

(2022) 06 MP CK 0018

In the Madhya Pradesh High Court

Case No : Writ Petition No. 7409, 8554, 9735, 10117, 10118, 12004, 12015, 16510, 16512, 17916, 18310, 24521, 24528, 26221 Of 2019, 1541, 15683, 1794, 1799, 3674, 4985, 4987, 6128, 8703, 8790, 8883, 8886, 9026, 11364, 11390, 12492, 12493, 12497, 12783, 12786, 13005,

Abbas Maru And Others

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 09-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Companies (Appointment And Qualification Of Directors) Rules, 2014 — Rule 11, 11(e)
Companies Act, 2013 — Section 2(6), 92, 137, 149, 150, 151, 152, 152(3), 153, 154, 157, 159, 160, 164, 164(1), 164(2), 164(2)(a), 167, 167(1), 167(1)(a), 168, 170, 248(1), 248(1)(4), 469

Citation : (2022) 06 MP CK 0018

Hon'ble Judges : Anand Pathak, J

Bench : Single Bench

Advocate : Sankalp Sharma, Praveen Kumar Niwaskar, Praveen Surange, Harshavardhan, Chetan Kanungo, Sarvendra Kumar Singh, Anvesh Jain, Sarvendra Kumar Singh, Himanshu Sharma

Final Decision : Allowed

Judgement

Anand Pathak, J

1. Regard being had to the similitude of controversy, all the writ petitions referred above were heard analogously and decided by this common order. For convenience's sake, facts of writ petition No.15683/2020 are taken into consideration.

2. The instant petition (W.P.No.15683/2020) under Article 226 of Constitution of India is preferred preferred by the petitioners seeking following reliefs:

a) That, the impugned order Annexure P-1 under section 164(2) of the

Companies Act, 2013 in relation to the petitioner may kindly be directed to be quashed and the name of the petitioner as a Disqualified Director from the list of Disqualified Director by ROC -Gwalior may kindly be deleted forthwith.

b) That, the DIN No.05171973 & 05266971 of the petitioners respectively be directed to be restored/reactivated in respect for E-filing of other surviving company.

c) Any such relief as this Hon'ble Court deem fit in the present facts and circumstance of the case.

3. Grievances as echoed in the writ petition along with other similar writ petitions are that they are aggrieved by the action taken by the Registrar of Companies (ROC), Madhya Pradesh, Gwalior (respondent No.2 herein) under Section 164(2) of the Companies Act, 2013 (hereinafter referred to as "the Act of 2013") of deactivation of Director's Identification Number (DIN) of petitioners, thus, disqualifying them under Section 164(2) of the Act of 2013 for a period of 5 years from 01-11-2018 to 30-10-2023 from acting as directors of the companies. Dispute originates on account of the fact that one of the companies in which petitioners were directors namely Kanchan Creation Ltd. had its name struck off from the Register of Companies by ROC -Gwalior.

4. Precisely stated facts of the case are that petitioners were working as directors of few companies and obtained DIN from the respondents in terms of provision as per Section 154 of the Act of 2013 read with rule 9/10 of the Companies (Appointment and Qualification of Directors) Rules, 2014 (hereinafter referred to as "the Rules of 2014"). Petitioners incorporated a company -Kanchan Creation Ltd. having CIN No.U45201MP1999PLC013727 in the State of Madhya Pradesh for the purpose of providing and managing manpower in various industries and organizations but company did not carry out any business for past 3 years and its bank accounts were also not in operation, for preceding 3 years petitioners did not file requisite return also as required under the Act of 2013. Consequently, petitioners incurred disqualification under Section 164(2) of the Act of 2013. However, the company continued to file its return but thereafter no return were filed as the company was not carrying on any business and consequently name of the company was struck off by the ROC -Gwalior.

5. Subsequently based upon on the status of the said company, respondents disqualified the petitioners to act as directors in other companies also and their DIN were also deactivated. It is worth mentioning the fact that other companies in which petitioners are directors are doing normal business and their statutory returns namely financial statements and annual returns are regularly filed.

