

\$~28

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 6th January, 2021

+ **W.P.(C) 7280/2020 & CM APPLs. 24543-44/2020**

ANANT NARAIN & ANR. Petitioners

Through: Mr. Varun Jain, Advocate.

versus

UNION OF INDIA & ANR. Respondents

Through: Mr. Manik Dogra, Adv. for ROC.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.
2. The Petitioners were directors in M/s Innowin Info Solutions Private Limited, which company was struck off due to non-filing of the company's financial statements or annual returns for a continuous period of three financial years. The Petitioners were disqualified and their Director Identification Number (*hereinafter*, "DIN") and Digital Signature Certificate (*hereinafter*, "DSC") were also deactivated. The Petitioners now wish to start a new business and accordingly, pray for reactivation of their DIN/DSC.
3. The legal aspects arising out of disqualification of directors under Section 164 and 167 of the Companies Act, 2013 and the deactivation of their DIN and DSC numbers have been dealt with in the following judgements:
 - i. ***Mukut Pathak & Ors. v. Union of India & Ors., 265 (2019) DLT 506,***
 - ii. ***Sandeep Agarwal & Anr. v. Union of India & Anr.***

[W.P.(C)5490/2020, decided on 2nd September, 2020] and

iii. Radhika Byrne v. UOI & Anr. [W.P.(C) 5534/2020, decided on 28th December, 2020].

4. There are four categories of Directors that are approaching Courts seeking setting aside of disqualification and activation of DIN/DSC numbers.

a) **Directors who have been disqualified prior to 7th May 2018, qua other companies in addition to the defaulting company:**

As per the proviso to Section 167 (1) (a) of the Companies Act, 2013, once a director is disqualified *qua* one company i.e., the defaulting company, the office of the said director would become vacant in all companies. The said proviso, has, however, come into effect only on 7th May, 2018. In ***Mukut Pathak (supra)*** it was held that this proviso cannot have retrospective effect and would only apply if the disqualification took place after 7th May 2018.

Paragraph 98 of ***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.”

Since there is no stay on the judgment in ***Mukut Pathak (supra)***, it continues to hold the field. Thus, in cases where directors have been disqualified prior to 7th May, 2018, the proviso to Section 167(1)(a) would

not apply and the directors would continue to be directors in companies other than the defaulting company. The disqualification of such directors *qua* active companies would therefore be liable to be set aside and their DIN and DSC's reactivated.

b) Directors who have been disqualified post 7th May 2018, *qua* other 'active' companies:

As held in *Mukut Pathak (supra)*, in all cases where the directors have been disqualified on or after 7th May, 2018, the proviso to Section 167 (1) (a) would apply and such directors would cease to be directors in all companies including the defaulting company. In March, 2020, in light of the COVID-19 pandemic, the Ministry of Corporate Affairs vide General Circular No. 12/2020 introduced CFSS-2020 to allow a fresh start for defaulting companies and directors of such companies. This Court, in *Sandeep Agarwal (supra)* has analyzed CFSS-2020 to conclude that the purpose of the scheme is to provide an opportunity for 'active' companies i.e., companies whose names have not been struck off, who may have defaulted in filing of documents, to put their affairs in order. The relevant portion of the judgment is extracted below:

“12. The salient features of the Scheme are:

i) It has been launched to facilitate a fresh start, on a clean slate, for companies registered in India;

ii) Alleviative measures under the Scheme are for the benefit of all companies. It gives an opportunity to file belated documents in the MCA-21 Registry in respect of annual filings, without being subject to higher additional fee on account of delay;

iii) It grants immunity from launch of

prosecution or of proceedings for imposition of penalty on account of delay associated with certain filings. For the said filings, only normal fee would be payable;

iv) Any defaulting company can file the belated documents, which were due for filing on any given date, as per the Scheme. Normal fee would be payable for such filing by the defaulting company under the Companies (Registration Offices and Fee) Rules, 2014 and no additional fee shall be payable;

v) To the extent that any prosecution has been launched or penalty has been imposed for the delay associated with the filings of belated documents, it provides that the same shall not be launched and immunity has been provided;

vi) Applications can be made for seeking immunity in respect of belated documents. Once the documents are taken on file or approved by the designated authority, such applications would have to be filed within six months from the date of closure of the Scheme;

vii) To avail benefit of the Scheme, the defaulting company would have to withdraw any appeal that it may have filed against prosecution launched or orders passed by a court or adjudicating authority under the Act;

viii) If a final notice of striking off of a company has already been initiated or in certain other situations as enumerated in Clause 6(ix), the Scheme would not apply;

ix) If immunity is granted, the Scheme provides that prosecution shall be withdrawn before the concerned Court and the proceedings for penalties shall also be closed.

