

(2020) 09 DEL CK 0135

In the Delhi High Court

Case No : Civil Writ Petition No. 5522 Of 2020, Civil Miscellaneous Application
No. 19889, 19890 Of 2020

Ashish Gupta

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 18-09-2020

Acts Referred:

Companies Act, 2013 — Section 164, 164(2), 167(1)(a), 455

Citation : (2020) 09 DEL CK 0135

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Nikhil Verma, Sanjeev Kumar Baliyan

Final Decision : Allowed

Judgement

Prathiba M. Singh, J. (Oral)

1. This hearing has been held through video conferencing.
2. The Petitioner - Mr. Ashish Gupta is a director in three companies namely (i) Delhi Control Devices Private Limited (hereinafter, "DCDPL") (ii) ABMR Tradex Private Limited (hereinafter, "ABMR"), & (iii) DCD Grand Power India Private Limited (hereinafter, "DCD Grand"). He has been disqualified as a director under Section 164 of the Companies Act, 2013 (hereinafter the "Act") with effect from 1st November 2017, due to the alleged non-compliance by DCDPL in filing its returns from 2014-2017. The Directors Identification Number (hereinafter, 'DIN') and Digital Signature Certificate (hereinafter, 'DSC') of the Petitioner have also been frozen, though the name of the company, DCDPL has not been struck off and it continues to be an active company.
3. The prayers in the writ petition are that the publication of the name of the Petitioner in the list of disqualified directors ought to be set aside and quashed and that the Petitioner should not be treated as a disqualified director under Section 164 of the Act. Mr. Nikhil Verma, Id. counsel for the Petitioner, relies upon

the judgment of this Court in *Mukut Pathak & Ors. v. Union of India & Ors.*, 265 (2019) DLT 506, to argue that in so far as two of the Companies i.e. ABMR and DCD Grand are concerned, in terms of paragraph 98 of *Mukut Pathak (supra)*, the Petitioner would not demit their office. In so far as DCDPL is concerned, since this is the defaulting company, they would also be permitted to continue as directors and file their records with the Registrar of Companies (hereinafter, "ROC"). Ld. counsel relies upon the Companies Fresh Start Scheme (CFSS) 2020 (hereinafter, "Scheme") dated 30th March, 2020 introduced by the Ministry of Corporate Affairs to argue that under the Scheme, if the defaulting company is active, the ROC has permitted the defaulting company to file its documents.

4. Mr. Baliyan, Id. counsel appearing for the Union of India, submits that the prayer sought by the Petitioner is quite broad. He also relies upon an order passed in *The Registrar of Companies Maharashtra Mumbai & Anr. v. Shailendrajit Charanjit Rai & Ors.* (SLP 18693-18703/2018), dated 6th August 2018, to argue that the order of the Bombay High Court, by which the DIN numbers were reactivated was stayed by the Supreme Court.

5. Mr. Santosh Kumar, the ROC has also joined the proceedings. As per the affidavit filed by the ROC, Delhi the Scheme applies for defaulting active companies and permits them to file belated documents. However, the same does not extend to cure the disqualification of the directors. The relevant paragraph of the affidavit is extracted below: -

"13. That the Company Fresh Start Scheme (CFSS), 2020 is applicable for defaulting active companies to file the belated document and doesn't not extent to cure the disqualification of directors as disqualified directors are not eligible to file return on behalf of company. If there are no authorised signatories/director left in the company to file documents in CFSS 2020, then the company may approach the jurisdictional ROC with formal request to add one new director to avail CFSS, 2020 from backend and file the belated documents. However, in the company Delhi Control Devices Private Limited, the other two directors are also disqualified for the period of 01.11.2017 to 31.10.2022. Moreover, only Ashish Gupta has filed the present petition."

Thus, as per the ROC, the company DCDPL ought to seek permission to nominate a new director and thereafter through the said new director, it has to file its returns, in order to be able to avail the benefit of the scheme.