6. On 13-09-2017, respondents posted a list of disqualified directors of the struck off companies all over the country with a separate list of companies having registered office under the jurisdiction of various offices of respondents across India with the title List of Disqualified Directors under Section 164(2)(a) of the Act of 2013 and said list shows petitioners are disqualified to act as

directors in all the companies w.e.f. 01-11-2018. Based upon the event of striking off the name of company -Kanchan Creation Ltd., respondents declared the petitioners disqualified to act as director in the company having their registered office inter alia in the State of Madhya Pradesh and consequently, petitioners who are directors in other companies also have been disqualified under Section 164(2)(a) of the Act of 2013, their DIN is deactivated and their name appeared in the list of disqualified directors in all the companies. DIN is prerequisite in terms of Section 152(3) of the Act of 2013 for appointment as a director and if a person is acting as director without DIN he is liable for punishment under Section 159 of the Act of 2013.

7. It is the submission of learned counsel for the petitioners Shri Sankalp Sharma in Writ Petition No.15683/2020 and learned counsel Shri Praveen Surange appearing in Writ Petition No.8554/2019, 12653/2021 and 8639/2022 that disqualification shall operate only in the company which is in default and not for all the companies. According to them, language of Section 164(2) and 167(1)(a) of the Act of 2013 makes it clear that disqualification shall operate only with respect to company which is in default filing financial statements and annual returns and not with respect to any other company because it is not the intention of Legislature to disqualify the director who is director in defaulting company to automatically cease as director from other companies. Wording of Section 167(1) of the Act of 2013 also makes it clear that vacation of director shall only be with respect to company which is in default.

8. According to them, as per rule 11 of the Rules of 2014, there is no mention about deactivation of DIN pursuant to Sections 164(2) and 167(1) of the Act of 2013, therefore, stretching rule 11 of the Rules of 2014 would be arbitrary and illegal.

9. It is further submitted that rule 11 of the Rules of 2014 does not contemplate exercise of suo motu power by the Central Government or Regional Director or Registrar of Companies (if authorized so) to deactivate DIN. Since no application was received by the Central Government to cancel or deactivate the DIN of petitioners either by petitioners themselves or by somebody else, suo motu cognizance could not have been taken for deactivation of DIN. In absence of any statutory power to exercise suo motu power by authority approach of authority to deactivate DIN was contrary to the provisions specifically under Section 164 and 167 of the Act of 2013.

10. Learned counsel for the petitioners also raised the point of violation of principle of natural justice as according to them no opportunity was afforded to them before passing such order while rule 11(e) of the Rules of 2014 specifically provides for affording opportunity of hearing.

11. It is the submission of learned counsel for the petitioners that in some cases, respondents issued show cause notice to the petitioners but that was in respect of alleged violation of Section 137 of the Act of 2013 (Copy of financial

statements to be filed with Registrar) and now respondents deactivated DIN, therefore, purpose and content of show cause notice and final order (by way of impugned order) are different, therefore, on the basis of show cause notice on some different ground, instant impugned order cannot be passed on some ground other than the one in show cause notice {Referred: CCE Vs. Ballarpur Industries Ltd., 2007 (215) ELT 489 (SC) and CCE Vs. GAS Authority of India Ltd., 2008 (232) ELT 7 (SC)}.

12. It is also submitted by learned counsel for the petitioners that a person cannot be punished for the same offence twice because punishment for non filing of financial statements and annual returns is prescribed under Sections 92 and 137 of the Act of 2013 and if any liability or punishment is incurred under the said provision then provision of rule 11 of Rules of 2014 read with Sections 164(2) and 167(1) of the Act of 2013 cannot be applied to punish a person again on same set of alleged irregularities.

13. According to them, penalty for violation of Sections 92 and 137 of the Act of 2013 has been prescribed upon the "officer who is in default" as per Section 2(6) of the Act of 2013 and not on each and every director of the company. Therefore, deactivation of DIN of ordinary director and treating the director as disqualified is contrary to the provisions of the Act of 2013. By the act of respondents, no distinction has been made to person who though a director but not an "officer who is in default" and the disqualification is same irrespective of any default of that director or not.

14. Last but not the least, it is argued that provision of Section 164 of the Act of 2013 shall be prospective and not retrospective because these sections came into being on 1st April, 2014 and in some of the cases, 3 years default contemplated therein had to commence from the financial year 2014-15 or in the financial year 2016-17 (end on March 31, 2017). Similarly, Section 167(1)(a) of the Act of 2013 is operational on May 7, 2018, therefore, its operation is to be seen thereafter. Before default of three preceding years, action has been taken without waiting for three years to lapse. They relied upon AIR 1976 SC 133 (Dileep Kumar Sharma and others Vs. State of Madhya Pradesh), AIR 1954 SC 496 (Tolaram Relumal and another Vs. State of Bombay) as well as (2011) 7 SCC 639 (State of Madhya Pradesh Vs. Narmada Bachao Andolan and another) wherein it is held that when two interpretations are possible; one favouring the subject ought to be made applicable especially in case of a penal statute.

