

Via video conferencing

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 18.09.2020

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W.P.(C) 4310/2020 & CM APPL.15510/2020

MUKUL MITTAL & ANR.

..... Petitioners

Through Mr.Sunil Kumar Tiwari with
Mr.Sudhir Kumar Gambhir, Advs.

versus

UNION OF INDIA THROUGH ITS SECRETARY & ANR.

..... Respondent

Through Mr.Awadhesh Kumar Singh, Adv.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. By way of the present petition under Articles 226 and 227 of the Constitution of India, the petitioners seek the following reliefs:-

“(a) Issue a writ of mandamus or a writ of any other nature or any other direction/order directing the Respondent Nos. 1 and 2 to remove the name of the Petitioner Nos. 1 & 2 from the impugned "List of Disqualified Directors" prepared by the Respondents, as published and upload on the website of Respondents Nos.1;

(b) Issue a writ of mandamus or a writ of any other nature or any other direction/order directing the Respondent Nos.1 and 2 to change the status of the Petitioner Nos. 1 & 2, in the records of the Respondents No.1 and 2 from "disqualified directors" and enabling their 'Director Identification Number' ("DIN"), thereby enabling, both the Petitioners to act as Directors and make their filings, in respect of other companies(ies), in which they are serving as a directors

(c) Issue a writ a mandamus or a writ of any other nature or any other direction/order directing the Respondent Nos. 1 and 2 not to treat the Petitioner as "disqualified directors" under Section 164(2)(a) of the Companies Act, 2013 and for any consequential measures and/or effects arising/contemplated therefrom; and

(d) Pass such other and further orders as this Hon'ble Court may deem fit, proper and just on the facts and circumstances of the case."

2. On 17.03.2008, when M/s "Agarwal Bandhu Infra Developers Private Limited" (hereinafter referred to as the "Company") was incorporated as a company, the two petitioners were appointed as its directors. Although the company continued to run smoothly for a few years and filed its statutory returns in a timely manner till 31.03.2013, its business slowed down thereafter and it stopped filing statutory returns as mandated under the provisions of the Companies Act, 2013 (hereinafter referred to as 'the Act'). As a consequence, the name of the Company was, vide a public notice dated 30.06.2017, struck off from the register of companies in accordance with the provisions of Section 248 of the Act. The petitioners, being directors of the Company, were consequently disqualified under Section 164(2)(a) of the Act for a period of five years, *i.e.*, from 01.11.2016 to 31.10.2021, and their names were included in the 'List of Disqualified Directors' published by the respondent on 03.10.2017. A further consequence of their disqualification as Directors was the cancellation of their Director Identification Numbers (DINs) and Digital Signature Certificates (DSCs).

3. It emerges that on an appeal filed by the Company under Section 252 of the Act, its name was restored in the register of companies by an order dated 22.10.2019 passed by the National Company Law

Tribunal (NCLT), Principal Bench. The said restoration was, however, subject to the Company filing the requisite documents and paying outstanding fee along with the fine applicable thereon as mandated by the rules, for the defaulting years.

4. Soon thereafter, on 30.03.2020, the respondent no.1 notified a Companies Fresh Start Scheme 2020 (CFSS) which aims to provide an opportunity to defaulting companies to file their documents at a belated stage, by condoning the delay insofar as it concerns any liability to pay additional fee for the delay in filing. The Scheme also promises to grant these companies immunity from any proceedings or prosecution instituted for imposing penalty on account of the delay. The window to avail of this Scheme, however, is open only till 30.09.2020 and, for this reason, the petitioners have sought the urgent intervention of this Court for a very particular purpose; they are aggrieved because they are unable to avail either the CFSS or comply with the directions of the learned NCLT, since their DINs and DSCs remain cancelled.

5. Mr. Tiwari, learned counsel for the petitioner submits that as per the directions of the learned NCLT, the sole condition to restore the name of the Company in the register of companies was the requirement to file all the requisite documents/statutory returns it had failed to file during the defaulting years. However, the petitioners are not in a position to comply with these directions on account of the fact that their DINs are required to be entered at the time of filing these documents, which is not possible in their case since their DINs remain cancelled. He submits that for this very reason, the petitioners are not even in a position to opt for the CFSS, which can only be availed till 30.09.2020 and requires them to apply by furnishing their DINs.

6. By placing reliance on the decision of a Coordinate Bench of this Court in ***Mukut Pathak and Ors. Vs. Union of India and Ors., W.P.(C) 9088/2018***, he submits that the petitioners' DINs have been cancelled without any legal authority. It is his contention that the action of cancelling the DINs can only be carried out under the proviso to Section 167(1)(a) of the Act, which came into effect on 07.05.2018. When it is an admitted position that the default of the Company and the petitioners, if any, took place prior to 07.05.2018, in fact it took place even prior to 30.06.2017, then evidently the respondents have applied the provision retrospectively to cancel the DINs of the petitioners. He submits that the retrospective application of the proviso to Section 167(1)(a) of the Act has already been held to be illegal by this Court in the decision in ***Mukut Pathak*** and, therefore, the act of cancelling the DSCs and DINs of the petitioners cannot hold ground. He, therefore, prays that the petition be allowed, and the respondents be directed to forthwith activate the DINs of the petitioners as also their DSCs, which had been illegally cancelled by the respondents.

