

(2020) 08 GAU CK 0012

In the Gauhati High Court

Case No : Writ Petition (C) No. 3159 Of 2020

Sanjay Kumar Sharma And Anr

APPELLANT

Vs

Union Of India And Anr

RESPONDENT

Date of Decision : 24-08-2020

Acts Referred:

Companies Act, 2013 — Section 164, 164(2)(a)

Citation : (2020) 08 GAU CK 0012

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : S K Agarwal

Final Decision : Disposed Off

Judgement

1. Heard Mr. S.K. Agarwal, learned counsel for the petitioners. Also heard Mr. S.C. Keyal, learned ASGI for the respondents.
2. The petitioners are the directors of a company namely Gicholin Mineral Trading Private Limited having its registered office at Itanagar, Papumpare, Arunachal Pradesh.
3. Being the directors of the company, the Directors Identification Number (DIN), being 03122502 and 0233541, were issued in favour of the petitioners by the respondent No. 2. Under Section 164(2)(a) of the Companies Act, 2013 no person who is or has been a director of a company which has not filed its financial statements or annual reports for any continuous period of three financial years be eligible to be reappointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.
4. The first proviso to Section 164(2)(a) provides that where a person is appointed as a director of a company which is in default, amongst others, of requirement of Section 164(2) (a), shall not incur the disqualification for a period of 6 months from the date of his appointment.

5. The provisions of Section 164(2) is extracted below:-

(2) No person who is or has been a director of a company which-

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

Shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

[Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause(b), he shall not incur the disqualification for a period of six months from the date of his appointment].

6. It is stated that in exercise of its power under Section 164(2)(a) a list of defaulting directors were published by the Union of India in the Ministry of Corporate Affairs through its Secretary and the Registrar of Companies at Guwahati. The name of the petitioners appeared in the said list of the directors who were identified as disqualified under Drive-ii and not filed the financial statement for three years. The name of the petitioners appear at Serial No.167 of the said list.

7. Being aggrieved by the inclusion of the petitioners in the said list of the directors who were identified as disqualified, this instant writ petition is instituted with the following prayers:-

"In the facts and circumstance of the present case it is the case it is therefore respectfully prayed that your Lordship's may graciously pleased to issue notice to the Respondents, call for the Records of the case and issue a Rule Calling upon the Respondents to show cause as to why a writ in the nature of Mandamus and/or any other writ, Order or Direction of like nature shall not be issued by directing the Respondents more particularly the Respondents No.2 to re-activate the DSC and DIN of the petitioners which was deactivated in purported exercise of power conferred under the Section 164 of the companies Act, 2013 and as to why a writ in the nature of Mandamus and/or any other writ, Order or direction of like nature shall not be issued by directing the Respondent Authorities more particularly the Respondent No.2 not to give effect of the impugned Disqualified Directors in respect of others companies except the defaulting company and after cause or causes that may be shown by the Respondent Authorities and after going through the records of the case and after hearing the parties Your Lordship's may deem fit and proper in the interest of justice by granting full relief/reliefs to the petitioners.

In the interim it is respectfully prayed that your Lordship's may be graciously pleased to direct the Respondent Authority more particularly the Respondent No.2 herein to re-activate the DSC (Digital Signature Certificate) and DIN (Director's Identification Number) immediately and/or may pass such other or further order(s) as your Lordship's may deem fit and proper in the interest of justice by granting full relief/reliefs to the petitioners."

8. From a reading of the prayer it is apparent that the petitioners are seeking a writ in the nature of mandamus directing the respondent No. 2 not to consider the petitioner as a disqualified director under Section 164(2)(a) of the Companies Act, 2013 and for a further direction to change the status of the petitioner in the records of the respondent No. 2 from the list of disqualified directors and consequently unfreeze the Directors Identification Number (DIN) and the Digital Signature Certificate (DSC) of the petitioners.

9. The pre-requisite of issuing a writ in the nature of mandamus is that there must be a legal right of the litigant, such right must be violated by the respondents and upon the right being violated, there must be a representation for removal of such violation and upon consideration thereof, such request for removing the violation be refused.

10. The said principle of issuing a writ in the nature of mandamus is of a fundamental importance inasmuch as, when a writ court issues a writ in the nature of mandamus, it takes upon itself to determine as to whether the litigant had a legal right of his own making it entitled to a direction as claimed for. In the absence of the principle being followed, it is difficult for the writ court to arrive at its conclusion whether the legal right claimed for by the litigant is actually present or such right is being merely being claimed for by the litigant.

11. In the instant case, the petition is devoid of any material which may indicate as to a legal right in favour of the petitioners against being removed as a disqualified director or to restore the Director Identification Number (DIN) and Digital Signature Certificate (DSC) of the petitioners so as to enable the Court to determine their legal right, if any. In the circumstance, we are of the view it would be appropriate for the petitioners to make a representation before the Registrar of Companies, Guwahati being the respondent No.2 as regards their claim for continuing with the Director Identification Number (DIN) and Digital Signature Certificate (DSC) as well as to exclude their name from the list of disqualified directors. Upon such representation being made, the Registrar of Companies shall pass a detailed reasoned order as regards the entitlement of the petitioners to continue with the Directors Identification Number (DIN) and Digital Signature Certificate (DSC) and to get themselves removed from the list of disqualified directors. In doing so, a hearing be also given to the petitioners so as to enable them to present their case before the Registrar. Upon such application being made, it is directed that the Registrar of Companies shall pass a reasoned order within a period of 15 days from such application being submitted. It is provided that the petitioners shall file such applications, if so advised, within a

period 7 days from today. Till the expiry of 7 days from today, the respondent authorities shall unfreeze the Directors Identification Number (DIN) and Digital Signature Certificate (DSC) issued in favour of the petitioners. However, if such application is not filed, the continuation of the order to unfreeze their Directors Identification Number (DIN) and Digital Signature Certificate (DSC) shall remain withdrawn and the Registrar of Companies shall be at liberty to take any action against the petitioners. In the event, application is filed the order to unfreeze the Directors Identification Number (DIN) and Digital Signature Certificate (DSC) shall continue till the Registrar of Companies may pass a reasoned order.

12. In terms of the above, the writ petition stands disposed of.