

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Present

Madam Justice Kashefa Hussain

And

Madam Justice Kazi Zinat Hoque

Writ Petition No. 6932 of 2022

In the matter of:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

A H Mostofa Kamal FCA

..... Petitioner.

Vs.

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Commerce and Others.

..... Respondents.

Mr. Imran Siddque, Advocate with

Mr. Zubair A. Bhuiyan, Advocate with

Mr. Mustafizur Rahman, Advocate

.....for the petitioners

Mr. Tanjib Ul Alam, Senior Advocate with

Mr. Kazi Ershadul Alam, Advocate

.... for the respondent No. 3

Heard on: 07.02.2023, 22.02.2023,

01.03.2023, 14.03.2023, 27.03.2023 and

judgment on: 28.03.2023.

Kashefa Hussain, J:

Rule nisi was issued calling upon the respondents to show cause as to why the impugned memo being ICAB/RA/2022/09 dated 11.01.2022 issued by the respondent No. 3 withholding the petitioner's DVS generation access (Annexure-D) and the impugned Memo being No. ICAB/RA/2022/54 dated 18.05.2022 issued by the

respondent No. 3 revoking the Certificate of Practice (CoP) of the petitioner for 3 years and imposing monetary penalty of Tk. 300,000.00 only, (Annexure-F) should not be declared to have been made without any lawful authority and is of no legal effect and /or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioner A H Mostafa Kamal FCA is Proprietor, Mostafa Kamal & Co., Chartered Accountants, Paltan Tower, (7th Floor, Suite-706, 87 Purana Paltan Line, Paltan, Dhaka-1000 and is a citizen of Bangladesh.

The respondent No. 1 is the Secretary, Ministry of Commerce, Bangladesh Secretariat, Secretariat Dhaka-1000, the respondent No. 2 is the Institute of Chartered Accountants of Bangladesh (ICAB) represented by its Chief Executive Officer (CEO), CA Bhaban, 100 Kazi Nazrul Islam Avenue, Dhaka, 1215, the respondent No. 3 is the Chief Executive Officer, Institute of Chartered Accountants of Bangladesh (ICAB), CA Bhaban, 100 Kazi Nazrul Islam Avenue, Dhaka, 1215 and the respondent No. 4 is the Chairman, Financial Reporting Council, Finance Division, Ministry of Finance, Porjoton Bhaban (8th floor), Plot- E-5, c/1, West Agargaon, Sher-e-Bangla Nagar Administrative area, Dhaka- 1207.

The petitioner's case inter alia is that the some officials of the ICAB visited the petitioner Mostafa Kamal & Co.'s office without any prior notice for a special review alleging abnormal volume of DVS records. The ICAB team reviewed 364 audit engagements of Mostafa Kamal & Co. from 1 December 2020 to 6 January 2022 and

prepared their special review report. It has been stated in the Executive Summary of the special review report that FRC requested the ICAB vide Letter No. 177/FRC/APR/2021/62 dated 30.12.2021 to investigate whether Mostafa Kamal & Co., Chartered Accountants ensured the quality of the audit engagements conducted and share a copy of the review report with them. However, it has been also stated in the Executive Summary of the special review report that the period of Review/Visit was 29 and 30 November 2021, 05 December 2021 which is long before the FRC recommendation, and 8 January 2022. Thereafter another revised special review report has been prepared with some addition to the report dated 11 January 2022. That after the review, the special Review Team submitted their report alleging non-compliance of the relevant laws and International Standard on Auditing (ISA) and making allegations of professional misconducts under ICAB Bye-Law 2004 against the petitioner. Thereafter, on 11.01.2022 the respondent No. 3 issued the impugned memo being ICAB/RA/2022/09 dated 11.01.2022 to the Petitioner alleging non-compliance of accounting standards and commission of numerous instances of professional misconduct by the Petitioner under ICAB Bye-laws 2004. By the said memo, the petitioner's DVS generator access was also withheld for an indefinite period of time. That as a result of the issuance of the aforesaid impugned memo dated 11.01.2022 the petitioner's DVS generation access has been withheld. As such, the petitioner's practice has been suspended on the basis of vague allegations without giving him any opportunity to respond to the said allegations. In this regard, it is stated that the petitioner's firm

