IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 29.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

Company Petition No.2 of 2019
AND Company Application No.33 of 2019

Harris Jayakumar Jayaraj ... Petitioner

Vs.

1.The Registrar of Companies,
O/o.The Registrar of Companies,
5th Floor, Shastri Bhawan,
No.26, Haddows Road,
Chennai-6.

2.Union of India,
Through its Secretary,
Ministry of Corporate Affairs,
5th Floor, A Wing,
'SHASTRI BHAVAN',
New Delhi 110 001. ... Respondents

Company Petition filed under Section 463(1) and (2) of The Companies Act, 2013 to grant the following reliefs :

a) to declare that the disqualification of the petitioner and the consequential blocking of the Digital Signature Certificate of the petitioner by the respondents is illegal, null and void and consequently direct the 1st respondent to remove his disqualification to serve on the Boards of the Companies and more fully described in Schedule A to the petition.

b) to issue a direction to the 1st and 2nd respondents to activate his Director Identification Number (02081326) to enable him to use his Director Identification Number.

For Petitioner : Mr.K.M.Anand
For Respondents : Mr.T.V.Krishnamachari,
Senior Panel Counsel

ORDER

Instant Company Petition ('CP' for brevity) has been listed under the caption 'FOR MAINTAINABILITY'.

2.Mr.K.M.Anand, learned counsel representing the counsel on record for the petitioner and Mr.T.V.Krishnamachari, learned Senior Panel Counsel for Government of India on behalf of both the respondents in the instant CP are before this Court.

3.This Company Petition pertains to an entity/company which goes by the name 'Trinity Audio Studios Private Limited', (hereinafter be referred to as 'said company' for the sake of convenience and clarity) the CIN number is U92132TN2002PTC048737 and was incorporated on 10.04.2002. Considering the very narrow scope on which the entire matter turns, it may not be necessary to advert to factual details and particulars extensively.

4.Suffice to say that sole petitioner in the instant CP who is a natural person was one of the directors in said company and he was disqualified by an order made by the first respondent (hereinafter 'ROC' for brevity) *inter alia* under Section 164(2)(a) of the Companies Act, 2013 (hereinafter 'said Act' for brevity). Instant CP has been filed under Sub-Sections (1) and

(2) of Section 463 of said Act assailing the aforesaid disqualification and the consequential blocking of the Digital Signature Certificate of the petitioner by ROC.

5.To be noted, there is no dispute or disagreement before this Court that the aforesaid disqualification was on the ground of default and the default is non filing of returns and financial statements for said company for a continuous period of three financial years.

6.Learned counsel for respondents urged that instant CP which is purportedly under Sub-Sections (2) and (3) of Section 463 is not maintainable. Therefore, the instant CP has been listed under the caption 'FOR MAINTAINABILITY'.

7.Before this Company Court proceeds further to deals with the issue of maintainability, the trajectory in the instant CP and the Company Application herein, viz. C.A.No.33 of 2019 are relevant. Proceedings dated 08.03.2019 and 15.03.2019 read as follows :

> "<u>Order dated 08.03.2019</u>
>
> Mr.K.M.Anand, learned counsel representing the counsel on record for petitioner is before this Court.
>
> After hearing the learned counsel for sometime, Mr.T.V.Krishnamachari, learned Senior Panel Counsel accepts notice for both the respondents and seeks a week's time to get instructions and revert to this Court.

To be noted, this shall be notice under Section 463(3) of The Companies Act, 2013, but it is made clear that it is open to the respondents to argue of maintainability.

List this matter on 15.03.2019.

<u>Order dated 15.03.2019</u>

Mr.Krishnamachari, learned Panel Counsel for respondents seeks a fortnight's time to file counter affidavit in the Registry.

List on 29.03.2019."

8.Learned counsel for petitioner brings to the notice of this Court that notice was ordered to the respondents for getting instructions with regard to activation of the deactivated Digital Signature Certificate of the petitioner as was done in the case of two petitioners in two CPs viz. CP.Nos.1 of 2017 and 2 of 2017.

