

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 493 of 2019

Naresh Kumar Poddar

Vs.

**Union of India, through Secretary,
Ministry of Corporate Affairs and another**

For the petitioner : Mr. Palash Tiwari,
Mr. Mainak Swarnokar

For the respondent : Mr. Avinash Kankani

Hearing concluded on : 17.12.2020

Judgment on : 05.01.2021

The Court:

1. The petitioner was a director of a Private Limited Company, namely, Lambodar Vinimay Private Limited, incorporated on January 27, 2009.
2. Vide public notice no. ROC/WB/STK/2017/1 dated April 7, 2017, it was declared that the name of the said company would stand removed/struck off from the Register of Companies within 30 days from the date of the notice, under Section 248(1) of the Companies Act, 2013 (hereinafter referred to as "the 2013 Act"). Accordingly, the petitioner's Director Identification Number (DIN) and Digital Signature Certificate (DSC) were deactivated under Section 164(2) of the 2013 Act, with effect from November 1, 2016 till October 3, 2021. The present writ petition

has been preferred, challenging such disqualification of the petitioner by the impugned notice dated April 7, 2017.

3. Learned counsel for the petitioner argues that sub-section (2) of Section 164 of the 2013 Act came into force from April 1, 2014 and can apply only prospectively. Thus, the three financial years, non-filing of the annual return and financial statement of the company for which would make the petitioner liable for deactivation of his DIN, would commence from April 1, 2014. The relevant three financial years would be 2014-2015, 2015-2016 and 2016-2017, covering the period from April 1, 2014 to March 31, 2017. Hence, it is argued, the deactivation of the DIN with effect from November 1, 2016 was patently illegal.
4. The petitioner further argues that the last date for filing financial statements for the third financial year was October 30, 2017 (with regular fees) and July 27, 2018 (with additional fees) as per Section 403 of the 2013 Act, which provides for an additional period of 270 days. Thus, in any event, no question of disqualification of the petitioner arose before the expiry of the said period.
5. Learned counsel for the petitioner next submits that the proviso to Section 167(1)(a) was inserted by the Amendment of Act of 2018 with effect from May 7, 2018. The said provision reads as follows:

“Section 167: Vacation of office of director – (1) The office of a director shall become vacant in case –

(a) he incurs any of the disqualifications specified in section 164:

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section;

....

6. It is contended that such proviso would be applicable to companies whose names are struck off only after the introduction of the 2018 Amendment, that is, after May 7, 2018 and could not be invoked in the case of the petitioner.
7. The proviso, prior to the 2018 Amendment, read as follows:
“Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such Court;” and did not contemplate the vacancy of the office of the director in respect of companies other than the defaulting company.
8. Learned counsel places reliance on *Keshavan Madhava Menon vs. State of Bombay*, reported at AIR 1951 SC 128, to submit that every statute is presumed to be prospective, unless the contrary is specifically stipulated. Thus, the operation of the amended Section 164(2) and the amended proviso to Section 167(1)(a) of the 2013 Act would not be operative prior to April, 2014 and May, 2018 respectively.
9. Learned counsel for the petitioner contends that a conjoint reading of Sections 92, 96, 137 and 403 of the 2013 Act makes it clear that a copies of the annual returns of the company and of the financial statements

thereof have to be filed within 60 days and 30 days respectively from the date on which the Annual General Meeting (AGM) is held. The AGM has to be held once in the financial year, within six months from the date of closing of the financial year, latest before expiry of 15 months from the last AGM. The first proviso to Section 403(1) allows documents to be submitted, filed or registered within a period of 270 days from the date by which they could have been submitted, on the payment of additional prescribed fees. The second proviso thereto allows the same to be filed even after the said period of 270 days, without prejudice to any other legal action or liability under the 2013 Act. It is submitted that such provisions ought to be construed to the effect that the petitioner's company could have filed its annual returns latest by November 30 and financial statements by October 30 of the relevant financial year ending on March 31, even without availing of the additional period of 270 days.

- 10.** Thus, the director of the company would incur disqualification or be ineligible to be reappointed as director of a company or appointed in any other company for five years, for defaults under Section 164(2)(a), only after October 30 or November 30, as the case may be, of the year 2017. The impugned notice disqualifying the petitioner for five years from November 1, 2016 to October 31, 2021 is premature and untenable at law.

