

BEFORE JUSTICE BADAR DURREZ AHMED (RETD), OMBUDSMAN, DDCA

Kirti Azad v. DDCA & Anr.

06.09.2021

1. The matter was heard on 11.04.2021, 11.06.2021, 03.07.2021, 31.07.2021, 7.08.2021, 14.08.2021 and the hearing was concluded on 19.08.2021. Initially the complainant appeared in person and thereafter he was represented by Mr. Devashish Bharuka, Adv., who appeared pro bono. DDCA was represented by Ms. Aishwarya Bhati, ASG, and its standing counsel Mr. Saurabh Chadda and Mr. Vinod Tihara, the second respondent, was represented by Mr. Ankur Chawla, Adv.
2. The complainant had filed a complaint by email dated 24.12.2020 seeking certain reliefs in view of the decision of the Ombudsman, DDCA, dated 05.12.2018 and the judgment of the Hon'ble High Court of Delhi dated 02.07.2019 passed in FAO no. 62 of 2019. This was followed by another email dt. 30.03.2021 and an additional application filed on 21.06.2021 by Mr. Bharuka, Adv.
3. It has been argued by the complainant that certain resolutions passed by the Apex Council of DDCA show that they have been passed with the sole intent of sitting in appeal over the said decision of the Ombudsman as also of deliberately and consciously ignoring the specific and categorical directions of the Hon'ble High Court of Delhi in the said judgment/ order dated 02.07.2019. Further, they seem to have been passed only to protect the second respondent in spite of the fact that he was found guilty of misconduct by the Ombudsman. It was further contended that, the persons, particularly the second respondent, responsible for passing such resolutions are themselves guilty of misconduct and therefore, liable to be punished in terms of DDCA's Articles of Association ('AOA') read with the DDCA Regulations regarding conduct and discipline of players, match officials, team officials, administrators, members and other persons associated with

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the DDCA. The complainant has categorically pleaded that the second respondent is guilty of misconduct, for inter alia, (i) attempting to nullify the decision of the Ombudsman dated 05.12.2018 by ensuring that the same does not reach the AGM inspite of the Apex Council resolution dated 23.07.2019; (ii) not complying with the directions of the Hon'ble High Court in its judgment dated 02.07.2019; (iii) being an active participant of the Apex Council resolution dated 05.12.2019 and then, entering into an MoU dated 06.12.2019 inspite of the fact that they are in the teeth of the decision of the Ombudsman dated 05.12.2018 and the judgment of the Hon'ble High Court of Delhi dated 02.07.2019 read with the Apex Council resolution dated 23.07.2019; (iv) failing to ensure that the issue of the second respondent's membership/secretaryship was placed before the AGM held on 31.12.2019 in compliance of the aforesaid decision of the Ombudsman, the said judgment of the Hon'ble High Court and the Apex Council resolution accepting the same and as such, the continued presence of the second respondent as a member/Secretary of DDCA is prejudicial to the interest of DDCA as well as being against the interest of the game of cricket.

4. Detailed replies, relevant judgments/ orders and documents as well as compilations have been filed on behalf of both respondents during the course of hearing.
5. On behalf of DDCA, it has been, inter alia, argued that the complaint is not maintainable because (i) the reliefs prayed for cannot be granted by the Ombudsman in exercise of powers vested in him under articles 41 and 42 of the AOA of DDCA, particularly in view of the complainant having sought modification of the order of the Hon'ble High Court passed in FAO 62 of 2019; (ii) each and every order of suspension passed against the second respondent has been duly set aside or withdrawn by the Apex Council; and (iii) because the process under Article 42 (1)(b) has not been followed and the complaint has not been referred to the Ombudsman by the Apex Council.