9.It was submitted that the petitioners in those two CPs of the year 2017 are also similarly placed (as petitioner in instant CP) and ROC has activated the Digital Signature Certificate with regard to the petitioners therein, whereas it has not been done in the instant case. It is in this backdrop, notice was ordered to the respondents specifically in the light of Sub-Section (3) of Section 463 of said Act. It is in this context that the aforesaid proceedings/orders dated 08.03.2019 and 15.03.2019 came to be made/passed.

10.There is no dispute that the disqualification and blocking of Digital Signature Certificate of petitioner in earlier CPs being C.P.No.1 of 2017 and 2 of 2017 have since been activated. It is also not in dispute or disagreement that they are also similarly placed qua the petitioner in the instant CP. To be noted, respondents' counsel accepted notice and undertook to get instructions in this regard.

11.It is also brought to the notice of this Court that C.P.Nos.1 of 2017 and 2 of 2017 were also listed under the caption 'FOR MAINTAINABILITY' and they have to be heard out with regard to maintainability, but, what happened in those CPs is another learned Judge, has issued notice under Sub-Section (3) of Section 463 of said Act, subject to maintainability and has granted an interim order with regard to disqualification. It is submitted that the blocking of Digital Signature Certificates were removed and activated owing to such interim orders. Under such circumstances, this Court is unable to persuade itself to believe that the petitioner herein cannot be given the same benefit notwithstanding the fact that the petitioner is similarly placed and particularly, in the light of the fact that no material has been placed before this Court to show that the case of this petitioner is different from the case of the petitioners in CP.Nos.1 of 2017 and 2 of 2017.

12.However, the matter does not end there as the main CP is listed under the caption 'FOR MAINTAINABILITY' as mentioned *supra*.

13.Furthermore, the other two CPs being viz. CP.Nos.1 of 2017 and 2 of 2017 have also been listed under the caption 'FOR MAINTAINABILITY' and they have to be heard out with regard to maintainability. As alluded to supra, in that matter, an interim order was granted albeit subject to maintainability.

14.In the instant case, as the matter is being heard out on maintainability, it would be appropriate to take up the issue of grant of interim stay only after deciding maintainability of the main matter i.e., CP. In other words, instant matter is now being heard on maintainability. In the other matter, notice was ordered and stay had been granted subject to maintainability, but, that is not the case here. In the instant CP, notice has been ordered and on return of notice, though ROC has not been able to highlight how the petitioners are differently placed qua petitioners in CP.Nos.1 of 2017 and 2 of 2017, but has raised the issue of maintainability and therefore, this Court has to necessarily consider the issue of maintainability.

15.This takes us back to the issue of maintainability of instant CP.

16.A perusal of Section 463 of said Act reveals that it pertains to five different kind of proceedings and they are as follows :

(a) negligence

(b) default

(c) breach of duty

(d) misfeasance and

(e) breach of trust.

Section 463 of said Act makes it clear that it applies to cases where there are proceedings for any one of the aforesaid five categories of violations.

17.In such a proceeding or in other words, in such a pending proceeding, if the Court is satisfied that the petitioner has honestly and reasonably, after taking into account all other circumstances of the case, comes to the conclusion that the petitioner is to be excused, the Court can relieve the petitioner. In the instant case, there are no such proceedings pending, as instant proceeding itself is one assailing disqualification (for default) under Section 164(2)(a) of said Act. It is submitted that the sheet anchor ground on which the instant petition is predicated and the primordial ground of attack qua disqualification is that disqualification has been done without giving an opportunity to the petitioner and it has been done by merely publishing a long list.

18.It is to be noted that though this is not the only ground of attack, it is a primary and primordial ground on which the challenge to disqualification for default is predicated. This takes us to Sub-Section (2) of Section 463 of said Act. To be noted, instant petition has been filed both under

Sub-Sections (1) and (2) of Section 463 of said Act which deal with situations where an officer of a company apprehends that any proceedings might be brought against such officer in respect of any one of the aforesaid five categories. On the teeth of such apprehension or in other words under such apprehension, an officer of a company can apply to the High Court and in such an application, High Court will have the same power to relieve the officer as it would have as a Court before which proceedings under one or more of the aforesaid five categories is/were pending.