11. Learned counsel for the petitioner reiterates the proposition that no retrospective effect can be given to the amended Section 164(2)(a).
12. By citing *Dilip Kumar Sharma and others vs. State of Madhya Pradesh* [AIR 1976 SC 133] and *Tolaram Relumal and another vs. State of Bombay* [AIR 1954 SC 496], it is submitted that when two interpretations are possible, the one favouring the subject ought to be made applicable, especially in case of a penal statute. By relying on *State of Madhya Pradesh vs. Narmada Bachao Andolan and another* [(2011) 7 SCC 639], learned counsel submits that an interpretation which is just, fair and sensible should be made and not one which results in drastic consequences.
13. Learned counsel further argues that a DIN, once allotted by the Central Government to a particular director, is valid for her/his lifetime, allowing her/him to become director in other companies as well. There is no provision defining a “disqualification of director”, at least with regard to Section 154(2) of the 2013 Act, though Rule 11 of the relevant Rules provides for cancellation, surrender or deactivation of DIN under certain circumstances. Since such circumstances do not arise in the present case, the company being struck off could not necessarily imply the cancellation/deactivation of its director, that is, the petitioner.

14. In support of his contentions, counsel for the petitioner cites the following judgments:

Sr no.	Name of the parties	Case No.	Quorum	Court
1	Mrs. Sunita Jain & Ors. Vs. Union of India & Ors.	WPC 7367/2018 Dated: 18.03.2018	Hon'ble Division Bench	High Court of Delhi
2	Arun Seth vs. Union of India	M.A.T. 1874/2017 Dated 15.11.2017	Hon'ble Division Bench	High Court of Calcutta
3	Kshitij Dattaray Shah vs. Union of India	W.P. 802/2018 Dated 26.03.2018	Hon'ble Division Bench	High Court of Bombay
4	Gaurang Balwantlal Shah Vs. Union of India	SCA/22435/2017 Dated 18.12.2018	Hon'ble Single Bench	High Court of Gujrat
5	Sunita Mehta Vs. Ministry of Corporate affairs	W.P. 2729/19 Dated 13.02.2019	Hon'ble Single Bench	High Court of Telengana
6	Bhagvan Das Dhananjaya Das v/s Union of India	W.P/25455/2017 Dated 03.08.2018	Hon'ble Single Bench	High Court of Madras
7	Yashodhara Shroff Vs. Union of India	W.P./52911/2017 Dated 12.06.2019	Hon'ble Single Bench	High Court of Karnataka
8	Siddharth Gupta & Another Vs. Union of India & Another	WPC/1487/2019 Dated: 25.04.2019	Hon'ble Single Bench	High Court of Chhattisgarh

15. Learned counsel for the respondents, on the other hand, submits that the petitioner stood disqualified by operation of Section 164(2)(a) and Section 167(1)(a) of the 2013 Act, which cannot be read in isolation.

Default, as per the said provisions, is triggered for not filing financial statements for a continuous period of three years and/or balance sheet within thirty days of the date of AGM.

- 16.** The said provisions, it is submitted, do not envisage any adjudicatory hearing to be provided to the errant company or concerned directors. The action taken for such default is through operation of the prevalent mandate of the 2013 Act. Disqualification of the petitioner is the consequence of operation of law and there is no scope of following principles of natural justice, as there is no discretion with the authorities to take recourse to any other procedure or to arrive at any other decision/conclusion.
- 17.** Learned counsel for the respondents next contends that the nature of Section 164 of the 2013 Act is 'disqualifying' and not penal. Penal consequence for not filing financial statements is envisaged under Section 137 of the 2013 Act, which corresponds to Section 220 of the Companies Act, 1956. The penal consequence for not filing annual returns is envisaged under Section 92 of the 2013 Act, corresponding to Sections 159 and 162 of the 1956 Act. Thus, penal consequences are provided for separately in both the 1956 and 2013 Acts.
- 18.** Section 164 of the 2013 Act, however, is disqualifying in nature and not penal in the sense of criminal law and hence, retrospective in nature. The amended Section 164 merely creates a disability to be appointed or

continue as a director in respect of a past event and no new penal provision has been introduced.