has been appointed as auditor under Section 210 of the Companies Act, 1994 by a large number of private limited companies. As such, the petitioner is under a responsibility to conduct audit as per law and submit the audit reports in compliance with the provisions of the Companies Act, 1994. However, because of the aforesaid memo dated 11.01.2022, the Petitioner has been unable to process their documents or submit the relevant audit reports, thereby exposing his clients to potential non-compliance and statutory fines under the Companies Act, 1994. That on December 2020, ICAB introduced DVS and DVC system to prevent the preparation of fake and/or duplicate audited financial statements. Subsequently, an agreement was reached between ICAB and NBR according to which compliance with the DVS system was made mandatory for the purpose of Income Tax and VAT collection. It is stated that through the DVS generator system, a unique verification code is generated for each audit report which has been audited by an ICAB member. It is stated that NBR officials will consider an audit report fake if the report does not contain any such authentication code. That on 18.05.2022, the respondent No. 3 issued a letter bearing memo No. ICAB/RA/2022/54 dated 18.05.2022 and thereby revoked the Certificate of Practice of the Petitioner for a period of 3(three) years together with imposition of monetary penalty of Tk. 3,00,000/-(taka three lac) only. That because of the Covid-19 pandemics, the applicant preserves a large number of documents relating to his practice in digital form, and as such, during the sudden visit by the ICAB team, hard copies of the relevant documents were produced by the Petitioner. However, the ICAB, without giving the

petitioner a reasonable opportunity to defend himself, locked the petitioner's DVS generation access and subsequently revoked his certificate of practice in violation of the ICAB Bye-Laws, 2004, causing irreparable loss and injury. That during the period under review, the petitioner did not audit any public or listed companies, nor did he audit any government entity or organizations. In fact, the vast majority of audits conducted by the petitioner during this period were in respect of sole proprietorships, which are fairly simple in nature and may be completed within a short period. All financial statements prepared by Mostafa Kamal and Co. under the supervision of the petitioner were based on proper documents and evidence. That sections 128-134 of Chapter X of the ICAB Bye-Laws, 2004 contain detailed provisions regarding suspension, exclusion and restoration of membership of ICAB. However ICAB did not follow the procedures in revoking the petitioner's certificate of practice as an Auditor. That the petitioner has made numerous requests for a copy of the minutes of the meeting of the council of ICAB where the decision was purportedly taken to revoke his Certificate of Practice. However, till date, ICAB has failed to provide the petitioner with a copy of its decision whereby the petitioner's right to practice as an accountant has been revoked. That no duly constituted meeting of the council of ICAB in the manner contemplated under the ICAB Bye Laws 2004 was held for the purpose of taking disciplinary action against the petitioner. As such, the decision to revoke the petitioner's certificate of Practice not having been taken by a properly constituted Council, the same is bad in law and liable to be declared without lawful

authority and of no legal effect. That the revocation of the petitioner's certificate of Practice is unduly harsh and is manifestly disproportionate to the alleged failure on his part to maintain proper records and documentation in respect of the audit reports prepared by him. The penalty imposed by ICAB is arbitrary, perverse and unreasonable, and has no basis in fact or law. That sections 128-134 of Chapter X of the ICAB Bye-Laws, 2004, as enacted pursuant to section 289(1) of the Bangladesh Chartered Accountants Order, 1973 (PO No. 2 of 1973) contain detailed provisions regarding suspension, exclusion and restoration of membership of ICAB. According to section 128, any complaint or information against any member is required to be laid before the Investigation and Disciplinary Committee. Under section 129, the Investigation and Disciplinary Committee is required to issue a notice to the member and also to permit him to be represented before the Council by a counsel or a member of ICAB, Thereafter the Investigation and Disciplinary Committee is required to report to the Council the result of the enquiry and the appropriate disciplinary action. Such Procedure, as contained in the ICAB Bye-Laws, 2004, has statutory sanction, and as such, the same was required to be complied with by ICAB prior to taking any adverse action against the petitioner. However, the impugned memos were issued without complying with the statutory procedure stipulated by the ICAB Bye-Laws, 2004. Hence being aggrieved by the arbitrary suspension and revocation of the petitioner's Certificate of Practice (CoP) for a period of 3 years and imposing monetary penalty of Tk. 300,000.00 only the

petitioner being aggrieved by such unlawful and illegal conduct of the respondents filed the instant writ petition.

