 2019-20. The AGM for FY 2019-20 was conducted on 30-09-2020. The Respondent was appointed on 03-10-2020 to conduct the statutory audit for the FY 2019- 20. Therefore, the question of the removal of Complainant or resignation of the Complainant does not arise. The Respondent was appointed as statutory auditor to fill the casual vacancy which was created on 30-09-2020. It was the error on the part of Complainant not to finish the job of the statutory auditor for FY 2019-20 within the time as desired by the Company.

Further, the Company passed special resolution for not to reappoint the Complainant in its 5th Board Meeting held on 03-10-2020. It is specifically mentioned that the Complainant has not been reappointed due to his unprofessional conduct. The Special Resolution further states that the term of the current auditor also expired with the conclusion the AGM as per Section 139 (1). The special resolution was passed in AGM dated 30-09-2020 regarding the same. The Company has filed MGT-14 regarding the appointment of Respondent as statutory auditor. Respondent submits that the appointment in question is for FY 2019-20. The appointment for FY 2019-20 was done after the AGM on 03-10-2020. The AGM was conducted on 30-09-2020 with a special resolution for not to reappoint the Complainant and fill the casual vacancy of auditor arose by virtue of application of Section 139 (9) (c) according to sub section 138 (8)(1). Further, EGM was done on 20-01-2021 for approving the Audited Balance Sheet for 31.03.2020. It was not held for appointment of auditor for FY 2019-20. The Appointment for FY 2019-20 was done as per the Board Meeting held on 03-10-2020. The appointment of Respondent was done in EGM for 5 years from FY 2020-21 to FY 2024-2025. There was no question of appointing auditor for FY 2019-20. Therefore, the question of accepting an appointment as statutory auditor for FY 2019-20 before EGM does not arise.

OBSERVATION OF THE BOARD:

5. Pursuant to hearing and thorough review of the documents on record in the matter, the Board observes that the Respondent in Para No. 27 of his written statement dated 13th October 2021 admitted that there was no written communication between him and the Complainant. Relevant portion from the said Para 27 is reproduced below: -

"Since there has been no written communication between us prior to undertaking the assignment, the Complainant can conveniently claim that there was no communication with him before accepting the assignment."



Therefore, as the Respondent clearly admitted his guilt regarding Charge 2.1 and moreover said non communication is evident from the documents on record, hence, the Board is of the view that despite being appointed as the statutory auditor of the Fortune Machine Private Limited from FY 2019-20 to FY 2024-25, failed to adhere to the requisite communication protocol mandated by the Chartered Accountants Act, 1949 and the accompanying Code of Ethics. This breach of professional conduct constitutes a violation of Item (8) of Part-I of the First Schedule to the Chartered Accountants Act, 1949. Relevant portion from the Act and the Code of Ethics is reproduced below: -

"A Chartered Accountant in practice shall be deemed to be guilty of professional misconduct: - if he accepts a position as auditor previously held by another Chartered Accountant or a certified auditor who has been issued certificate under the Restricted Certificate Rules 1932 without first communicating with him in writing". [Item (8) of Part-I of the First Schedule to the Chartered Accountants Act, 1949].

"Members should therefore communicate with a retiring auditor in such a manner as to retain in their hands positive evidence of the delivery of the communication to the addressee. In the opinion of the Council, the following would in the normal course provide such evidence: -

- (a) Communication by a letter sent through "Registered Acknowledgement due", or*
- (b) By hand against a written acknowledgement, or*
- (c) Acknowledgement of the communication from retiring auditor's vide email address registered with the Institute or his last known official email address, or*
- (d) Unique Identification Number (UDIN) generated on UDIN portal (subject to separate guidelines to be issued by the Council in this regard)."* **[2.14.1.8 (x) of Code of Ethics (2020 edition) for the Chartered Accountants].**

6. As regards Charge 2.2, where it is alleged that Respondent has carried out the audit work for financial year 2019-20 and signed the audit report of the Company without verifying the provision of Sections 139 and 140 of the Companies Act 2013 and Rule 7 (1) of Companies (Audit and Auditors) Rules 2014, the Board noticed that the fact being Respondent signing financial statements for the FY 2019-2020 on 30th December 2020, is even concurred by the Respondent himself in para-No. 6 of his written statement and Para 4.7 of his further written statement. Hence, from the above it is un rebutted fact that the Respondent did carry out the audit work and signed the audit report pertaining to the FY 2019-2020 on 30th December 2020.
7. The Board lunged into the chain of transactions to ascertain that how and when the Respondent got power to sign the audit report. In this regard, the Board noticed that the Board of Directors of the Company on 3rd October 2020 in their

meeting passed a resolution wherein on account of application of Section 139 (9) (c) due to passing of special resolution on 30-9-2020 by which Complainant, was resolved for not to re-appoint and due to filing this casual vacancy Respondent was appointed as statutory auditor on the said date of the meeting. Relevant para from the meeting is stated below: -