- 19.** Section 164, read with Section 167, of the 2013 Act is clearly intended to be retrospective in operation.
- 20.** The original provision, that is, Section 167(1)(a), created a paradoxical situation as the office of all directors in a Board would become vacant when they were disqualified under Section 164(2) and a new person could not be appointed as a director as they would also attract such a disqualification. Thus, it is argued, the newly-introduced proviso to Section 167(1)(a) of the 2013 Act is curative and declaratory in nature. A proviso is added to an enactment to qualify or create an exception to the enactment and, ordinarily, is not interpreted as stating a general rule. A proviso inserted to remedy unintended consequences and to make the provision workable, supplying an obvious omission in the section and required to be read into the section to give the latter a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.
- 21.** As regards principles of natural justice, learned counsel for the respondents reiterates that neither Section 164(2)(a) nor Section 167(1)(a) of the 2013 Act envisages any adjudicatory hearing to the errant companies or concerned directors. Action is taken thereunder by operation of law, that is, the 2013 Act. Such disqualification is an

automatic consequence by operation of law and there is no scope of the authorities exercising any discretion, thus, negating any scope of hearing.

22. Learned counsel for the respondents cites the following judgments:

S/1 No.	Name of the parties
1	Gautam Mehra vs. Union of India W.P.A. 22790 of 2019
2	Vijay vs. State of Maharashtra & Ors. (2006) 6 Supreme Court Cases 289
3	K. Prabhakaran vs. P Jayarajan (2005) 1 Supreme Court Cases 754
4	State of Bombay (Now Maharashtra) vs. Vishnu Ramchandra All India Reporter 1961 Supreme Court 307
5	Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha All India Reporter 1961 Supreme Court 1596
6	Allied Motors (P) Limited vs. Commissioner of Income Tax, Delhi (1997) 3 Supreme Court Cases 472
7	Punjab National Bank and Others vs. Manjeet Singh & Another (2006) 8 Supreme Court Cases 647
8	W.P. No. 700(W) of 2020 Subhas Kumar Biswas vs. Union of India & Ors.
9	W.P. No. 268 of 2019 Imraj Ali Molla vs. Union of India and Others
10	W.P. No. 4282(W) of 2018 Mukul Somany & Anr. vs. Registrar of Companies & Anr.
11	W.P. No. 5774(W) of 2020 Sourajit Ghosh vs. Union of India & Ors.

23. The legal questions posed in the present case are:

- (i) Whether Section 164(2)(a), as introduced by the 2014 Amendment and the proviso to Section 167(1)(a), as

introduced by the 2018 Amendment, are prospective, retrospective or retroactive in nature; and

- (ii) Whether there is any scope for giving opportunity to the defaulting company or its directors to represent against the disqualification under Section 164, read with Section 167 of the 2013 Act.

24. The other questions raised by the parties are corollaries of the above two broad questions.

25. For the sake of brevity, the second question posed above is taken up first for resolution. A clear reading of Section 164(2) and Section 167(1)(a), both with the corresponding provisos (as amended) leaves no scope of any discretion on the part of the authorities in case of a company incurring the defaults as contemplated therein. It is well-settled that the rules of natural justice can only be applied if an opportunity of hearing/representation is of relevance and affects the outcome of the procedure. In the absence of any discretion of the authorities, since the disqualification under the said sections is automatic on the perpetration of the defaults contemplated therein, an opportunity of representation/hearing to the defaulter would merely be an exercise in futility. Thus, question (ii) as formulated above, is answered in the negative.

26. While dealing with question (i) above, some of the provisions of the 2013 Act are required to be considered. Those are as follows:

“92. Annual return. - (1) *Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding –*

(a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;

(b) its shares, debentures and other securities and shareholding pattern;

[(c) Omitted by Act 1 of 2018, S. 23(i)(a). Prior to its omission, Cl. (c) read as under:-

“(c) its indebtedness;”.]

(d) its members and debenture-holders along with changes therein since the close of the previous financial year;

(e) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;

(f) meetings of members or a class thereof, Board and its various committees along with attendance details;

(g) remuneration of directors and key managerial personnel;

(h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;

(i) matters relating to certification of compliances, disclosures as may be prescribed;

(j) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors [the words “indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them” Omitted by Act 1 of 2018, S. 23(i)(b)]; and

(k) such other matters as may be prescribed,

and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice:

Provided that in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company:

Provided further that the Central Government may prescribe abridged form of annual return for "One Person Company, small company and such other class or classes of companies as may be prescribed.