Learned Advocate Mr. Imran Siddique along with learned Advocate Mr. B.M Elias along with learned Advocate Mr. Zubair A. Bhuiyan appeared for the petitioner while learned Senior Advocate Mr. Tanjib Ul Alam along with learned Advocate Mr. Kazi Ershadul Alam appeared for the respondent No.3.

Learned Advocate for the petitioner submits that the suspension/revocation of the license for a period of 3(three) years and imposing monetary penalty is unlawful and such order is not sustainable. He submits that while issuing the impugned order Annexure-F issued by the respondent No. 3 such order is issued without lawful authority and upon non compliance and violation of the ICAB Bye-Laws, 2004. He submits that ICAB Bye-laws, 2004 was created under P.O 2 1973 therefore the bye laws enacted by the ICAB Bye-Laws bears the force of law. He submits that however the respondents upon ignoring the procedural requirements while issuing order of suspension/revocation whatsoever upon total arbitrary and whimsical conduct issued the order and therefore such order needs interference. He draws our attention to the documents annexure hereto and points out that it is manifest from the documents and shows that the petitioner was served a copy of the report of the investigation committee on 13.04.2022 (Annexure-H-2 of the supplementary affidavit). He submits that significantly enough although the investigation committee evidently submitted its report after 06.04.2022 but however the initial show cause notice was served upon

the petitioner on 06.04.2022 (Annexure-H-1). He draws us to Annexure-H-1 wherefrom he points out that from the show cause notice dated 06.04.2022 the petitioner was asked to appear for the first time on 20.04.2022 to explain his position. He submits that however the petitioner to his surprise before 20.04.2022 received a copy of the report of the investigation committee. He agitates that the inconsistent and intransparent conduct of the respondents are manifest from the fact that the petitioner received the copy of the report of the investigation committee after the show cause notice was issued and before the petitioner could even appear for personal hearing. He submits that since the copy of the report is dated 13.04.2022 therefore it clearly shows that before 13.04.2022 the respondents did not have any idea of the basis of the complaint. He submits that the respondents could not show anywhere from the records that there are any basis to their complaint in the show cause notice dated 06.04.2022. He contends that the respondents displayed further intransparency in their conduct given that on 20.04.2022 by way of Annexure-I of the supplementary affidavit the petitioners duly gave their written reply pertaining to investigation and the recommendation of the disciplinary committee. He submits that surprisingly enough the impugned order was passed on the same date 20.04.2022 on the day of the hearing (impugned order Annexure-F in the writ petition). He submits that such uncalled haste in issuing the impugned order on the same date as personal hearing raises serious doubt as to the intention of the respondents.

There was a query from this bench regarding the respondents' contention that there are some admissions of the petitioner to the allegations against him. In reply the learned counsel for the petitioner controverts that nowhere from the materials can it be indicated that the petitioner ever admitted to the allegations against him. Next he takes us to the ICAB Bye-laws, 2004. He particularly draws our attention to chapter 10 of the ICAB Bye-laws, 2004 wherefrom he takes us to Rule 129 and 130. He submits that although Rule 130 sub-rule 2 which is relevant for the purpose of this Rule, such Rule 130 sub-rule 2 requires that if the complaint has been proved it is the duty of the council to give a clear finding before any order is passed. He submits that however in this case from Annexure-F of the writ petition it shows that the impugned order was passed by the council without giving any clear finding and without communicating such finding to the petitioner. He submits that the lacuna that is significant in this case is that the documents reflects a procedural flaw given that the respondents did not record their findings and furthermore did not communicate the finding to the petitioner before he appeared for personal hearing. He submits that therefore the respondents committed a serious violation of the Rules particularly Rule 13 of ICAB Bye-laws, 2004. He argues that the ICAB Bye-laws, 2004 being enacted under P.O 2 of 1973 therefore any order issued or any action taken in violation of the ICAB Bye-laws, 2004 is unlawful and without legal authority.