"RESOLVED THAT pursuant to sub-section (8) of section 139 of the Companies Act, 2013 and other applicable provisions, if any, of the Companies Act, 2013 as amended from time to time or any other law for the time being in force (including any statutory modification or amendment thereto or re-enactment thereof for the time being in force), M/s Amit S Agrawal & Co, Chartered Accountants, (Firm Registration No. 008125C), be and are hereby appointed as statutory auditors of the Company to fill up the casual vacancy caused due to completion of the term of previous auditor M/s. Manoj Santosh & Company. (FRN: 006935C) (Manoj Kumar Jain) Proprietor, Chartered Accountants, up on conclusion of 16th AGM since their appointment on 30th Sep 2015 according to section 139 (1) and on account of application of section 139 (9)(c) due to passing of special resolution on 30-9-2020 by which M/s. Manoj Santosh & Company: (FRN: 006935C), (Manoj Kumar Jain) Proprietor, Chartered Accountants, was resolved to be not reappointed."

Consequently, the Director of the Company vide letter dated 3rd October 2020 informed the Respondent that his firm has been appointed as statutory auditor of the Company in the Board meeting dated 3rd October 2020.

The Board noted that the Director of the Company vide letter dated 30th December 2020 informed the Respondent that his firm is proposed to be appointed as statutory auditor of the Company at ensuring EGM to be held on 20th January 2021 and requested Respondent to write his consent to the appointment. In ordinary resolution passed at the Extraordinary General meeting of Company dated 20th January 2021, in pursuant to the provisions of Section 139, 142 and other applicable provisions of Companies Act, 2013; Respondent was appointed as statutory auditor of the Company for five consecutive years. Director of the Company vide letter dated 20th January 2021 informed the Respondent that by the resolution passed at EGM dated 20th January 2021, Respondent has been appointed as statutory Auditor of the Company till the conclusion of 21st Annual General Meeting to be held in calendar year 2025. Thus, from the perusal of the above course of transaction, it is manifestly clear to the Board that Respondent has legally been appointed as statutory auditor on 20th January 2021 by the Company and Respondent signed the Audit Report on 30th December 2020.

In the light of above, it is transparent to the Board that Respondent signed the documents before being appointed as statutory auditor. Further, Section 139 of Companies Act, 2013 clearly mandates that auditor shall be appointed in the general meeting of the Company and the defence of Respondent that he has

been appointed as auditor on 3rd October 2020 is erroneous as this date is the date of Board meeting and not the date of General Body Meeting. Relevant portion from Section 139 of Companies Act, 2013 is stated below: -

"Subject to the provisions of this Chapter, every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed"

Resultantly, this whole scenario clearly implies that the Respondent did not ascertain the requirements of section 139 of Companies Act, 2013, hence the Board is of the view that the Respondent is Guilty of Professional Misconduct falling within the meaning of Item (9) of Part-I of the First Schedule to the Chartered Accountants Act, 1949. Relevant portion is stated below: -

"A Chartered Accountant in practice shall be deemed to be guilty of professional misconduct if he: - Accepts an appointment as auditor of a company without first ascertaining from it whether the requirements of Section 225 of the Companies Act, 1956 [or sections 139 to 141 of the Companies Act, 2013 or any other law pertaining to appointment of auditors for the time being in force] in respect of such appointment have been duly complied with". [Item (9) of Part-I of First Schedule to the Chartered Accountants Act, 1949.]

8. As regard the charge that the Respondent has connived and colluded with the Management of the Company to become the statutory auditor for the year 2019-20 and contravened the proviso of Item (6) of Part-I of the First Schedule to the Chartered Accountants Act, 1949. The Complainant also stated that Item (6) of Part I of First Schedule states that a member shall be deemed to be guilty if he *"Solicits clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means"*. The Complainant alleged that the Respondent contravened the above Item by securing work through collusion with the Management of the Company and deliberately chose not to adhere to the various Items of the Code of Ethics, the Board concurred with the reasons given by the Director (Discipline) that there is nothing on record to show that the Respondent has colluded with the Management of the Company to become the statutory auditor of the Company. Hence, the Respondent is held 'Not Guilty' of Professional and Other Misconduct falling within the meaning of Item (2) of Part-IV and Item (6) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.
9. As regard the allegation that the Respondent has signed the audit report of the Company after the extension of due date by the Ministry of Corporate Affairs vide Circular No.28/2020 dated 17.08.2020 too, the Board concurred with the



reasons given by the Director (Discipline) that the Complainant has failed to explain the exact nature of misconduct or negligence on the part of the Respondent if the Balance Sheet of the Company was signed by the Respondent during the extended period. Hence, this allegation against the Respondent is not maintainable.

10. Therefore, considering the fact and circumstances of the present case, the Board concludes that the Respondent is '**Guilty**' of Professional Misconduct.

CONCLUSION:

11. Thus, in conclusion in the considered opinion of the Board, the Respondent is held '**GUILTY**' of Professional Misconduct falling within the meaning of Items (8) and (9) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.

Sd/-
CA. Rajendra Kumar P
Presiding Officer

Sd/-
Dolly Chakrabarty, IAAS (Retd.)
Government Nominee

Date: 30-05-2024

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