(2) The annual return, filed by a listed company or, by a company having such paid-up capital and turnover as may be prescribed, shall be certified by a company secretary in practice in the prescribed form, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act.

(3) Every company shall place a copy of the annual return on the website of the company, if any, and the web-link of such annual return shall be disclosed in the Board's report.

*(4) Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed, **[The words “within the time as specified, under section 403” Omitted by Act 1 of 2018, S. 23(iii) (w.e.f. 7-5-2018)].***

(5) If a company fails to file its annual return under sub-section (4), before the expiry of the period specified therein, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees and 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.

(6) If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

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96. Annual general meeting. – *(1) Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:*

Provided that in case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company and in any other case, within a period of six months, from the date of closing of the financial year :

Provided further that if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation:

Provided also that the Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

(2) Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate:

Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in

advance:

Provided further that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

Explanation.—For the purposes of this sub-section, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

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137. Copy of financial statement to be filed with Registrar. – (1) *A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed [The words “within the time specified under section 403” Omitted by Act 1 of 2018, S. 39(i)(a)]:*

Provided that where the financial statements under sub-section (1) are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents under sub-section (1) shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose:

Provided further that financial statements adopted in the adjourned annual general meeting shall be filed with the Registrar within thirty days of the date of such adjourned annual general meeting with such fees or such additional fees as may be prescribed [The words “within the time specified under section 403” Omitted by Act 1 of 2018, S. 39(i)(b) (w.e.f. 7-5-2018)]:

Provided also that a One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are

required to be attached to such financial statements, within one hundred eighty days from the closure of the financial year:

Provided also that a company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India:

Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.

(2) Where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached under sub-section (1), duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed [The words “within the time specified, under section 403” Omitted by Act 1 of 2018, S. 39(ii) (w.e.f. 7-5-2018)].

(3) If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein, the company shall be punishable with fine of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of

the company, shall be punishable 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.

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403. Fee for filing, etc. – *(1) Any document, required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as may be prescribed:*

Provided that where any document, fact or information required to be submitted, filed, registered or recorded, as the case may be, under section 92 or 137 is not submitted, filed, registered or recorded, as the case may be, within the period provided in those sections, without prejudice to any other legal action or liability under this Act, it may be submitted, filed, registered or recorded, as the case may be, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed, which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of companies:

Provided further that where the document, fact or information, as the case may be, in cases other than referred to in the first proviso, is not submitted, filed, registered or recorded, as the case may be, within the period provided in the relevant section, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded as the case may be, on payment of such additional fee as may be prescribed and different fees may be prescribed for different classes of companies:

Provided also that where there is default on two or more occasions in submitting, filing, registering or recording of the document, fact or information, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed and which shall not be lesser than twice the additional fee provided under the first or the second proviso as applicable.

(2) Where a company fails or commits any default to submit, file, register or record any document, fact or information under sub-section (1) before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

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- 27.** Section 92(4) provides that every company shall file with the Registrar of Companies (ROCs) a copy of its annual return within 60 days from the date on which the AGM is held or should have been held, with consequent compliance of deposit of fees/additional fees as prescribed. Sub-section (5) of Section 92 stipulates the pecuniary penalty visiting non-compliance of sub-section (4).
- 28.** Section 137(1), on the other hand, grants 30 days from the date of AGM or, when not adopted at an AGM or adjourned AGM, provisional filing of financial statements, subject to filing within 30 days of the date of adjourned AGM in case of financial statements of a company.
- 29.** Section 96 of the 2013 Act provides for AGM, which is to be held not more than 15 months after the date of the previous AGM and within a period of 6 months (apart from the first AGM) from the date of closing of the financial year.
- 30.** Section 403 of the 2013 Act stipulates the documents and fees to be filed by a company. The provisos to Section 403 envisage delayed filing of

such document, fact or information as required under Section 92 or 137 of the 2013 Act, upon payment of additional fee as prescribed.