This bench draws the petitioner's attention to annexure-J of the supplementary affidavit filed by the petitioner. Some queries were

made to the petitioner relying on Annexure-J persuading the respondents that the petitioner's contention that the finding of the council was not communicated to the petitioner is not true. Controverting the respondents the learned Advocate for the petitioner contends that Annexure-J dated 08.01.2022 was not issued by the proper authority. He submits that Annexure-J is only a minutes of a meeting and cannot constitute a formal finding. He submits that therefore it cannot be said that the allegations were formally communicated to the petitioner and it also cannot be said that the procedural requirements of Rule 130 was followed. He reiterates that it is clear from Annexure-H-1 dated 13.04.2022 that when the show cause notice was issued on 06.04.2022 no cause of action against the petitioner yet arose but however the respondents deliberately and with malafide intent to stop the petitioner's organizations from professional functions embarked upon a procedure which is filled with lacunas and flaws.

He next takes us to annexure-D of the writ petition wherefrom he submits that from annexure-D dated 11.01.2022 it is reflected that the respondents wrongly preempted and already decided in advance that the petitioner is guilty of professional misconduct. He submits that by such preemptive conduct on 11.01.2022 even before affording any show cause or any personal hearing the respondents already accused the petitioner of non compliance of law and international standards etc. He submits that wrongly preemptive and such and back and forth conduct of the respondents significantly show the malafide

intent of the respondents in suspending and revoking the petitioner's license.

In support of his submissions that any order which arises out of procedural irregularity and lacuna is not sustainable, he draws our attention to a decision of the Indian Supreme Court in the case of Institute of Chartered Accountants of India Vs. L.K. Ratna and others reported in (1986) 4 SCC 537. He takes us to paragraph No. 11 and Paragraph No. 30 in the case of Institute of Chartered Accountants of India Vs. L.K. Ratna and others reported in (1986) 4 SCC 537. He submits that since this writ petition also involves the Institute of Chartered Accountants as in The Indian Supreme Court this decision consequently the principle applicable is also ought to be the same. He concludes his submissions upon assertion that the Rule bears merit ought to be made absolute for ends of justice.

On the other hand learned Senior Advocate Mr. Tanjib Ul Alam for the respondent No. 3 upon filing affidavit in opposition vehemently opposes the Rule. Controverting the argument of the learned Advocate for the petitioner he agitates that contrary to the petitioner's claim there has been no procedural illegality in the whole process prior to suspension and imposition of penalty. He submits that the respondents substantively followed the Rules as laid out in the laws and also substantively complied with Rule 129 and 130 of the ICAB Bye Laws of 2004. In support of his arguments he first takes us to annexure- 6 of the supplementary affidavit. He shows that by annexure-6 it is clear that the petitioner appeared on 20.04.2022 duly for personal hearing. He draws our attention to Annexure-J of the

supplementary affidavit filed by the petitioner. Annexure-J reflect an exit meeting. From annexure-J he shows us that the findings in the exit meeting were all recorded in presence of the petitioner and the petitioner's signature is therein. He argues that therefore whatever be the form of the finding vide an exit meeting or in any other manner, nevertheless Annexure-J clearly shows that the finding was recorded in presence of the petitioner. He next takes us to Annexure-C1 of the writ petition which is the revised special review report dated 11.01.2022. Therefrom he shows that the allegations against the petitioner was initially communicated to him on 11.01.2022. He agitates that therefore it is clear that when the show cause notice was issued on 06.04.2022 asking the petitioner to appear on 20.04.2022 the petitioner was well aware of the allegations against him. He submits that Annexure-C-1 read with annexure-H-1 shows that the petitioner was aware of the allegations prior to 06.04.2022. He next submits that the petitioner's contention that no cause of action arose before 06.04.2022 is not true at all and which is manifest from Annexure-C and which the petitioner himself annexed in the writ petition.