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6. Apart from supporting the abovementioned arguments advanced on behalf of DDCA, it has been argued on behalf of the second respondent, Mr. Vinod Tihara, inter alia, that the complaint is not bona fide and has been made in collusion with other parties having vested interests; is against the letter and spirit of the order dt. 15.10.2020 passed by the Hon'ble Supreme Court in SLP (C) 9285 of 2020; suffers from delay and laches; that the aforementioned Regulations are ultra vires the AOA and in any case, have been rendered otiose as the same have not been placed before the General Body of DDCA and as such cannot be relied upon to pass any order of punishment; and that the Ombudsman may not sit in appeal against consent decrees passed by courts of competent jurisdiction. It has also been argued that the Annual General Meeting of DDCA for the years 2019-20 and 2020-21 have been long overdue and that the term of office bearers had come to an end on 02.07.2021. The second respondent has also argued that the order dt. 02.07.2019 of the Hon'ble High Court passed in FAO 62 of 2019 did not direct the DDCA to place before the General Body the issue of his suspension but directed that in case the Apex Council decides to suspend or terminate his Directorship/ membership then the same may be placed before the General Body and thereafter the Apex Council decided to withdraw all complaints against the second respondent vide resolution/ compromise dt. 5.12.2019, which was approved by the Hon'ble Supreme Court in its order dt. 15.10.2020.

7. The parties have been heard at length and I have perused all documents brought on record. There is no dispute that a complaint dated 14.08.2018 on behalf of DDCA was referred to the Ombudsman. The complaint was limited to the issue of determining whether the activities of the second respondent, in particular, in issuing a circular dated 12.08.2018, amounted to indiscipline or misconduct, detrimental to the interest of DDCA and the game of cricket. Imposition of any penalty was not sought as the Ombudsman then did not have such a power. By an order dated 05.12.2018 the second respondent had been found guilty of misconduct by the

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Ombudsman. The relevant portion of which is:

"In view of the foregoing, I hold that the Circular dated 12.08.2018 was not in consonance with the Articles of Association, the Companies Act and law in general and in issuing the same, Mr. Tihara has exhibited indiscipline and misconduct, which is detrimental to the interest of the DDCA and the game of cricket."

8. Pursuant to the said order of the Ombudsman, a show cause notice ('SCN') dated 20.12.2018 was issued by DDCA to the second respondent. This SCN was challenged in a suit (CS 13 of 2019) before the Ld. Additional District Judge. The Trial Court passed an interim order dated 02.02.2019, inter alia, restraining DDCA from acting upon the said SCN dated 20.12.2018. The Trial Court was prima facie of the view that the second respondent could be removed as a member/ secretary only by the General Body and not by the Apex Council. The said order was challenged by DDCA by filing FAO 62 of 2019 before the Hon'ble High Court.

9. Thereafter, while disposing FAO 62 of 2019, by an order dated 02.07.2019, the Hon'ble High Court, inter alia, held as under:

"24. The decision of the learned Ombudsman may be non-justiciable in terms of the AOA, inasmuch as he has found that respondent no.1 has acted against the interests of the DDCA as well as against the interest of the game of cricket. However, the conduct of respondent is not under examination by this Court. Instead, what is to be determined is whether R-1, as Secretary of the DDCA (akin to Director of a Company) can be removed by the appellants' Apex Council ("Board of Directors") or by the company itself i.e. by the General Body of the shareholders.

25. What clearly emanates from the above discussion is that only the company i.e. General Body can remove a director, because anything other than that would be in derogation of the statutory provisions. In view of the above, there is no reason to interfere with the impugned order. The petition is without merit and is, accordingly, dismissed.

26. Lest the administration of the DDCA fester in internal squabbles of the parties and ultimately affect the game of cricket in Delhi, it would be prudent that the matter be

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resolved at the earliest i.e. the issue be placed before the General Body of the Association to consider the position of the respondent's Membership/Secretaryship, in view of the decision of the learned Ombudsman. The appellant may take a decision in this regard in four weeks from the date of this order.

27. With the aforesaid observations, the appeal is dismissed.”

(underlining added)

10. After the said decision dated 02.07.2019 passed by the Hon'ble High Court of Delhi, a special meeting of the Apex Council of DDCA was held on 23.07.2019. Amongst other matters, agenda item number 5 was for consideration of the judgement and order dated 02.07.2019. After discussion, the following resolutions were passed by the apex Council:

“RESOLVED THAT in compliance of the judgement and order dated 02.07.2019 passed by Hon'ble Delhi High Court in FAO No. 62/2019, the assent of the Apex Council be and is hereby accorded to place the judgement and order dated 05.12.2018 passed by the Hon'ble Ombudsman before the General Body of the DDCA, in its next Annual General Meeting (AGM), in order that it may consider and impose such penalty upon Mr Vinod Tihara, Secretary, as would be commensurate with the gravity of misconduct made out in the aforesaid judgement and order of the Hon'ble ombudsman, and, while doing so, the General Body may decide whether or not Mr Vinod Tihara shall continue to be Member/Secretary of the DDCA.