31. A conjoint reading of the aforesaid provisions reveals that non-compliance of the provisions regarding filing/submission of annual returns and financial statements by a company, as envisaged in Sections 92 and 137 of the 2013 Act, shall result in pecuniary fines as penalty; nothing more, nothing less.
32. However, the scenario has completely changed with the introduction of the 2014 Amendment to Section 164(2), with effect from April 1, 2014. The directors of a defaulting company now become liable, for contravention of Sections 92 and 137, to ineligibility for re-appointment as a director of that company or appointment in any other company for a period of five years from the date of default. This consequence has been newly-introduced and had no parallel in the 2013 Act or, for that matter, in the 1956 Act. Similarly, before the amendment to Section 167(1)(a) by way of a proviso, with effect from May 7, 2018, there was no provision in the 2013 or 1956 Act which automatically vacated the office of the director in all companies other than the defaulting company in case a director incurs disqualification under sub-section (2) of Section 164.
33. Although the aforesaid provisions “disqualify” the directors for a span of five years, the effect of such disqualification is patently penal in nature. Several provisions of the 2013 Act (for example Section 152 pertaining to

appointment of directors) ensure that the disqualification of a director entails the concerned director to be precluded not only from acting as director of the defaulting company but all other companies in which he is a director for a five-year period, which is sufficient to throw off the director from the limelight of competition, by hitting at the root of her/his goodwill and integrity. Nature abhors a vacuum, which translates into the functioning of the concerned person in his capacity as director of companies to be replaced by others in the line of competition. The concerned director misses out on participation in company affairs for five crucial years and might lose relevance in the cut-throat rat-race of the corporate world. This directly affects the fundamental right of the director, enshrined in Article 19(g) of the Constitution of India, that is, the right to practice any profession, or to carry on any occupation, trade or business. Although Article 19(6) clarifies that nothing in sub-clause (g) of Article 19(1) shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by sub-clause (g), the expression “reasonable” is not applicable to the scenario under discussion, since the punishment of disqualification would be rather disproportionate with the offence, more so if operative for a previous period of default, when the director had no scope of apprehending the severe penalty to be meted out by a future

statutory amendment. Such disqualification would effectively screen off the director from his commercial activity for five crucial years, which may witness an era of difference in technology and finance in the fast-paced modern world. The specific instances given in Article 19(6) of the Constitution, pertaining to any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise, are indicators as to the ratio behind Article 19(6) and are completely inapplicable to the situation at hand.

34. Thus, even abiding by the ratio laid down by the Supreme Court in *Vijay vs. State of Maharashtra and others (supra)*, to the effect that the general rule of retrospective construction is not applicable to a disqualifying provision or to a curative or clarificatory statute, the context of the disqualification is to be assessed in each particular case to appreciate whether it is 'disqualifying' merely by nomenclature but penal in effect or is uniformly disqualifying, both in nomenclature and effect. The said report itself clarifies strongly that every law that takes away a right vested under the existing law is, ordinarily, retrospective in nature. Even if the intendment of the legislature in the present case is considered to be for the benefit of the community as a whole by streamlining the economy

and shutting out recalcitrant operators, if a literal reading of the provision giving retrospective effect produces absurdity or anomaly, the same has to be construed to be only prospective and not retrospective in nature.

35. Speaking of anomalies, one should consider the practical implication of giving retrospective/retroactive effect to the amended provisions of Section 164(2) and the proviso to Section 167(1)(a). Assuming that a company has failed to file its annual returns and/or financial statements for three consecutive years, ending between the enactment of the 2013 Act and before April 1, 2014 (for Section 164) and May 7, 2018 (for Section 167), the only consequence suffered by a director of the defaulting company would be in pecuniary penalty, affecting the pocket of the director or the company at best but not visiting them with the grave consequence of depriving the director of her/his livelihood for five crucial years.
36. As on the date when such default for three years ripens and reaches culmination, it would not have been possible for the director to apprehend that the rigours of the 2014 or the 2018 Amendment would be breathing down their neck soon.
37. Now, assuming retroactive effect is given to the 2014 and 2018 Amendments, as on the date on which such amendments come into force, that is, April 1, 2014 and May 7, 2018 respectively, the directors

would be removed from office, not only in the defaulting company but in the other companies where they are directors, despite no defaults having been committed by such other companies. In such a case, the previous default would attract operation of the amendments, if retroactive effect is given thereto, and would entail the directors suffering a grievous violation of their fundamental right under Article 19(1)(g) of the Constitution without any possibility of the directors, or anyone for that matter, having been able to predict such consequence on the relevant date, that is, the date of such default. In such a factual scenario, it cannot be argued by reasonable prudence that a retroactive effect ought to be given to the amendment-in-question. This is an irreconcilable anomaly that would befall the directors if retrospective/retroactive effect is given to the amendments-in-question, not justiciable even by applying Article 19(6) of the Constitution.