15. Learned counsel for the petitioner also placed list of cases in which different High Courts have taken a similar view while deciding the dispute finally and held in favour of petitioners. They relied upon the judgments passed by different High Courts from time to time in which some cases are worth reference like Madras High Court in Bhagwan Das Vs. UOI order dated 03-08-2018 [2018] 146 CLA 168 (Mad), by Gujarat High Court in Gaurang Balvantlal Vs. UOI order dated 18-12-2018, [2019] 149 CLA 286 (Guj), by Delhi High Court in Mukut Pathak Vs. UOI order dated 04-11-2018 [2020] 156 CLA 43 (Delhi) and all other judgments

filed by Shri Sankalp Sharma Advocate along with his synopsis in writ petition No.15683/2020. Petitioners sought parity.

16. Learned counsel for the respondents opposed the prayer by way of filing reply and tried to support impugned action of respondents. He denied the factum of denial of opportunity of hearing and referred Company Law Settlement Scheme, 2014 (CLSS, 2014) vide General Circular No.34 of 2014 in which all directors and companies were given a chance for course correction to submit financial statement/annual return and to cure the defects. Therefore, all these petitioners knew the fate very well, therefore, factum of opportunity of hearing is not available to the petitioners. According to him, respondents' action is as per the provision of Section 164(2) read with Section 167(1) of the Act of 2013, therefore, no error has been committed by the respondents. Since name of the company has been struck off from the register of Registrar of Companies due to non filing of statutory documents since 2014-15 notice under Section 248(1) of the Act of 2013 was issued to the company and its directors. Subsequently the public notice was issued under Section 248(1)(4) of the Act of 2013 read with rule 3 of the Rules of 2013. In sum and substance by way of filing reply, respondents opposed the petitioners and prayed for dismissal of all petitions.

17. However learned counsel for the respondents fairly accepted the fact that several High Courts have passed the orders in which orders of Registrar have been set aside on various grounds. However, he prayed for dismissal of petitions.

18. Heard learned counsel for the parties at length and perused the documents appended thereto.

19. From the pleadings and submissions of counsel for the parties, it appears that there are bunch of writ petitions covering or having similar issues. As per the written submissions given by Shri Surange it appears that following categories of cases are submitted before this Court for adjudication:

Category -I

Matters wherein defaulting company

has already been struck off.

Matters wherein de

is not struck off.

faulting

company

Category -II

Matters wherein Directors intended to continue the affairs of the defaulting company

Matters wherein Directors have no intention to continue the affairs of the company who is in default of filing

Annual Accounts.

Category -III

Matters wherein the defaulting company is a "Private Limited Company"

Matters company Company"

wherein is

the "Public

defaulting Limited

Category -IV

Matters wherein there is delay in approaching this Court

Matters wherein there is no delay in approaching this Court

Category -V

Matters wherein directors/petitioners have resigned from defaulting company

Matters wherein Directors/petitioners have not resigned from defaulting company

Category -VI

Matters wherein provisions of Section

164(2) has been retrospectively applied by Registrar of Companies

Matters wherein provisions of Section

164(2) has been prospectively applied by Registrar of Companies.

Category -VII

Matters wherein Company Law Settlement Scheme, 2014 (CLSS -2014) and/or condonation of delay

scheme -2018 (COD -2018) scheme is applicable

Matters wherein Company Law Settlement Scheme, 2014 (CLSS -2014) and/or condonation of delay

scheme -2018 (COD -2018) is not applicable

Category -VIII

Matters wherein petitioners are

directors in other companies apart from defaulting company

Matters wherein petitioners are not

directors in other companies apart from defaulting company

Category -IX

Matters wherein petitioners have made the default good of non-filing after obtaining interim relief from this

Court.

Matters wherein petitioners still in default of non-filing after obtaining interim relief from this Court.

