IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2020

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THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

W.P. No.35818 of 2019
and
W.M.P. No.36714 of 2019

K.Shanmugasundaram

... Petitioner

-vs-

1. The Union of India
   Represented by its
   Ministry of Corporate Affairs,
   Shastri Bhawan, Dr.Rajendra Prasad Road,
   New Delhi – 110001.

2. The Registrar of Companies
   Block No.6, B Wing 2nd floor,
   Shastri Bhawan 26,
   Haddows road,
   Chennai – 600 006.

... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent pertaining to the impugned order dated 01.11.2017 uploaded in the website of the 1st respondent and quash the same as being illegal, arbitrary and devoid of merits and consequentially direct both the respondents herein to permit the petitioner to be reappointed as Director any company or appointed as Director in any company without any hindrance.

For Petitioner : M/s.Nathan and Associates.
For Respondents : Mr.V.Athikesavan
For 2nd Respondent: Mr.T.M.Pappiah
Special Government Pleader

O R D E R

Heard M/s.Nathan and Associates, Learned Counsel for the Petitioner and Mr.V.Athikesavan, Learned Counsel appearing on behalf of the Respondents and perused the materials placed on record, apart from the pleadings of the parties.

2. In this Writ Petition, the list dated 01.11.2017 published by the Registrar of Companies, Tamil Nadu, Chennai uploaded the website of the Ministry of Corporate Affairs, New Delhi disqualifying the Petitioner to hold the Office of the Directorship of a Company under Section 164 (2) (a) of the Companies Act 2013, which came into effect from 01.04.2014, is challenged with the consequential direction to the Respondents to permit the Petitioner to get re-appointed or appointed as Director in any other Company without any hindrance.

3. The lists dated 08.09.2017 and 01.11.2017 published by the Registrar of Companies, Tamil Nadu, Chennai were the subject matter of challenge before this Court in a batch of cases in W.P. No. 25455 of 2017 etc. batch [(2018) 6 MLJ 704] and came to be disposed by this Court by order dated 03.08.2018, the operative portion of which is extracted below:-

> "29. In fine,
> (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 Meering. 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).

30. For all the aforementioned reasons, the impugned orders are set aside and the writ petitions shall stand allowed. Consequently, all the connected writ miscellaneous petitions are closed. However, there shall be no order as to costs.''

4. As the Petitioner in this case is similarly placed to the Petitioners in the aforesaid batch of cases relating to the same impugned list published in the website by the Respondents, he is entitled to identical relief that has been granted to them. Accordingly, the Writ Petition stand allowed and the impugned orders are set aside on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To
1. The Union of India
Ministry of Corporate Affairs,
Shastri Bhawan, Dr.Rajendra Prasad Road,
New Delhi – 110001.

2. The Registrar of Companies
Block No.6, B Wing 2nd floor,
Shastri Bhawan 26,
Haddows road,
Chennai – 600 006.

+1 CC to M/s. Nathan and Associates sr 1068.

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and
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PPA(CO)
SP(23/01/2020)