- 38.** The relevant test here is not a mere lip-service to public good but of the ground-level impact of the amendment. Such an amendment (if retrospective) would, without fail, be anomalous and absurd, outlying the “reasonableness” envisaged in Article 19(6) of the Constitution and overreaching the justification for the ratio laid down in *Vijay vs. State of Maharashtra and others (supra)*.
- 39.** *State of Bombay vs. Vishnu Ramchandra (supra)* specifies operation of its ratio to statutes which create no new punishment but authorize “some

action” based on past conduct and reaches out to statutes designed to protect the public against acts of a harmful character which, it lays down, may be considered retrospectively if the language admits of such an interpretation. The “harmful” nature of the act has to factor in the practical consequence of the act. Till April 1, 2014, the consequence was mere pecuniary penalty. Thereafter, more so after May 7, 2018, the character of the offence itself was vilified to the extent of interdicting with the right of the concerned directors to practice their trade, thereby changing the rules after commencement of the game. This itself is absurd even as per the standards laid down in *State of Bombay vs. Vishnu Ramchandra (supra)*.

40. As far as *Shah Bhojraj (supra)* is concerned, even the Supreme Court observed in paragraph no. 11 thereof that the arguments advanced by the parties were interesting and much could be said on both sides, particularly, as the legislature had by a subsequent amendment changed the proviso therein. However, in the facts of that case, such question was not considered at length. A proviso, it was observed, is added to qualify or create an exception to an enactment and is not interpreted ordinarily to state a general rule.
41. Even otherwise, the ratio said report is not applicable in the present circumstance. In the report, a curtailment of the rights regarding a landlord-tenant relationship was being considered. Rent control acts, it

is well-settled, often afford a cloak of protection to tenants. Such protection is a creature of the statute-in-question and can be taken away, even retrospectively in some cases, by subsequent amendments. Directorship of a company, however, is an existing right guaranteed under the Constitution of India and is not any additional cloak of protection provided by subordinate legislation. In the latter case, a new punishment is created, not merely “some action” based on past conduct, as contemplated in *Vishnu Ramchandra (supra)*. Thus, the ratio of the said reports cannot be applied to the present case at all.

- 42.** In *Allied Motors (supra)*, the Supreme Court dealt with curative/declaratory provisos and held that those might have retrospective effect. However, the amended provisions of Section 164 and Section 167 of the 2013 Act are not merely curative provisions. By virtue of the 2018 Amendment to Section 167, for example, vacancy of the director’s office is contemplated in all companies other than the defaulting company, which serious consequence cannot be relegated to the toothless domain of a mere curative provision. If effect is given to such a provision retrospectively, the right guaranteed to directors under the Constitution of India itself would be obliterated for ‘offences’ committed without having any inkling or premonition of the future introduction of such provision. Thus, *Allied Motors (supra)* is not helpful for the respondents in the present case.

- 43.** *K. Prabhakaran (supra)* deals with the right to contest an election, which might be nipped in the bud by an amendment to the relevant law. However, in the present case, the existing right of directorship in companies is being considered. There is a sea of difference between the two, inasmuch as an inchoate statutory right, if not exercised, would not prejudice an election candidate drastically whereas the erasing of the existing fundamental right to continue with one's profession, as in the case of directors of companies, has serious economic and financial effects to the detriment of the directors, affecting their livelihood. The two are not on equal footing and, thus, do not merit analogy.
- 44.** Since *Gautam Mehra (supra)* differed with the proposition laid down in *Subhas Kumar Biswas (supra)* as to the prospectivity of the 2014 and 2018 amendments and also since *Subhas Kumar Biswas (supra)* was a product of the same logic delivering the present judgment, propriety demands that the ratio laid down in *Subhas Kumar Biswas (supra)* is not assumed to be valid here, to obviate any scope of bias in thought-process.
- 45.** *Sourajit Ghosh (supra)*, rendered by a co-ordinate Bench of this court, did not consider *Subhas Kumar Biswas (supra)* or enter into all the questions raised in the present writ petition and hence can be kept out of the present discussion. As to the other judgments cited by the respondents, only *Gautam Mehra (supra)*, the judgment of Justice Debangsu Basak of