Regarding the issue of the petitioner's admission claimed by the respondents the learned Advocate for the respondents takes us to Annexure-I of the supplementary affidavit filed by the petitioner. He takes us to the concluding portion of the supplementary affidavit which was signed by the petitioner himself. He points out that the statement made by the petitioner is in annexure-I particularly requesting the respondents to give him opportunity to "rectify our

short comings”. He asserts that such statement requesting to be allowed opportunity to rectify his short coming is adequate enough to indicate that the petitioner admitted to the allegations against him. Next he relied on Annexure-D dated 11.01.2022 followed by Annexure-H, dated 19.03.2022 asking the petitioner to appear for personal hearing. Further followed by show cause noticed dated 06.04.2022 annexure-H1, copy of the report dated 13.04.2022 annexure-H2 the personal hearing dated 20.04.2022 and impugned order 20.04.2022. He contends that all these documents are adequate enough to show that the respondents substantively followed the procedure before revoking / suspending the license of the petitioner and imposing monetary penalty.

Upon a query from this bench regarding the procedural details which ought to be followed while conducting departmental enquiry/proceedings he cites a decision of our Apex court in the case of M. Hossain Vs. Bangladesh J.M.C reported in 36 DLR(AD)1984 page 282. He takes us to the relevant portion in paragraph No. 4 of the judgment. From Paragraph No. 4 he points out that the cardinal principle settled by this decision is that mere technical irregularity of minor nature will not invalidate the proceeding of the domestic Tribunal if it had otherwise found a person guilty since the proceeding is not vitiated by any irregularity whatsoever. He asserts that in this case also the minor flaws if any may be over looked since the petitioner was proved guilty and the petitioner himself admitted to the allegations by way of Annexure-I. He concludes his submission upon

assertion that the Rule bears no merit ought to be discharged for ends of justice.

We have heard the learned Advocates for both sides, perused the application and materials on record before us. The petitioner in this matter primarily challenged the impugned order upon arguing that while issuing the impugned order the procedure as laid down in the ICAB Bye-Laws, 2004 was not followed. He draws our attention to Rule 129 and particularly Rule 130 sub-rule 2 of the Rules. Rule 130 sub-rule 2 of the ICAB Bye-Laws, 2004 is reproduced below:

“130(2): If on receipt of such report the Council finds that a complaint has been proved, it shall record a finding to that effect and shall afford to the member or the Articled student either personally or through counsel or a solicitor or a member of the Institute, an opportunity of being heard before orders are passed against him on the case, and may thereafter, keeping in view the recommendations of the Investigation and Disciplinary Committee, make any of the following orders, namely: ”

The learned advocate for the petitioner persuaded that the Council while issuing the impugned order (Annexure-F) did not however follow the recommendation as contemplated by Rule 129 sub-rule 2 followed by rule 130 of the ICAB Bye-Laws, 2004. Rule 129 of the ICAB Bye-Laws, 2004 contemplate that on receipt of complaint it is the duty of the investigation and disciplinary

committee shall initially to conduct an investigation and upon investigation the disciplinary committee shall give to the member or Articled student notice of its intention to consider the complaint. The investigation and Disciplinary Committee shall give such member or Articled student an opportunity of being heard before it and shall, if the member or Articled student so desires, permit such member or Articled student to be represented before it by a counsel or by a solicitor or by a member of the Institute. The Investigation and Disciplinary Committee shall thereafter report to the council the result of its enquiry.

It can be seen from Annexure-H of the writ petition that the opportunity for personal hearing was afforded to the petitioner by way of Annexure-H of the supplementary affidavit on 19.03.2022. We have also noticed that the allegations against the petitioner by way of document was addressed to the petitioner by way of annexure-D dated 11.01.2022. The relevant portion of Annexure-D dated 11.01.2022 is reproduced hereunder:

“The ICAB officials selected your Firm for a special review due to abnormal value of DVS records and reviewed working papers of all audit engagements of your firm on quality aspect and found numerous non-compliance on laws and international Standards on Auditing (ISA) and also you committed with professional misconducts as enumerated in the ICAB Bye-Laws, 200 Schedule C, Part-I; Professional Misconduct in relation to

Chartered Accountant in Practice and ICAB directives and guidelines during the course of audit.”