20. Since the primary and consequential question is in respect of deactivation of DIN of petitioners by respondents, therefore, all these writ petitions have been heard together and decided by this common order. Minor deviation in facts of different petitions would not alter the nature of controversy.

21. From the perusal of the Act of 2013 and Rules of 2014, it appears that Section 152 of the Act of 2013 deals in respect of Appointment of Director whereas Section 153 is in respect of Application for allotment of DIN and Section 154 is in respect of Allotment of DIN. It is pertinent to mention here that as per Section 152(3), allotment of DIN under Section 154 (or any other number as may be prescribed under Section 153) is a prerequisite for appointment as director of a company. So far as cancellation or surrender or deactivation of DIN is concerned, it is provided in the Rules of 2014 purportedly made under Section 149, 150, 151, 152, 153, 154, 157, 160, 168, 170 read with Section 469 of the Act of 2013. Rule 11 of the Rules of 2014 which is relevant herein is reproduced for ready reference:

"11. Cancellation or surrender or Deactivation of DIN. - (1)

The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with fee as specified in companies (Registration Offices and Fees) Rules 2014 from any person, cancel or deactivate the DIN in case-

(a) the DIN is found to be duplicated in respect of the same person provided the

data related to both the DIN shall be merged with the validly retained number;

(b) the DIN was obtained in a wrongful manner or by fraudulent means;

(c) of the death of the concerned individual;

(d) the concerned individual has been declared as a person of unsound mind by a competent Court;

(e) if the concerned individual has been adjudicated an insolvent:

Provided that before cancellation or deactivation of DIN pursuant to clause (b), an opportunity of being heard shall be given to the concerned individual;

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN:

Provided that before deactivation or any DIN in such case, the Central Government shall verify e-records. Explanation.- For the purposes of clause (b)-

(i) the term "wrongful manner" means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation;

(ii) the term "fraudulent means" means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.

(2) The Central Government or Regional Director (Northern Region), or any officer authorised by the Central Government or Regional Director (Northern Region) shall, deactivate the Director Identification Number (DIN), of an individual who does not intimate his particulars in e-form DIR-3-KYC [or the web service DIR-3-KYC-WEB as the case may be] within stipulated time in accordance with Rule 12A.

(3) The de-activated DIN shall be re-activated only after e-form DIR-3-KYC [or the web service DIR-3-KYC-WEB as the case may be] is filed along with fee as prescribed under Companies (Registration Offices and Fees) Rules, 2014.]”

22. From perusal of said rule, it appears that cancellation or deactivation of DIN can be done at the instance of any person while moving an application along with fee as specified in the Rules of 2014 and that too after affording of opportunity of hearing (if cancellation or deactivation of DIN is made pursuant to clause (b) of sub-rule 1 of rule 11).

23. Here, prima facie no application has been moved by any person to reach to a conclusion regarding cancellation or deactivation of DIN at the hands of Registrar. In Rules, incorporation of requirement of moving application is obvious, because allotment of DIN number is prerequisite for appointment of directors, therefore,

moving application by person assumes more significance because it is identity which is carried by the director over his shoulder during his stint as director of the company, therefore, such important identification cannot be sacrificed suo motu or at the instance of any misrepresentation. It needs verification of e-record and affording opportunity of hearing in some contingencies especially when the matter pertains to obtaining DIN in a Wrongful Manner or by Fraudulent Means. Interestingly in writ petition No.8554/2019, show cause notice dated 12-02-2019 was issued for alleged violation under Section 137 of the Act of 2013 but in the said notice, no mention about deactivation or cancellation of DIN was referred but thereafter impugned order has been passed in which deactivation of DIN was made and interestingly disqualification of petitioners was given effect from 01-11-2018 upto 30-10-2023 which clearly suggests that before issuance of show cause notice dated 12-02-2019 respondents already and impliedly deactivated DIN of petitioners and this amounts to violation of principles of natural justice because at the one hand show cause notice does not include any trappings of rule 11 of the Rules of 2014 and on the other hand, impugned order has been passed under Section 164(2) and 167(1) of the Act of 2013.

24. Petitioners rightly relied upon CCE Vs. Ballarpur Industries Ltd. (supra) and CCE Vs. GAS Authority of India Ltd.(supra) in this regard, because show cause notice is the foundation of imputation and dichotomy of foundation of show cause notice vis a vis punishment order (impugned order herein) renders the proceedings vulnerable in the eyes of law.