this court, has to be considered in serious light, being relevant on the point and having discussed several other judgments of this court and others. The learned Single Judge examined the context of the amendments-in-question and the development of company law in recent years. The pre-dominant logic in the said report was based on the Literal Rule of interpretation. It was held that principles of natural justice should not be applied mechanically and that, if the statute itself permits consideration of periods of time anterior to the statute coming into effect, a Government Circular (No. 8/2014 dated April 14, 2014) could not override such statutory provisions. The premise of the report under consideration was that the cancellation of DIN occurs by virtue of a statute and is imperative to give effect to the disqualification suffered under statute. Justice Basak held that, as was the scheme under the Act of 1956, a company governed by the Act of 2013 cannot have an existence *ad infinitum* if it continues to remain in default for non-compliance of the statutory provisions, which visits the company with stipulated consequences, which are graded and are nuanced on the gravity of the situation. There are methods for curing such defaults as well. There being nothing in the amendments to prevent disqualification in case of previous defaults under Sections 92 and 137 of the 2013 Act for three years, the learned Single Judge differed with the ratio of *Subhas Kumar Biswas (supra)* and *Chetan Chokhani vs. Union of India and others*

[W.P. No. 21504(W) of 2019] but agreed with *Mukul Somany (supra)* and *Sourajit Ghosh (supra)*. However, the yardsticks and factors which weighs with this court in the present context, were not available and/or considered in *Gautam Mehra (supra)*.

46. Justice Basak, while referring the matter to a larger Bench, dealt with the recent development of company law in an erudite manner. However, with utmost humility, there are several other factors which create a relevant backdrop for the development of company law. The evolution of company law jurisprudence cannot be taken in isolation with the general economic scenario prevalent in the country. Some other factors which are relevant in the context are discussed below in brief.
47. The ‘unorganized’ or non-corporate sector holds sway over a major chunk of the economy of developing countries, including India, primarily in the manufacturing and production domains, apart from tourism and partially in trading. The capital incentives gained by the corporate sector is off-set by the implicit advantages available to the unorganized sector, since the latter is unfettered with several liabilities with regard to revenue, capital, adherence to the industrial and labour laws and manipulation of resources. While the corporate sector has to pay higher interest and viably stick to corporate laws and labour laws, the unorganized sector thrives on exploitation of means and people. This has a direct effect on the business of the corporate sector, in particular small

operators and private limited companies, barring a few eminent and resourceful ones.

- 48.** In the absence of any requirement of adherence to the principles of natural justice or any scope of discretion in applying the amended provisions of Sections 164 and 167 of the 2013 Act, there is no scope for the authorities to consider the reason behind defaults and desist from disqualifying the directors if necessary. This lack of discretion in the matter of disqualification operates directly to the detriment of corporate functioning of the small and medium corporate operators. The fall-out of retrospective operation of the amendments is fatal to small and medium businesses, which still comprise the backbone of the economy. There can be umpteen reasons, arising from the inherent disadvantages of functioning befalling private limited companies and small corporate units, which might result in unintentional contravention of Sections 92 and 137 of the 2013 Act. That apart, there might be ‘Black Swan’ situations, for example, economic recession and debilitating pandemics, which would throw off business and commerce out of gear for considerable periods of time, having little or no effect on robust or anti-fragile (*Courtesy: Nassim Nicholas Taleb for the terms ‘Black Swan’ and ‘anti-fragile’*) large operators but ruining the credibility and goodwill of small companies, completely veering them off course. Sops in the form of credit incentives for MSMEs and other medium sector units have been

proved to be ineffective to alleviate such large-scale economic disasters. This, coupled with the automatic disqualification envisaged in the 2014 and 2018 amendments to the 2013 Act, is sufficient to ruin the economy as a whole which, somewhat counter-intuitively, is detrimental to the growth of the economy. Thus, attributing retrospective/retroactive effect to the said amendments would run contradictory to the purpose of public good. The simplistic approach of merely identifying non-performers in an attempt to provide a fillip to commerce, by a pseudo-streamlining of the economy, loses teeth in the broader perspective discussed above.