Annexure-D also pre-suppose an exit meeting which was duly signed by the parties including the petitioner (Annexure-J of the supplementary affidavit filed by the petitioner). The petitioner contended that Rule 130 sub-rule 2 of the ICAB Bye-Laws, 2004 was not meticulously followed since Rule 130 sub-rule 2 of the ICAB Bye-Laws, 2004 require that the finding must be recorded by the Council. The petitioner further contended that the finding was not properly recorded and also argued that annexure-J is only a resolution of a meeting and cannot constitute a formal document of communication. We have examined Annexure-J. It is our considered view that whatever be the form of the finding however it is clear that the petitioner was aware of the finding and it was recorded by the Council even if it is in form of a resolution of an exit meeting. It may be pertinent to note that Rule 130 does not specify as to what exactly the form of the recording of a finding ought to be. Therefore in the absence of any specific form of recording any finding under Rule 130 sub-rule 2 of the Bye Laws of 2004, we are inclined to opine that the recording of the finding as stated in the exit meeting (Annexure-J) is adequate enough for the purpose of recording finding under Rule 130 sub-rule 2.

Next we have drawn our attention to Annexure 6 of the affidavit in opposition filed by the Respondent No. 3. From annexure-6 it is seen that pursuant to personal hearing an order was passed and

the respondent No. 2 ICAB giving its finding on the allegation. It can also be seen that the decision of revoking the Certificate of Practice (CoP) of the petitioner for 3(three) years and imposing monetary penalty of Tk. 300,000/- which is Annexure-6 of the affidavit in opposition was followed by the impugned order which is annexure-F. Therefore relying on these documents we are of the considered view that the petitioner's contention that the findings were not recorded by the respondents is not correct.

By way of these several Annexures our considered opinion is that there has been no substantive illegality committed by the respondents while embarking in the departmental enquiry/ procedure following the allegations against the petitioner.

Our duty here is to supervise against any procedural illegality. While assessing the extent of the procedural illegality we have also relied on the decision placed by the learned Advocate for the respondent No. 3 in the case of M. Hossain Vs. Bangladesh reported in 36 DLR(AD)(1984) 282. The relevant portion of this decision is reproduced below:

“In the case of positive allegation was made against the plaintiff for which the Enquiry Committee was set up and the domestic Tribunal had found him guilty and recommended his dismissal. It is well settled that mere technical irregularity of minor nature will not invalidate the proceeding of the domestic Tribunal and it had found him guilty and since this proceeding is not

vitiated by any irregularity or is in violation of any well settled principle of law no interference is warranted.”

Although the facts of the instant case are different from the fact of the 36DLR(AD)(1984) case but however the general principle is that mere technical illegality of minor nature may be overlooked in order not to frustrate any proceeding in any domestic tribunal.

In this case also we are of the opinion, that since no major substantive flaws are noticed, therefore mere insignificant technical details may be overlooked for larger ends of justice.

The learned counsel for the petitioner also cited a decision of the case of Institute of Chartered Accounts of India Vs. L.K Ratna and others reported in (1986) 4 SCC 537. However we are inclined to opine that the circumstances for interference as stated in the Indian Supreme Court Judgment inter alia absence and failure of the Council in recording the findings arising out of a complaint, such circumstances do not exist in the case before us.

Moreover we are not bound by the principles of the Indian Supreme Case. We are only bound by the provisions of the ICAB Bye Laws, 2004 and the 36 DLR AD principle held by our Apex Court. It may be further reiterated that in this case we have found that findings have been adequately recorded and the allegations has also been communicated to the petitioner before any decision or order was passed. The petitioner also got adequate chance to explain his position and defend himself.

From an overall view, there has been no significant procedural illegality nor any significant deviation from the Rules framed in the

Bye Laws of 2004. In particular we have not noticed any specific deviation or non compliance of the procedure laid out in Rule 129 and Rule 130 of the Bye Law of 2004.

Taking all these into consideration, we are of the considered view that the respondents did not commit any substantive illegality and we are not inclined to interfere with the impugned order passed by the respondents. We do not find any merits in this Rule.

In the result, the Rule is discharged without any order as to costs.

Communicate this judgment at once.

Kazi Zinat Hoque, J:

I agree.

Arif(B.O)