19.In the instant case, it is not a case of apprehension qua any of the aforesaid five categories, because the proceedings have already been made. It is also necessary to make it clear that out of the five categories of violations set out in Section 463 of said Act which have been adumbrated *supra*, we are concerned with the second category, viz. default only in the instant case. In this backdrop, it is to be noted that it is not a case of apprehension of any proceedings qua default. This is a case where disqualification order has been passed on the ground of default and that order is being put to challenge. Also to be noted, there are no pending proceedings, i.e., proceedings for default as disqualification has already been made.

20.Be that as it may, this takes us to the question as to whether the petitioner will be without any remedy as there is no other provision under said Act to seek relief assailing an order of disqualification by an officer of a company. The answer is, it is open to the petitioner to file a writ petition under Article 226 of The Constitution of India. This is projected before this Court by the learned counsel for respondents. It is pointed out that several other similarly placed persons have already filed writ petitions before this Court in a batch of writ petitions in W.P.Nos.25455 of 2017 etc. A Hon'ble Single Judge of this Court *vide* order dated 03.08.2018 has quashed orders of disqualification. However, it is brought to the notice of this Court that this order made by a learned Single Judge of this Court has been carried in appeal by way of an intra court appeal by respondents *vide* W.A.No.63 of 2019, the same is pending and the hearing is on the anvil. Furthermore, this Court as a matter of research embarked upon the exercise of examining the obtaining position in similar matters in other High Courts. In the course of such examination, this Court noticed that in the High Court of Gujarat at Ahmedabad, a Single Judge has entertained a batch of writ petitions as in the Madras High Court and passed an order dated 18.12.2018 quashing orders of disqualification. This is in R/Special Civil Application No.22435 of 2017 etc., batch. In this judgment of Gujarat High Court, learned Single Judge has held that the action is prospective.

21.If the action is prospective and if it had already come into force, the petitioner stands disqualified. In this regard, the petitioner becomes an Ex-Director qua said company. However, this does not prevent the petitioner from seeking a remedy in writ jurisdiction, if the petitioner chooses to do so.

22.Be that as it may, learned counsel for petitioner submitted that the equivalent of Section 463 of said Act i.e., in The Companies Act, 2013 is Section 633 of the old Act i.e., The Companies Act, 1956 (hereinafter 'old Companies Act'). Learned counsel saying so, drew the attention of this Court to a reported judgment of this Court being *P.V.R.S.Manikumar Vs. Official Liquidator, High Court and Others reported in (2013)113 CorLA 188*. This is an order dated 18.01.2013 made by a Division Bench of this Court in O.S.A.No.92 of 2009.

23.A perusal of the said order reveals that the factual matrix is very different. *P.V.R.S.Manikumar* case is one where there was a pending winding up proceedings i.e., winding up proceedings *inter alia* under Section 434 of old Companies Act, Ex-Directors who were expected to submit state of affairs in the prescribed form i.e., Form 57 under the Companies (Court) Rules, 1959 within 21 days from the date of winding up order did not do so, owing to which, the Official Liquidator took out an application in A.No.1081 of 2004 along with a report under Section 454 of old Companies Act with a prayer to punish the Ex-Directors for failure to submit state of affairs within the statutory period. Therefore, that was a case where there was a pending proceeding and action was proposed. In other words, an action for alleged default was proposed against Ex-Directors in pending proceedings. This comes out clearly in paragraph 2 of the order wherein the facts of the case have been captured in a nutshell. This Court deems it appropriate to extract paragraph 2 of the aforesaid reported judgment which reads as follows :

> *"2.An order of winding up was passed by the company court on 25th February, 1997 in C.P.No.101 of 1994 in respect of Indag Products Ltd. and the Official Liquidator attached to the High Court was appointed as the provisional liquidator. The appellant and the other ex-directors were expected to submit the statement of affairs in Form 57 of the Companies (Court) Rules, 1959 within twenty-one days from the date of winding up or from the date of appointment of the provisional liquidator. However, the ex-directors failed to file the statement of affairs in spite of receipt of notice from the official liquidator on 19th April 1997. This made the official liquidator to file an application in A.No.1081 of 2004 in C.P.No.101 of 1994 along with a report u/s 454 of the Companies Act, 1956 before the company court. <u>The prayer in the application was to take the complaint on file and to punish the ex-directors for their failure to submit the statement of affairs within the statutory period</u>."*