- 49.** Taking into consideration the above factors and the ground-level impact and practical impossibility of giving retrospective effect, it cannot but be held that the operation of the 2014 and 2018 Amendments to the 2013 Act are prospective in nature.
- 50.** To be specific, the amendment to Section 164(2), with effect from April 1, 2014 has to be applied prospectively. The three-year default contemplated therein has to commence from the financial year 2014-2015 (April 1, 2014 - March 31, 2015) and end in the financial year 2016-2017 (ending on March 31, 2017). As far as the amended proviso to Section 167(1)(a) of the 2013 Act is concerned, the operation of such proviso has also to be construed prospectively by applying it to companies in default of Sections 92 and 137 of the 2013 Act only after May 7, 2018.

- 51.** On a conjoint reading of the provisions in proper perspective, the distilled effect is that, the DIN of directors of defaulting companies can only be deactivated for violations of Sections 92 and 137 of the 2013 Act commencing from April 1, 2014 and such disqualification shall extend to other companies than the defaulting company, as envisaged in the amended proviso to Section 167(1)(a), only in case the default takes place post-May 7, 2018. Needless to mention, the deactivation of DIN for violation of pre-existing Company Rules, framed under the 2013 Act, can happen within the limited scope of such Rules only, and not on blanket non-compliance of Sections 92 and 137 of the 2013 Act.
- 52.** Since the above questions and factors did not fall for consideration in *Gautam Mehra (supra)*, the ratio laid down therein does not impede the conclusion reached in the present case.
- 53.** That apart, in paragraph no. 69 of *Gautam Mehra (supra)*, the learned Single Judge held that the decision on the topic, as to why an event occurring prior to April 1, 2014 can be taken into consideration for the purpose of considering whether a person suffered disqualification under Section 164 of the Act of 2013, need not detain the Court in considering the relief to be granted to the petitioner in that case. In paragraph nos. 95 and 96 of the report, the learned Single Judge merely referred to the judgments considered therein and it was specified that in the facts of the said case, the petitioner was not entitled to any relief as he had failed to

explain the delay in approaching the court and had not explained as to why the defaulting company did not avail of the condonation of delay scheme in vogue from time to time, for which he stood disqualified to be a director by operation of provisions of Section 164(2)(a) of the Act of 2013. The learned Single Judge further clarified that since the views expressed therein were in conflict with *Chetan Chokhani (supra)* and *Subhas Kumar Biswas (supra)* but in consonance with *Mukul Somany and another (supra)* and *Sourajit Ghosh (supra)*, there were conflicting views of this court on the same issue and it would be appropriate to invoke the provisions of Rule 26 of the Writ Rules of the High Court, thus referring the said writ petition to a Division Bench.

- 54.** As such, there was no specific adjudication in *Gautam Mehra (supra)* on the question as to whether the operation of the amendments to Sections 164 and 167 of the 2013 Act is retrospective or prospective. Moreover, there was no formulation of any particular question of law for reference, but the writ petition was merely transferred under the general provisions of Rule 26 of the Writ Rules, to be considered by a Division Bench. Hence, there was no reference or adjudication on the questions which are in issue in the present case and, thus, *Gautam Mehra (supra)* does not operate as a precedent on such questions. In fact, there was no reference on any specifically-formulated question, as contemplated under Chapter

II, Rule 1 (Fourth proviso) of the Appellate Side Rules of this court, in *Gautam Mehra (supra)*.

55. Question (i), as formulated above, is, thus, answered to the effect that Section 164(2)(a), as introduced by the 2014 Amendment, and the proviso to Section 167(1)(a), as introduced by the 2018 Amendment, to the 2013 Act are prospective in operation.
56. W.P.O. No.493 of 2019 is thus allowed, thereby setting aside the deactivation of DIN by virtue of the notice dated April 7, 2017.
57. There will be no order as to costs.
58. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(**Sabyasachi Bhattacharyya, J.**)