x) The Scheme also extends to inactive companies who can file the requisite documents and get themselves declared as dormant

companies under Section 455 or apply for striking off the name of the company.

13. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order. It thus provides Directors of such companies a fresh cause of action to also challenge their disqualification qua the active companies. In the present case, the Petitioners are Directors of two companies – one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme, in respect of the active company. The purpose and intent of the Scheme is to allow a fresh start for companies which have defaulted. In order for the Scheme to be effective, Directors of these companies ought to be given an opportunity to avail of the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. Under such circumstances, the question of delay or limitation would not arise. The Id. Division Bench did not have an occasion in the case of Anamika Devi (supra) and Gaurav Kumar (supra) to consider this Scheme.”

Applying the scheme to the facts of the case, this Court in **Sandeep Agarwal (supra)** directed reactivation of the DINs and DSCs of directors of two companies – one whose name had been struck off and one, which was still active. Thus, the DINs and DSCs of disqualified directors of struck off companies, who are also directors in active companies, may be reactivated *qua* the active companies, in line with the spirit of the CFSS-2020.

c) Directors of ‘active’ companies who have been disqualified:

In cases where directors of ‘active’ companies have been disqualified,

CFSS-2020 would squarely apply. Such directors would be entitled to avail of CFSS-2020 and file documents of the defaulting company. In ***Radhika Byrn (supra)***, the Court permitted reactivation of the DINs and DSCs of the directors of active companies under CFSS-2020.

d) Disqualified directors of struck off companies seeking appointment as directors in other/new companies:

The purpose of CFSS-2020 has been elucidated in the circular of the Ministry of Corporate Affairs as follows:

“In furtherance of the Ministry’s Circular No 11/2020, dated 24th March, 2020 and in order to facilitate the companies registered in India to make a fresh start on a clean slate, this Ministry has decide to take certain alleviative measures for the benefit of all companies.”

This scheme has been introduced in view of the COVID-19 pandemic with the aim to enable a fresh start to defaulting companies and directors of such companies. The disqualification of defaulting companies was a step which was taken sometime in 2016-17 in order to ensure that filing of regular returns and compliances are undertaken strictly as per the provisions of the Act. It was also meant to be a measure to ensure that entities that are not conducting businesses are not misused as ‘shell companies’ for any improper activities. A substantial part of the disqualification period has already been completed. The introduction of the CFSS is itself a step for ‘providing a fresh start’. Under such circumstances, continuation of the disqualification would defeat the Scheme and its purpose.

5. In furtherance of the purpose of this scheme, directors of struck off companies who seek to be appointed as directors of other/new companies,

ought to be provided an opportunity to avail of this scheme, provided that they have undergone a substantial period of their disqualification. The scheme clearly seeks to provide a fresh start for directors of defaulting companies who seek appointment in other companies or wish to start new businesses. Therefore, if a substantial period has passed since the disqualification of such directors, they ought to be given an opportunity to avail of the scheme.

6. The CFSS-2020 was last extended till 31st December 2020. If the scheme is extended beyond 30th December, 2020, directors who fall in any of the categories mentioned above ought to be given an opportunity to avail of the same.

7. The Petitioners in the present petition satisfy condition (d). Since the Petitioners wish to start a new business, their DIN/DSC ought to be reactivated within a period of one week to enable them to conduct their fresh business in accordance with law. Insofar as M/s Innowin Info Solutions Private Limited is concerned, the Petitioners are permitted to file the relevant documents and seek condonation of delay in accordance with the applicable laws and regulations, if the same is permissible.

8. With these observations, the present petition, along with all pending applications, is disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 6, 2021
dj/T/Ak/Ap

corrected & released on 12th January, 2021

W.P.(C) 7280/2020

Page 7 of 7