

(2020) 05 GAU CK 0005

In the Gauhati High Court

Case No : Writ Petition (C) No. 1161 Of 2020

Surersh Kumar Jain

APPELLANT

Vs

Union Of India And 2 Ors

RESPONDENT

Date of Decision : 11-05-2020

Acts Referred:

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

Citation : (2020) 05 GAU CK 0005

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : R C Sanchati

Final Decision : Disposed Off

Judgement

1. Heard Mr. S. Sancheti, learned counsel for the petitioner. Also heard Mr. S.C. Keyal, learned ASGI for the respondent.
2. The petitioner is the Director of the respondent No.3 company namely Bikund Infra Private Limited having its registered office at Leiren Mansion, Opposite Lamphel Super Market, Imphal, Manipur.
3. Being one of the directors of the respondent No.3 company, the Directors Identification Number (DIN) was issued in favour of the petitioner by the respondent Nos. 1 and 2 and the number allotted was 00462768. 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. In the said list of the directors identified as disqualified under Drive-ii and who had not filed the financial statement for three years, the name of the petitioner appears at Serial No.167.

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

a) "Directing the respondent No.1 and 2 that the publication of the name of the petitioner on the list of disqualified directors uploaded and published on the website of respondent No.1 is arbitrary and liable to be quashed to the extent pertaining to the petitioner;

b) Directing the respondent Nos. 1 and 2 not to treat the petitioner as "disqualified director" under Section 164 of the Companies Act, 2013 and for any consequential measures and /or effects arising/contemplated there from;

c) Directing the respondent No.1 and 2 to change the status of the petitioner in the records of the respondent No.1 and 2 from disqualified director and consequently directing respondent Nos.1 and 2 to unfreeze the Directors Identification Number (DIN) and Digital Signature Certificate (DSC) of the petitioner, thereby enabling the petitioner to act as Director and to file the documents and returns on behalf of the respondent No.3 as well as all other companies on which such petitioner serve as director;

d) Issue appropriate Writ, Order or Direction, directing the respondent Nos.1 and 2 to give opportunity to the petitioner and/or such relief to make default good, if

any.

e) upon cause or causes being shown and after hearing the parties be pleased to make the Rule absolute and/or pass such other order or orders as your Lordships shall deem fit and proper.

AND

During pendency of the rule, your Lordships may be pleased to direct the respondent No.1 and 2 to unfreeze the Directors Identification Number (DIN) and Digital Signature Certificate (DSC) of the petitioner, thereby enabling the petitioner to file the documents and returns on behalf of the respondent No.3 as well as other companies on which such petitioner serve as director and/or pass such other further orders as Your Lordships shall deem fit and proper."

8. From a reading of the prayer it is apparent that the petitioner is seeking a writ in the nature of mandamus directing the respondents No. 1 and 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 Nos. 1 and 2 from the list of disqualified directors and consequently unfreeze the Directors Identification Number and the Digital Signature Certificate (DSC) of the petitioner.

9. The pre requisition 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 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 principles 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 has a legal right of his own making it entitled to a direction as claimed for. In the absence of the principles 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 petitioner for being removed as a disqualified director or to restore the Director Identification Number and Digital Signature Certificate of the petitioner so as to enable the Court to determine his legal right, if any. In the circumstance, we are of the view it would be appropriate for the petitioner to make a representation before the Registrar of Companies, Guwahati being the respondent No.2 as regards his claim for continuing with the Director Identification Number (DIN) and Digital Signature Certificate (DSC) as well as to exclude his 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 petitioner to continue with the Directors

Identification Number (DIN) and Digital Signature Certificate (DSC) and to get himself removed from the list of disqualified directors. In doing so, a hearing be also given to the petitioner so as to enable him to present his 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 in the Office of the Registrar of Companies. It is provided that the petitioner shall file any such application if so advised within a period of 7 days from today. In the event, such application is not filed, the continuation of the interim order dated 20.02.2020 shall remain withdrawn and the Registrar Companies will be at liberty to take any action against the petitioner. In the event, the application is filed, the interim order shall continue till the passing of the reasoned order by the Director of Companies.

12. Writ petition disposed of in the above terms.