7. In their detailed counter affidavit, the respondents have neither denied that the default on the part of the petitioners and the Company took place prior to 07.05.2018, nor have they denied that the decision in ***Mukut Pathak (supra)*** is applicable to the present case. They have also not denied that pursuant to the order passed by the NCLT on 22.10.2019, the name of the Company has been restored in the register of companies, provided it files all outstanding, statutorily prescribed documents for the defaulting years and completes all other necessary formalities, including paying the late fee and any other leviable charges. The respondents have, however, opposed the petition

primarily on the ground that the petitioners, having failed to comply with their statutory duties or avail the benefits of the earlier Company settlement schemes, deserve no relief from this Court at this belated stage.

8. In line with its counter affidavit, Mr. Awadhesh Kumar Singh, learned counsel for the respondent has opposed the petition and has urged this Court to await the outcome of the Letters Patent Appeal preferred by the respondents against the decision in **Mukut Pathak** (*supra*).

9. I have considered the submissions of learned counsel for the parties and with their assistance perused the record.

10. From the submissions of the parties, it is evident that in **Mukut Pathak** (*supra*), this Court has come to a categorical conclusion that the proviso to Section 167(1)(a) of the Act, which came into force w.e.f. 07.05.2018, cannot be applied retrospectively. The relevant extract of the decision in **Mukut Pathak** (*supra*) reads as under:

“98. In view of the above, the petitioners would not demit their office on account of disqualifications incurred under Section 164(2) of the Act by virtue of Section 167(1)(a) of the Act prior to the statutory amendments introduced with effect from 07.05.2018. However, if they suffer any of the disqualifications under Section 164(2) on or after 07.05.2018, the clear implication of the provisos to Section 164(2) and 167(1)(a) of the Act are that they would demit their office in all companies other than the defaulting company.”

113. As discussed above, the Scheme of Section 164(2) and Section 167(1)(a) of the Act was materially amended by the Companies Amendment Act, 2018 by introduction of the provisos to Section 164(2) and Section 167(1)(a) of the Act with effect from 07.05.2018. All directors who incur disqualification under Section 164(2) of the Act after the said date, would also cease to be directors in other companies (other than the defaulting

company) on incurring such disqualification. However, the operation of the provisos to Section 164(2) and Section 167(1)(a) of the Act cannot be read to operate retrospectively. The proviso to Section 167(1) of the Act imposes a punitive measure on directors of defaulting companies. Such being the nature of the amendment, the same cannot be applied retrospectively. It is well settled that the Statute that impairs an existing right, creates new disabilities or obligations – otherwise than in regard to matters of procedure – cannot be applied retrospectively unless the construction of the Statute expressly so provides or is required to be so construed by necessary implication. Therefore, the office of a director shall become vacant by virtue of Section 167(1)(a) of the Act on such director incurring the disqualifications specified under Section 164(1) of the Act. It shall also become vacant on the directors incurring the disqualification under Section 164(2) of the Act after 07.05.2018. However, the office of the director shall not become vacant in the company which is in default under sub-section 164(2) of the Act.”

11. In the present case, admittedly, the Company itself stood struck off the register on 30.06.2017 and was restored only on 22.10.2019, and the default on its part as also that of the petitioners took place prior to 30.06.2017. This implies that the ratio of the decision in **Mukut Pathak** (*supra*) is squarely applicable to the facts of this case since it specifically clarifies that any Company or Directors committing defaults under Section 164(1) of the Act before 07.05.2018 cannot invite application of the proviso to Section 167(1)(a) of the Act and a necessary corollary thereof is that their DINs and the DSCs cannot be cancelled either. It is pertinent to note that though the respondents’ challenge to the decision in **Mukut Pathak** (*supra*) is pending before the Division Bench, since the Court of appeal has not stayed the operation of the decision itself, I see no reason to deny the benefit of this decision to the petitioners. Even otherwise, in the light of the

admitted position that the CFSS can be availed only till 30.09.2020, any delay in extending the benefit of the decision in *Mukut Pathak (supra)* to the petitioners would cause them grave prejudice and deprive them of the opportunities under this Scheme.

12. For the aforesaid reasons, the petition deserves to succeed and is, accordingly, allowed. Keeping in view the fact that the petitioners, in order to apply for the CFSS, need to file their statutory returns on/by 30.09.2020, the respondents are directed to reactivate the DINs and the DSCs of the petitioners within three days from today so that they can do the needful to apply for the Scheme.

13. The petition, along with the pending application, is disposed of.

SEPTEMBER 18, 2020

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REKHA PALLI, J

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