25. Another aspect worth consideration in the matter is that rule 11 of the Rules of 2014 prescribes certain contingencies which may lead to deactivation and cancellation of DIN. Sections 164 of the Act of 2013 deals in respect of disqualification for appointment of director and Section 167 of the Act of 2013 deals in respect of vacation of office of director but it nowhere deals in respect of cancellation of DIN, therefore, resorting to Sections 164 and 167 of the Act of 2013 for cancellation/deactivation of DIN is arbitrary and illegal. Only source available for deactivation of DIN is provided under rule 11 of Rules of 2014.

26. Close scrutiny of Sections 164(1) and 164(2) of the Act of 2013 makes it clear that former takes care of individual act of person which may operate as disqualification whereas later provision talks about conduct of a company in which person is working as director. Basis of disqualification in both the contingencies are different and apparently contingency of Section 164(1) of the Act of 2013 and rule 11 of the Rules of 2014 may be overlapping but so far as Section 164(2) of the Act of 2013 vis a vis rule 11 of Rules of 2014 is concerned, it appears that Section 164(2) and for that matter, Section 167(1) are concerned, there are certain different set of contingencies mainly non-existent in contingencies as provided in rule 11 of the Rules of 2014. Therefore, applying the grounds mentioned in rule 11 and treating them to be the grounds available under Section 164(2) and 167(1) of the Act of 2013 would lead to anomaly and

would apparently go into the arena where authorities would move in arbitrariness and illegality. On this pretext also, case of petitioners gains ground.

27. So far as application of Sections 164 and 167 of the Act of 2013 is concerned from the Act of 2013 itself it appears that Section 164 of the Act of 2013 was made applicable from 1st May, 2014 whereas Section 167 of the Act of 2013 was made applicable w.e.f. 7th May, 2018 and it is settled in law that unless statute is made applicable retrospectively, its application would be prospective in nature. In some of the cases, alleged default appears to be of 2015-16 and 2016-17, therefore, three consecutive years have not been lapsed so as to attract the liability or rigours of Section 164(2) of the Act of 2013.

28. All other High Courts, list of which is provided hereinbelow have held in unison that Section 164(2) of the Act of 2013 would be prospectively applied and therefore, on this ground also case of respondents loses grounds:

S.No.

Parties Name

Journal

Order dated

High Court

1

Bhagwan Das V. UOI

[2018] 146 CLA

168 (Mad)

03-08-18

Madras (SB)

2

Gaurang Balvantlal V. UOI

[2019] 149 CLA

286 (Guj)

18-12-18

Gujarat (SB)

3

Yashodhara UOI

Shroff

V.

[2019] 152 CLA

393 (Kar)

12-06-19

Karnataka (SB)

4

Mohd. Tariq V. UOI

[2020] 159 CLA

267 (All)

15-10-19

Allahabad (DB)

5

Mukut Pathak V. UOI

[2020] 156 CLA

42 (Delhi)

04-11-19

Delhi (SB)

6

Jai Shankar V. UOI

2020(3)

645

ADJ

16-01-20

Allahabad (DB)

7

Naresh Poddar V. UOI

[2021]

CompCas 552(Cal)

224

05-01-21

Calcutta (SB)

8

Zacharira Maramkandathil Mohan

V. UOI

[2021] 3

550

KHC

16-06-21

Kerala (SB)

9

Meethelaveetil Kaitheri

V. UOI

[2020] 159 CLA

277 (Mad)

09-10-20

Madras (DB)

10

Gautam Mehra V. UOI

[2021]224Comp

Cas514 (Cal)

15-10-20

Calcutta (SB)

29. Different High Courts have taken same stand that DIN cannot be cancelled or deactivated resorting to Section 164 or 167 of the Act of 2013 and for the reasons assigned into their orders. For brevity, this Court does not intend to elaborate the order further while repeating the discussion.

30. Resultantly, in the considered opinion of this Court, looking to the legal position and the judgments passed by different High Courts from time to time, this Court intends to allow the writ petitions preferred by petitioners and set aside the impugned orders passed by Registrar of Companies against the petitioners whereby DIN has been cancelled/deactivated. After setting aside of impugned orders passed in different writ petitions referred above, consequential follow-up action shall be ensured, if required to be done at the instance of

respondents.

31. All petitions stand allowed and disposed of accordingly.