6. In the present case, there are three aspects to be considered.

i. Whether the DIN of the Petitioner is liable to be activated for the two companies ABMR and DCD Grand?

ii. Whether the Petitioner can be considered as a Director of DCDPL?

iii. Whether DCDPL ought to be permitted to avail of the Scheme and filed its documents and if so, can the company do the filings through the Petitioner, signing as a director?

7. On the first aspect, it is relevant to note that the ROC disqualified the Petitioner as a director w.e.f 1st November 2017. On the said date, the Proviso to Section 167 (1)(a) did not exist. The said Proviso came into effect only on 7th May 2018. It was by virtue of this Proviso that once a director was disqualified qua one company i.e., the defaulting company, the office of the said director would become vacant in all companies. The Id. Single judge in Mukut Pathak (supra) has categorically held that this Proviso cannot have retrospective effect and would only apply if the disqualification took place after 7th May 2018. A perusal of paragraph 98 of Mukut Pathak (supra) is clear to this effect. The same reads:

"98. In view of the above, the petitioners would not demit their office on account of disqualifications incurred under Section 164 (2) of the Act by virtue of Section 167(1)(a) of the Act prior to the statutory amendments introduced with effect from 07.05.2018. However, if they suffer any of the disqualifications under Section 164(2) on or after 07.05.2018, the clear implication of the provisos to Section 164(2) and 167(1)(a) of the Act are that they would demit their office in all companies other than the defaulting company".

The judgment in Mukut Pathak (supra) is stated to have been appealed against, before the Id. Division Bench, however there is no stay against the judgment. Thus, as on date, the judgment would continue to hold the field.

8. Insofar as the order relied upon in the SLP relied upon by Mr. Baliyan above, the same arose from the Bombay High Court's judgement in Shailendrajit Charanjit Rai & Anr. v. The Registrar of Companies, Maharashtra [W.P. 148 of 2018]. In the said case the question before the Bombay High Court was whether disqualified companies could avail of the benefit of the 'Condonation of Delay Scheme, 2018' (hereinafter, "COD Scheme"). The Bombay High Court, after considering the matter, held that the writ petitions would be disposed of in terms of the directives contained in the Delhi High Court's order dated 21st December, 2017, in Trilokchand M. Kothari v. Union of India [W.P(C) 11381/2017]. The Bombay High Court also directed that the DIN and DSC of the Petitioners in the said cases would be activated. This judgment of the Bombay High Court has been stayed by the Supreme Court vide order dated 6th August 2018.

9. In Trilokchand M. Kothari (supra), the Delhi High Court was dealing with a case involving the disqualification of Directors and companies who intended to avail of the CODS Scheme. A perusal of the said order reveals that the same has been passed in the peculiar facts and circumstances of the said cases. A perusal of the said order also shows that the stay of disqualification was granted only to enable the company to file its returns. The decisions in Trilokchand M. Kothari (supra) as also in Shailendrajit Chiranjit Rai and Ors. (supra) were prior to the enactment of the Proviso to Section 167(1)(a) and also the decision in Mukut Pathak (supra).

10. The DIN of the Petitioner herein was deactivated and he was disqualified

prior to the proviso to Section 167(1)(a) taking effect. Thus, qua ABMR and DCD Grand, the Petitioner's disqualification is not sustainable in view of paragraph 98 of Mukut Pathak (supra).

11. Coming to the second aspect, i.e., whether the Petitioner can be considered as a Director in DCDPL, again in view of para 98 of Mukut Pathak (supra), the Petitioner would not demit his office in the defaulting company. The ROC's stand that the shareholders can nominate a new director and approval for the same can be sought, would not be an answer, as the same could in effect result in dummy directors being appointed to Companies, which is exactly what the new provisions may have intended to avoid. In any event, so long as the present case is covered by the Mukut Pathak (supra) decision, the Petitioner does not demit office and would be entitled to act as a Director in DCDPL.