RESOLVED FURTHER THAT the above action shall be without prejudice to DDCA preferring a Special Leave Petition against the judgement in order dated 02.07.2019 passed by the Delhi High Court in FAO No. 62/2019 titled Delhi and District Cricket Association vs. Vinod Tihara & Ors.”

11. However, before the next AGM could be held, a resolution dated 30.11.2019 was passed by circulation by the Apex Council which was to the following effect:

“Resolved that, in supersession of all resolutions, circular resolutions made in the past by the Apex Council more particularly resolution dated 25.10.2019, whereby it was



resolved by the Apex Council to suspend the Secretary under article 42 (6) and refer the complaint of Sh. Rajan Manchanda for enquiry to Hon'ble Ombudsman, however, in view of the Hon'ble Delhi High Court judgement dated 20.09.2018 in FAO No. 413/2018, titled DDCA versus Vinod Kumar Tihara, the company hereby resolves to revoke & withdraw the suspension of the Secretary and also the enquiry reference made to the Hon'ble Ombudsman. The Secretary is thus allowed to discharge his official duties and & functions in terms of the articles of association of the company."

12. An emergent meeting of the Apex Council was held on 05.12.2019, wherein, inter alia, the resolution passed by circulation dated 30.11.2019 was passed by the Apex Council. In the same meeting, under item number 18, it was decided as under:

"As per advice of Shri Gautam Dutta, Advocate, the Company should endeavour to amicably resolve court cases and pending legal disputes to save huge litigation costs incurred in the past. The Apex Council unanimously decide to refer the pending disputes, legal cases to the legal committee for further consideration and necessary action."

13. Subsequently, a compromise/ MoU was entered into on 06.12.2019 between the Acting President of DDCA (on behalf of DDCA) and the second respondent, wherein it is recorded as under:

"(1) It is resolved between the parties that all disputes, litigations, show cause notices, charges of indiscipline and misconduct etc or of any nature being initiated in the past and pending between the parties stands withdrawn with immediate effect.

(2) It is further resolved that Sh. Vinod Kumar Tihara being the elected Secretary of the DDCA, be allowed to discharge his official duties and functions as laid down in the Articles of Association of the DDCA Amended up-to-date.

(3) The parties shall withdraw all litigation, pleadings, written statements, show cause Notices, charges issued till date and filed in court authorities and shall consequently stand withdrawn for all purposes. The parties shall not pursue them.



(4) The parties shall be bound by the terms of this Memorandum of Compromise and Understanding.

(5) A copy of this Memorandum shall be jointly filed before all courts and authorities wherever the matters are pending to facilitate their immediate withdrawal.”

(underlining added)

14. It is clear that the said MoU was in respect of disputes, litigations, show cause notices, charges of indiscipline and misconduct which were pending. The finding of misconduct in the order dated 05.12.2018 passed by the Ombudsman was not a pending dispute, litigation, show cause notice or charge of indiscipline and misconduct. What was pending was the Apex Council's action of suspension and proposed termination from membership based on the finding of misconduct. But, as held by the Hon'ble High Court of Delhi in its judgment and order dated 02.07.2019, the Apex Council had neither the power to suspend nor to terminate and that power exclusively vested in the General Body. That is why the Hon'ble High Court had directed that the issue of penalty, pursuant to the finding of misconduct, be placed before the General Body. The said MoU does not, in my view, as it could not, extinguish the finding of misconduct and certainly not the direction of the Hon'ble High Court of Delhi.
15. Thereafter, on 06.01.2020, the suit bearing CS No. 5963/2018 was disposed of as settled between the parties on the basis of the said MoU. By way of the said suit, Mr Vinod Tihara (the second respondent herein) had challenged his suspension order dated 14.08.2018 which was to be effective till final outcome of the enquiry before the Ombudsman.
16. Pursuant to the said order dated 05.12.2018 whereby the Ombudsman had found the second respondent guilty of misconduct, another suit (CS No.13/2019) had been filed by the second respondent herein challenging the show cause notices dated 20.12.2018 and 21.12.2018 issued by DDCA regarding his proposed expulsion from the primary membership of DDCA.