(underlining made by Court to supply emphasis and highlight)

24.Therefore, the aforesaid order under Section 633 of old Companies Act does not help the petitioner and it does not apply to the facts of the instant case. At the risk of repetition, it does not apply for two reasons. One reason is, that was a case where Official Liquidator took out the application for action in pending proceeding. The second reason is, that was a case where action was proposed and the application was for proposed action for default, unlike the instant case, where action has already been completed and an order of disqualification has already passed. As mentioned *supra*, it is the order of disqualification that has been called in question in instant case.

25.There is one other aspect of the matter which is projected before this Court by learned counsel for respondents and that is, on an order of disqualification under Section 164(2)(a) of said Act being passed, the petitioner ceased to be an officer of the said company and therefore, the instant petition cannot be maintained by the petitioner. Therefore in the considered view of this Court, it follows as a sequitur that, if the order disqualifying the petitioner is stayed or is questioned in the writ jurisdiction, it will be open to the petitioner to state that he is an officer of the Company and seek remedies available to an officer of the company. However, very interestingly it has also been submitted in a counter affidavit filed by ROC that offences for which penal and punitive measures are prescribed under said Act are to be tried in Special Courts established under Section 435 of said Act. It is submitted that the petitioner can invoke Section 463(1) of said Act, if proceedings are initiated in Courts constituted under Section 435 of said Act. This articulated by the respondents to the following manner :

"21.It is humbly submitted that all the offences for which penal and punitive measures are prescribed under this Act are to be tried in Special Courts established under Section 435 of

the Companies Act 2013. It is further stated that Section 463(1) of the Act can inovked by the Officers of any Company if any proceeding is launched against them before the Special Court or if there is an apprehensiion that a proceeding will be launched by the Respondent in a Special Court. It is further submitted that Section 164(2)(a) does not envisage any proceeding to be initiated against the directors in a Special Court and hence the Petition deserves to be dismissed on grounds of validity."

26.Therefore in one breath, it is submitted that the petitioner ceases to be an officer of the said Company on the order of disqualification being passed and in the same breath, it has been stated that it is open to the petitioner to initiate proceedings under Section 463 of said Act, if proceedings are initiated in a Court constituted under Section 465 of said Act for penal and punitive measures or when there is an apprehension of the same. Therefore in the considered opinion of this Court, this question of whether a petition under Section 463 of said Act can be maintained by an Ex-Director is best left open in this order as it is not necessary to delve into that aspect of the matter for deciding the maintainability issue on hand.

27.This Court deems it appropriate to set out that a reading of the three Sub-Sections of Section 463 of said Act brings to light that while Sub-Section (1) deals with a situation where there are pending proceedings for any one of the aforesaid five violations, Sub-Section (2) deals with a situation where an officer of a Company apprehends that proceedings under any one of the five categories may be initiated against him or her. Sub-Section (3) is merely in the nature of a caveat to proceedings under Section 463 of said Act itself as Sub-Section (3) of said Act makes it clear that no Court shall grant relief under Sub-Sections (1) and (2) alluded to *supra*, without having notice served on ROC and any other person which the Court thinks is necessary.

28.In other words, it is a condition precedent that ROC and any other person/entity which the Company Court finds appropriate should be given opportunity to showcause as to how relief under Sub-Sections (1) or (2) should not be granted. As a sequitur, it follows that relief under Sub-Sections (1) or (2) of Section 463 of said Act cannot be granted without giving an opportunity of being heard to ROC and others who are considered necessary by the Court in this regard.

29.This takes us to the other arm of submission before this Court.

