IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.08.2018

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THE HONOURABLE MR.JUSTICE T.RAJA

W.P.Nos.19754 and 19755 of 2018 &
W.M.P.Nos.23198 to 23201 of 2018

Raj Kumar Bokadia .. Petitioner in W.P.No.19754/2018

Suraj Kawar .. Petitioner in W.P.No.19755/2018

-vs-

1. The Union of India
Represented by the Secretary to Government of India
Ministry of Corporate Affairs
Shastri Bhawan, Dr.Rajendra Prasad Reoad
New Delhi- 110 001

2. The Registrar of Companies
Tamil Nadu Chennai
Block No.5, B-Wing, 2nd Floor
Shastri Bhawan
No.26, Haddows Road
Chennai - 600 006 ..Respondents in both WPs

Petitions under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus calling for the records of the 2nd respondent relating to the impugned order dated 08.09.2017 read with updated list dated 01.11.2017 uploaded and hosted on the website of the 1st respondent insofar as the petitioner herein is concerned, quash the same as illegal, arbitrary and devoid of merits and consequently direct the respondents herein to permit petitioner to get reappointed as Director of any Company or appointed as Director in any company without any hindrance.

For Petitioners :: Mr.Adithya Reddy

For Respondents :: Mr.S.Paresh Kannan
Central Govt. Standing Counsel

ORDER

The petitioners have filed these writ petitions to quash the proceedings of the 2nd respondent relating to the impugned order dated 08.09.2017 uploaded in the website of the 1st respondent insofar as the petitioners herein is concerned and consequently direct the respondents herein to permit the petitioners to get reappointed as Director in any of the companies.

2.Heard Mr.Adithya Reddy, learned counsel for the petitioners and Mr.S.Paresh Kannan, learned Central Government Standing Counsel for the respondents.

3.Similar issue was considered by this Court in W.P.No.25455 of 2017 [Bhagavan Das Dhananjaya Das Vs. Union of India and another] etc., batch and this Court allowed those writ petitions by order dated 03.08.2018 on the following terms:-

> (a) When the New Act 2013 came into effect from 1.4.2014, the second respondent herein has wrongly given retrospective effect and erroneously disqualified the petitioner-directors from 1.11.2016 itself before the deadline commenced wrongly fixing the first financial year from 1.4.2013 to 31.3.2014.
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> (b) By virtue of the new Section 164(2)(a) of the 2013 Act using the expression "for any continuous period of three financial years" and in the light of Section 2(41) defining "financial year" as well as their own General Circular No.08/14 dated 4.4.2014, the first financial year would be from 1.4.2014 to 31.3.2015, the second financial year would be from 1.4.2015 to 31.3.2016 and the third financial year would be from 1.4.2016 to 31.3.2017, whereas the second respondent clearly admitted in paras 15 and 22 of the counter affidavit that the default of filing statutory returns for the financial years commenced from 2013-14, 2014-15 and 2015-16 i.e., one year before the Act 2013 came into force. This is the basic incurable legal infirmity that vitiates the entire impugned proceedings.
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> (c) By virtue of the first proviso to Section 96 (1) of the 2013 Act, Annual General Meeting for the year ending on 31.3.2017 can be held within six months from the closing of financial year i.e., 30.9.2017, additionally in the light of Section 164(2)(a) referring to "annual return" and "financial statement", the time limit to file annual return under Section 92 (4) of 2013 Act is sixty days from Annual General Meeting or the last date on which Annual General

Meeting ought to have been held, hence, the time limit to file balance sheet under Section 137(1) of the 2013 Act is again thirty days from Annual General Meeting. Therefore, in view of these legal position, the disqualification could get triggered off only on or after 30.10.2017 only, if any company fails to file annual forms for three financial years. Importantly, it is to be borne in mind that even beyond that time limit, additional time limit of 270 days was available by virtue of the then first proviso to Section 403.

(d) Although there is no statute or provision expressly spelling out the observance of the principles of natural justice against disqualification of directors, as the legal right of the petitioners to continue as director in other company or to be reappointed in any other company, which are scrupulously following the provisions of the Companies Act, have been deprived of, the principles of natural justice should have been adhered to by issuing proper notice to all the directors.

(e) When the disqualification clause was not attracted to the directors of private companies under the old Act of 1956, the same cannot be allowed to take a retrospective effect under the new Act, when the provision of Section 164(2)(a) came into force only from 1.4.2014. This is also for one more reason that the failure to file the annual returns has been adequately taken care of by the penal provision under Section 92, making it clear that every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both. Again under Section 137, the failure to file the financial statement visits punishment with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both. Further, under Section 441 (4), the default in filing returns or accounts compoundable by Tribunal or Regional Director or by any officer authorized by the Central Government.

(f) In view of the above legal position, when the default in filing the accounts or returns are made as compoundable offence, Section 164(2)(a) providing the disqualification of director of private company not only in the defaulting company, but also from other company in which the petitioner is a director, diligently and meticulously following every provision of law, is certainly disproportionate to the lapse, as it is only regulatory in nature, because, notice to be sent under Section 248(1) of the Companies Act, 2013 by the Registrar of Companies for striking off the name of the company from the Registrar of Companies on the premise that the company has not been carrying on any business for a period of two financial years, is different from the disqualification under Section 164 (2)(a), inasmuch as a company can be struck off, if the company has not been carrying on any business for a period of two financial years, whereas for disqualification, the criteria is three financial years. Therefore, in my considered opinion, although the petitioners have not challenged the provision of Section 164(2)(a), as the respondents have not followed the principles of natural justice, extinguishing the corporate life of the directors to the extent of disqualifying them to hold the directorship in the other companies, the said provision is liable to be read down, hence, Section 164(2)(a) is read down to the extent it disqualifies the directors in other companies which are scrupulously following the requirements of law, making it clear that no directors in other companies can be disqualified without prior notice.

(g) However, it is made clear beyond any pale of doubt that the mischief of removal of the names of the companies by the Registrar of Companies and the disqualification of the directors in the defaulting company will go together, as it is inseparable, and the Registrar of Companies need not give fresh notice to the directors for their disqualification from the dormant company, if there is a failure to file the financial statement or annual return for any continuous period of three financial years as per Section 164(2) (a).

Following the same, these writ petitions are also allowed on the above terms and the impugned orders are set aside. Consequently, all the connected writ miscellaneous petitions are closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

gpa

To

1.The Secretary to Government of India
The Union of India
Ministry of Corporate Affairs
Shastri Bhawan, Dr.Rajendra Prasad Road
New Delhi- 110 001.

2.The Registrar of Companies
Tamil Nadu Chennai
Block No.5, B-Wing, 2nd Floor
Shastri Bhawan
No.26, Haddows Road
Chennai - 600 006.

+1cc to Mr.Venkataswamy Babu, Advocate Sr.53612

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srg 27/08/2018