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Apparently, this suit has also been disposed off in terms of the said MoU. Neither the said MoU nor the consent decrees based thereon in the said suits nullified the finding of misconduct by the Ombudsman and the direction of the Hon'ble High Court to place the matter before the General Body. The MoU and the said suits pertained to the Apex Council's power to suspend and terminate the second respondent's primary membership. They had nothing to do with the said finding of misconduct and the power of the General Body to suspend/terminate the primary membership of the second respondent based on the finding of misconduct returned by the Ombudsman.

17. Several matters were pending before the Hon'ble Supreme Court, being SLP (C) 9285 of 2020, etc. All the matters were disposed of by the Hon'ble Supreme Court by its order dated 15.10.2020 after recording the terms of settlement, as under:

"The Parties reached a settlement the terms of which are as follows:

- A. That the present terms are binding between the parties and shall be complied in letter and spirit;
- B. That the parties will jointly make following prayers before the Hon'ble Supreme Court:
  - I. To set aside the order dated 10.10.2020, passed by the Ld. Chief Ld. Electoral Officer, whereby, the Ld. Electoral Officer had countermanded the election process;
  - II. Direct the Ld. Electoral Officer to resume the process as per Election Notice dated 30.9.2020; and
  - III. Direct the Ld. Electoral Officer to fix the following schedule:
    - (i) Withdrawal of nomination by the candidate: 17.10.2020 from 11:00am to 01:00pm;
    - (ii) Publishing of the final list of the candidates for the election: 17.10.2020 by 04:00pm;
    - (iii) Polling of votes: 05.11.2020, 06.11.2020, 07.11.2020 and 08.11.2020 from 11:00 am till






05:00pm;

- (iv) Counting of votes: 09.11.2020; and
  - (v) Declaration of poll results upon counting of Votes on 09.11.2020
- C. That a direction may kindly be issued directing all parties to render full assistance to the Ld. Electoral Officer and his team to finalize the elections to post of President, Treasurer and four Directors in terms of Articles of Association approved by the Hon'ble Supreme Court. There shall be no interference by any person, in the Election Process which has to be conducted in the Extra Ordinary Meeting of the General Body. That the Electoral Officer shall be assisted by the team appointed by the Hon'ble High Court vide order dated 09.09.2020 passed in FAO. No. 92 of 2020 and only member of the team as appointed by the Electoral Officer shall issue all notices/ directions, which shall be complied with by each and every party herein and staff of the Company;
- D. That the direction may kindly be issued that the payment of the Ld. Electoral Officer and members of his team as fixed by the erstwhile Hon'ble Ombudsman shall be paid forthwith and, in any case, not later than 16.10.2020;
- E. The direction may kindly be issued that the agenda item-3, pertaining to the termination/removal of Mr. Rajan Manchanda as per Order of the Ld. Ombudsmen dated 14.05.2020, shall be kept pending in the list of business of the DDCA and will be taken up in the Annual General Meeting of the DDCA to be held in December, 2020, or as and when convened as per MCA Notifications;

That in view of the resignation of Hon'ble Mr. Justice (Retd.) Deepak Verma, Hon'ble Mr. Justice (Retd.) Badar Durez Ahmad is appointed as Ombudsman of the DDCA till the next Annual Meeting of the General Body, wherein, fresh appointment of Ombudsman will be made as per the Articles of Association of the Company as prevailing on date. That all dues of Hon'ble Mr. Justice (Retd.) Deepak Verma shall be settled forthwith and in any case not later than 16.10.2020;

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- F. That the Director Sports and Woman Director shall continue on the Apex Council of DDCA till a decision, in this regard, is taken by Hon'ble Ombudsman, as per applicable law and Articles of

Association of DDCA;

The SLP's are disposed of in terms of the settlement. All pending applications stand disposed of.

In view of the amicable settlement between the parties, the allegations and counter allegations made by the petitioners and the respondents stand withdrawn.

Question of law relating to the maintainability of the Suit is left open."

