



We Are Not Helpless!!!

Prior to the issuance of Show-Cause notice by the Board, certain procedural safeguards are in place in the IBBI Regulations itself, some of them are stated *infra*:

- i. Regulation 7 (3) of IBBI (Grievance & Complaint Handling Procedure), 2017
 7. Disposal of complaint.
 - (3) ***The Board shall form an opinion whether there exists a prima facie case within forty-five days of the receipt of the complaint.***
- ii. Regulation 10 of IBBI (Inspection And Investigation) Regulations, 2017:
 10. Investigation Report.
 - (1) ***The Investigating Authority shall submit the investigation report to the Board.***
 - (2) The Board shall examine the investigation report as to whether investigation is complete and satisfactory or requires further investigation and advise the Investigating Authority accordingly within 15 days of receipt of the investigation report.
 - (3) After taking into account advice of the Board, ***the Investigating Authority shall prepare the investigation report and submit it to the Board.***
- iii. Regulation 11 (2) of IBBI (Inspection And Investigation) Regulations, 2017:
 11. Consideration of Report.

(2) If the Board, after consideration of the report under sub-regulation (1) or on the basis of material otherwise **available on record, is of the prima facie opinion that sufficient cause exists to take actions** under section 220 or sub-section (2) of section 236, it shall issue a show-cause notice in accordance with regulation 12 to the service provider or an associated person and in any other case, close the inspection or investigation, as the case may be.

iv. Regulation 12(2) of IBBI (Inspection And Investigation) Regulations, 2017

(2) For the purposes of clause (e) of sub-regulation (1), the Board **shall take into account**, but not limited to, the following factors:

(a) the nature and seriousness of the alleged contraventions, including **whether it was deliberate**, reckless or negligent on the part of the noticee;

(b) the **consequences and impact of the alleged contravention**, including –

(i) unfair advantage gained by the noticee as a result of the alleged contravention;

(ii) loss caused, or likely to be caused, to stakeholders or any other person as a result of the alleged contravention; and

(iii) the conduct of the noticee after the occurrence of the alleged contravention, and prior to the alleged contraventions.

A. Though the IBBI regulations do not explicitly specify the mandatory requirement of supplying the noticee (against whom disciplinary action is proposed to be taken) with the copies of Opinions/Reports/Documents prepared in compliance to the afore-stated Regulation/s; but if an action is sought to be taken, the position in law settled by

Hon'ble Supreme Court casts a duty on IBBI to provide the same prior to any Disciplinary Action. The settled position in law narrated *infra*:

i. Kashinath Dikshita V/s Union of India 1986 SCC (L&S) 502:

Para 10: ... And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. ... It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. ***If only the disciplinary authority had asked itself the question: "What is the harm in making available the material?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude.*** On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it. It is not even the case of the respondent that there was involved any consideration of security of State or privilege....

ii. State of U.P. V/s Raj Narain, (1975) 4 SCC 428

Para 74: In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept

of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. [See New York Times Co. v. United States, 29 L Ed 822 : 403 US 713] To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. ***The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption...***

B. It is not only the right to receive the documents that have been provided but also the Professional facing Disciplinary Action has been conferred the right to test the evidence adduced against him by way of Cross-Examination. The settled position in law is narrated *infra*:

i. Ratiocination of Hon'ble Supreme Court ruling in State of Assam V/s Bimal Kumar Pandit (1964) 2 SCR 1, excerpts *infra*

Para 6: ... An enquiry must be conducted according to the rules prescribed in that behalf and consistently with the requirements of natural justice. ***At this enquiry, the public officer concerned would be entitled to test the evidence adduced against him by cross-examination, where necessary, and to lead his own evidence. ...***

ii. Ratiocination of Hon'ble Supreme Court ruling in Rajiv Arora V/s Union of India, (2008) 15 SCC 306, excerpts *infra*

Para 13: ... ***Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Evidence Act as also the principles of natural justice demand that the maker of the report should be examined,*** save and except in cases where the facts are

admitted or the witnesses are not available for cross-examination or similar situation....

As was ruled by Hon'ble Supreme Court in Maninderjit Singh Bitta V/s UoI **2011 SCC OnLine SC 1389** – '***Every person is required to respect and obey the orders of the court with due dignity for the institution. The government departments are no exception to it***'. Thus, failure to provide for the documents being relied upon against the noticee & failure to provide opportunity to cross-examine is not only contempt towards the binding precedents by IBBI Officials, but also the Disciplinary Committee findings and the order stands vitiated since being ultra-vires to the settled position in law & in violation of the Rules of Natural Justice, which is liable to be quashed *in-limine*.

One of the salient features of the jurisprudence followed in our country is *Ubi jus ibi remedium* i.e. we are not remediless when attempts are being made to deprive us of our statutory rights by authorities misusing their powers/acting in contemptuous disregard to the settled position in law. Pertinent to highlight, Hon'ble Supreme Court Constitution Bench in S.G. Jaisinghani V/s Union of India **AIR 1967 SC 1427** had ruled that:

Para 14: ... the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. ***In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits.*** The rule of law from this point of view means that ***decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is.*** ...

Further, Hon'ble Supreme Court in Kasturi Lal Ralia Ram Jain V/s State of U.P. **(1966) 2 LLJ 583** had ruled:

Para 20: ... *If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: **was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant?** If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, **if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie.** ...*

And it is this examination of the ‘*source of power*’ & ‘*clearly defined limits*’, which helps us to identify the correctness/legality of the action taken and to protect our rights against executive excesses which tend to curtail our entitlements. Disobedience to the settled position in Law by IBBI Officials is not without precedence & Judiciary on occasions has invoked its powers to correct such excesses; in the matter of [Shreeshyam Metaliks V/s Concast Steel & Power Ltd. – C.P.\(IB\) No. 446/KB/2017](#), Hon’ble NCLT Kolkata (Ld. Member/s Sh. Vijai Pratap Singh & Sh. Jinan K.R.) directed Sh. Sreekara Rao (the then DGM of IBBI) to remain present in-person to show-cause as to why action should not be taken against him for his contemptuous act.

To conclude, we have been conferred the right to resist the wrongs against us, it is for us to think about what is holding us back from invoking our rights & to decide when to resist the wrongs...

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Do feel free to share us your feedback/opinion on the Article. For clarifications/queries, do mail us at our E-Mail: contact@vidhilegal.in or pratik@vidhilegal.in. You may also connect us at our Landline: 022-49733719 or Mobile: +91-9028105899 / +91-7042952905.