30.Though maintainability is a pristine question of law, for the purpose of satisfying itself, this Court wanted to know the kind of impediment, if any which the petitioner will be put to, if the petitioner were to assail the order of disqualification in the writ jurisdiction. To put it differently, this Court examined as to what kind of prejudice (if at all) would be caused to the petitioner, if the petitioner were to assail the order of disqualification in the writ jurisdiction.

31.This Court also heard learned counsel for petitioner on this aspect of the matter.

32.After hearing learned counsel for petitioner on this aspect of the matter, it is clear as daylight that no prejudice would be caused to the petitioner, if the petitioner were to assail the impugned order of disqualification in the writ jurisdiction and there will be no impediment in doing so, owing to the view that is being taken in the instant CP.

33.This will be made clear in the latter portion of this order.

34.Owing to all that have been set out *supra*, this Court is unable to persuade itself to believe that instant CP is maintainable under Section 463 of said Act. However, it is deemed necessary to extract the prayer in the instant CP which reads as follows :

(a) to declare that the disqualification of the petitioner and the consequential blocking of the Digital Signature Certificate of the petitioner by the respondents is illegal, null and void and consequently direct the 1st respondent to remove his disqualification to serve on the Boards of the Companies and more fully described in Schedule A to the petition.

(b) to issue a direction to the 1st and 2nd respondents to activate his Director Identification Number (02081326) to enable him to use his Director Identification Number."

The nature of the prayer itself makes it clear that order under Section 164 (2)(a) of said Act has already been argued albeit according to the petitioner without notice.

35.The question as to whether the petitioner has acted honestly and reasonably and whether the petitioner is entitled to relief on this ground is also left open as this Court is not examining instant CP on merits. It has become necessary to make this clear as, in the counter affidavit, ROC has adverted to the issue as to whether the petitioner has acted honestly and reasonably.

36.This Court deems it appropriate to crystalize salient aspects of this order. This Court does so and it is as follows :

a) Instant CP viz. CP.No.2 of 2019 filed under Sub-Sections (1) and (2) of Section 463 of the Companies Act, 2013 is held to be not maintainable owing to the narrative *supra* and more particularly, owing to the fact that the order of disqualification has already been passed and there are no pending proceedings with regard to default.

b) The legal question as to whether the petitioner qualifies as an officer of the Company (for the purpose of Section 463) post disqualification i.e., after becoming an Ex-Director is being left open for reasons alluded to *supra* in this order.

c) Likewise, the factual question as to whether the petitioner has acted honestly and reasonably qua the alleged default i.e., default of non filing statements and actual returns for a continuous period of three financial years is also left open.

d) It is made clear that all questions on merits of the matter are left open to be agitated in an appropriate forum, if the petitioner chooses to do so.

e) Petitioner is granted leave and liberty to approach the writ jurisdiction of this Court if so advised, assailing the order of disqualification under Section 164(2)(a) of said Act. In other words, it is made clear that this instant CP being held to be not maintainable and the instant order on maintainability qua instant CP will not impede or come in the way of the petitioner filing a writ petition assailing the disqualification, if the petitioner chooses to do so.

f) Likewise, it is made clear that disposal of instant CP as one that is not maintainable, will not impede or tie the hands of ROC from activating digital signature or in other words, deactivating the disqualification as has been done in the case of other similarly placed persons more particularly, petitioners in CP.Nos.1 of 2017 and 2 of 2017.

g) If there is a situation of pending proceedings or apprehension in future, this order will not preclude the petitioner from initiating a company petition under Section 463 and if that happens such a petition shall be listed and disposed of on its own merits untrammelled by this order.

37.To be noted, the aforesaid exercise of crystalizing the salient points of this order of this Court has been done by way of sub paragraphs in preceding paragraph as a matter of summation for the purpose of clarity.

38.*Supra* has been done only for the purpose of enhancing clarity in the order and therefore, the same is not to be construed as relief granted as this Court is holding that the instant CP is not maintainable. Instant CP is dismissed as not maintainable. Considering the nature of the matter and the trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs. Consequently, connected Company Application No.33 of 2019 also dismissed.

29.03.2019

Index : Yes/No
Internet : Yes
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M.SUNDAR, J.

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