18. It is evident, the said compromise/ MOU entered into on 06.12.2019 is different from the settlement before the Hon'ble Supreme Court. While the MOU was essentially in respect of suspension and proposed termination of membership, the settlement before the Hon'ble Supreme Court was primarily concerning the elections to the posts of President, Treasurer and four Directors. The settlement terms recorded by the Hon'ble Supreme Court did not even mention the said MOU. The withdrawal of the allegations and counter allegations referred to in the terms recorded by the Hon'ble Supreme Court has to be read in this context and cannot be read as a detraction from the finding of misconduct by the Ombudsman.
19. The compromise/ MOU, apart from the fact that it has not been placed before the General Body, as pointed out above, was made in respect of the suspension and proposed termination of membership of the second respondent. By the said order dated 05.12.2018, the second respondent was found to be guilty of misconduct and that order had not been disturbed by the order dated 02.07.2019 passed by the Hon'ble High Court or even by the Hon'ble Supreme Court. The charge of misconduct had already crystallised into a finding and therefore when the said MOU was entered into there was no "pending" allegation, counter allegation, dispute or charge regarding misconduct which the Apex Council and the second respondent could withdraw or settle. As such, the said finding remains and cannot be altered or negated by any agreement between the Acting President of DDCA and the second respondent.



20. After the finding was recorded in the order dated 05.12.2018, the only question that was pending was with regard to the penalty and as to who was empowered to impose the same. Initially the Apex Council, as mentioned above, took it upon itself to suspend and contemplate the termination of membership of the second respondent but the Hon'ble High Court by its judgement and order dated 02.07.2019 made it clear that the Apex Council did not have any such power and that the power vested only in the General Body. Consequently, it directed that the matter of penalty be placed before the General Body. In other words, the Apex Council did not have the power to punish. It also did not have the power to decide not to punish. It was for the General Body to decide whether any punishment was called for at all and if there was to be a punishment what would it be commensurate with the nature of misconduct. In this light, the Acting President of the DDCA, the Apex Council DDCA and the second respondent did not have the power or authority to decide that no penalty/punishment would be imposed in respect of the finding of misconduct returned by the ombudsman in the order dated 05.12.2018. So, in my view, for this reason also, the MOU of 06.12.2019 did not, as it could not, absolve the second respondent of any penalty whatsoever. That was only for the general body to decide.
21. The term of the Apex Council of DDCA has come to an end and the AGMs are overdue. This is an accepted fact. However, it is a settled principle of law that in the event an AGM is not conducted in time for whatever reason and the term of the office bearers comes to an end, the company cannot function in a vacuum and the office bearers carry on de-facto to run the day to day activities of the company with the limitation that no policy decisions, except of directing the conduct of an AGM and of holding elections to the posts of the office bearers, can be taken by them.
22. The AGMs for 2019-20 and 2020-21 were undoubtedly delayed but when, in March 2021, it was decided to hold the AGMs, the 2<sup>nd</sup> wave of the Covid-



19 pandemic hit India. As a result it was then not possible to hold the AGMs. Anyhow, now the Apex Council has decided to hold the AGMs on 15.09.2021 and 26.10.2021, respectively.

23. It was contended on behalf of the complainant that Regulations have been framed subsequent to the said order dated 05.12.2018 and now the Ombudsman has the power to impose penalty for misconduct. While it is true that the finding of misconduct against the second respondent cannot and has not been washed away, at the same time, the Ombudsman would not have the power to punish as the misconduct is of a time when the Ombudsman did not have the power to punish. In this context, the arguments with regard to the validity or invalidity of the Regulations need not be gone into.
24. In sum, the direction of the Hon'ble High Court in the judgment/ order dated 02.07.2019 in FAO 62 of 2019 requiring the DDCA to place the issue of the second respondent's Membership/ Secretaryship before the General Body, in view of the Ombudsman's decision date 05.12.2018, still stands. Therefore, it would be in the interest of cricket that the decision of misconduct is placed before the General Body in the next AGM to be held on 15.09.2021 for any action that it may feel appropriate in accordance with the AOA.
25. Finally, in my view, the decision of the Ombudsman cannot be whittled down by any agreement between some office bearers. Otherwise, the whole purpose behind having an Ombudsman as contemplated by the Hon'ble Supreme Court would be set at naught.
26. The complaint is disposed of accordingly.

  
Justice Badar Durrez Ahmed (Retd)