12. On the last aspect i.e., whether the Petitioner can file the Returns on behalf of the defaulting company DCDPL, which wishes to avail of the Scheme, the answer to the same would be in the affirmative. As held by this Court recently, vide order dated 2nd September 2020, in Sandeep Agarwal & Anr. Vs. Union of India & Anr (W.P.(C) 5490/2020), the purpose of the Scheme is to provide an opportunity for active companies, who may have defaulted in filing of documents, to put their affairs in order. The operative portion of the order is extracted below:

"12. The salient features of the Scheme are:

- i) It has been launched to facilitate a fresh start, on a clean slate, for companies registered in India;
- ii) Alleviative measures under the Scheme are for the benefit of all companies. It gives an opportunity to file belated documents in the MCA-21 Registry in respect of annual filings, without being subject to higher additional fee on account of delay;
- iii) It grants immunity from launch of prosecution or of proceedings for imposition of penalty on account of delay associated with certain filings. For the said filings, only normal fee would be payable;
- iv) Any defaulting company can file the belated documents, which were due for filing on any given date, as per the Scheme. Normal fee would be payable for such filing by the defaulting company under the Companies (Registration Offices and Fee) Rules, 2014 and no additional fee shall be payable;
- v) To the extent that any prosecution has been launched or penalty has been imposed for the delay associated with the filings of belated documents, it provides that the same shall not be launched and immunity has been provided;
- vi) Applications can be made for seeking immunity in respect of belated documents. Once the documents are taken on file or approved by the designated authority, such applications would have to be filed within six months from the date of closure of the Scheme;

vii) To avail benefit of the Scheme, the defaulting company would have to withdraw any appeal that it may have filed against prosecution launched or orders passed by a court or adjudicating authority under the Act;

viii) If a final notice of striking off of a company has already been initiated or in certain other situations as enumerated in Clause 6(ix), the Scheme would not apply;

ix) If immunity is granted, the Scheme provides that prosecution shall be withdrawn before the concerned Court and the proceedings for penalties shall also be closed.

x) The Scheme also extends to inactive companies who can file the requisite documents and get themselves declared as dormant companies under Section 455 or apply for striking off the name of the company.

13. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order. It thus provides Directors of such companies a fresh cause of action to also challenge their disqualification qua the active companies. In the present case, the Petitioners are Directors of two companies - one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme, in respect of the active company. The purpose and intent of the Scheme is to allow a fresh start for companies which have defaulted. In order for the Scheme to be effective, Directors of these companies ought to be given an opportunity to avail of the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. Under such circumstances, the question of delay or limitation would not arise. The Id. Division Bench did not have an occasion in the case of Anamika Devi (supra) and Gaurav Kumar (supra) to consider this Scheme."

13. The Scheme is a fresh lease of life given to defaulting companies, which are not yet declared 'Inactive', to file their returns and do their businesses in accordance with law. The purpose being one to enable businesses, to limit the economic disruption caused due to COVID-19, ought to be interpreted in a manner so as to not render the objective of the Scheme, a failure. The scheme is an ENABLER and not a DISABLER for defaulting but active companies.

14. In view of the above it is held that the Petitioner would be entitled to avail of the Scheme to file documents of the defaulting company, which is still an active company whose name has not been struck off.

15. Accordingly, the following directions are being issued:-

(1) In respect of DCDPL, the Petitioner is permitted to avail of the Scheme, file the relevant documents and seek condonation of delay;

(2) In respect of the other two companies i.e. ABMR and DCD Grand, the DIN

and DSC of the Petitioner would not be treated as suspended from the position of Director, as the Petitioner would be entitled to the benefit of the rationale of this court in paragraph 98 of Mukut Pathak (supra).

16. Since the deadline for the Scheme is 30th September, 2020, the DIN number of the Petitioner would be activated within two working days, in order for the Petitioner to file the documents in respect of DCDPL.

17. With these observations, the petition is allowed in the above terms. All pending applications are disposed of.