IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.10.2022

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.26571 of 2017
and
W.M.P.No.28290 of 2017

P.Sadanand Goud ... Petitioner

Vs

1.The Secretary,
Ministry of Corporate Affairs,
Union of India,
Shastri Bhawan, Dr Rajendra Prasad Road,
Central Secretariat,
New Delhi – 110 001.
Rep by Mr Tapan Ray Secretary.

2.The Registrar of Companies Chennai,
Block No.6 B Wing 2nd Floor,
Shastri Bhawan 26,
Haddows Road,
Chennai – 600 034. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records relating to the website notice of the respondents holding M/s GAMMA INSURANCE BROKERS PRIVATE LIMITED to have attracted default under Section 164(2) of the Companies Act

2013 and the orders passed based thereon holding the petitioner ineligible to file any returns or accounts on behalf of any company of which the petitioner is a Director and quash the same.

For Petitioner : Mr.Prakash Goklaney

For Respondents : Mr.K.Ramanamoorthy
Central Government Standing Counsel

ORDER

This petition has been filed for a certiorari, to call for the records relating to the website notice of the respondents holding M/s GAMMA INSURANCE BROKERS PRIVATE LIMITED to have attracted default under Section 164(2) of the Companies Act 2013 and the orders passed based thereon holding the petitioner ineligible to file any returns or accounts on behalf of any company of which the petitioner is a Director and quash the same.

2.The learned counsel for the petitioner and the learned Central Government Standing Counsel for the respondents submits that the issue is squarely covered in favour of the petitioner in terms of order dated 09.10.2020 in W.A.No.569 of 2020 batch etc., in the case of **Meethelaveetil Kaitheri Muralidharan and others** Vs. **Union of India, Rep by its Secretary,**

Ministry of Corporation Affairs, Shastri Bhawan, New Delhi and others.

The operative portion of the aforesaid order is extracted hereunder:-

> "33.The aforesaid illustrations exemplify as to why a prior enquiry would not be an empty formality and, on the other hand, would be necessary for purposes of enforcing Section 164(2), especially in the context of the non-filing of Form DIR-9, but even otherwise in the absence of unambiguous statutory prescription of criteria. As state above, the disqualification under Section 164(2) of CA 2013, in contradistinction to that under Section 164(1), is consequential to a default by the company concerned. Therefore, it involves two stages. The first stage being to determine as to whether the company concerned committed a default. This determination is not completely uncontentious, as explained above, but easier than the second stage, namely, the attribution of the default to a particular set of directors. For reasons set out above, this determination certainly requires a prior enquiry. Hence, the prior notice requirement is clearly not an empty formality as regards disqualification under Section 164(2). As a corollary, the exceptions to the natural justice rule, namely, the possibility of only one conclusion or the absence of prejudice, as laid down in S.L.Kpoor V. Jagmohan (1980) 4 SCC 379 and other cases such as K.L.Tripathi V. State Bank of India (1984) 1 SCC 43, would not apply in these cases.
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> 34.Mr.Aravind Pandian contended that Section 164(2) can only be invoked after the filing of Form DIR-9 by the Defaulting Company. This contention is acceptable to the limited extent that it is obligatory on the ROC to wait until the expiry of the time limit under Rule 14(3) of the AQD Rules before commencing disqualification proceedings. But in case of default in filing Form DIR-9 within the prescribed 30 day period, the ROC is not powerless and may proceed to determine the set of directors to whom the default should be attributed by drawing on Section 2(60). However, for such purpose, prior notice and an enquiry would be necessary for

reasons elucidated in the proceeding paragraphs.

35.This leads to be next question as to whether the ROC is entitled to deactivate the DIN. For this purpose, it is necessary to closely examine the relevant rules. Rules 9, 10 and 11 of the AQD Rules are as under:

Rule-9:

"9.Application for allotment of Director Identification Number:--

(1) Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3, to the Central Government for the allotment of a director Identification Number (DIN) along with such fees as provided in the Companies (Registration Offices and Fees) Rules, 2014.

(2) The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.

(3) (a) The applicant shall download Form DIR-3 from the portal, fill in the required particulars sought there in and sign the form and after attaching copies of the following documents, scam and file the entire set of documents electronically--

(i) photograph;

(ii) proof of identity;

(iii) proof of residence;

(iv) verification by the applicant for applying for allotment of DIN in Form DIR-4; and

(v) specimen signature duly verified.

(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by -

(i) a chartered accountant in practice or a company secretary in practice or a cost accountant in practice; or

(ii) a company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed as director.

Rule 10:

Allotment of DIN: (1) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode the provisional DIN shall be generated by the system automatically which shall not be utilized till the DIN is confirmed by the Central Government.

(2) After generation of the provisional DIN, the Central Government shall process the applications received for allotment of DIN under sub-rule (2) of rule 9, decide on the approval or rejection thereof and communicate the same to the applicant along with the DIN allotted in case of approval by way of a letter by post or electronically or in any other mode, within a period of one month from the receipt of such application.

(3) If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application, directing the applicant to rectify such defects or incompleteness by resubmitting the application within a period of fifteen days of such placing on the website and email:

Provided that the Central Government shall-

(a) reject the application and direct the applicant to file fresh application with complete and correct information, where the defect has been rectified partially or the information given is still found to be defective;

(b) treat and label such application as invalid

in the electronic record in case the defects are not remove within the given time; and

(c) inform the applicant either by way of letter by post or electronically or in any other mode.

(4) In case of rejection of invalidation of application, the provisional DIN so allotted by the system shall get lapsed automatically and the fee so paid with the application shall neither be refunded or adjusted with any other application.

(5) All Director Identification Numbers allotted to individual(s) by the Central Government before the commencement of these rules shall be deemed to have been allotted to them under these rules.

(6) The Director Identification Number so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

Rule - 11. Cancellation or surrender or Deactivation of DIN:- The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received from any person, cancel or deactivate the DIN in case--

(a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DIN shall be merged with the validly retained number;

(b)(b) the DIN was obtained in a wrongful manner or by fraudulent means;

(c) of the death of the concerned individual;

(d) the concerned individual has been declared as a person of unsound mind by a competent Court;

(e) if the concerned individual has been adjudicated an insolvent:

Provided that before cancellation or deactivation of DIN pursuant to clause (b), an opportunity of being heard shall be given to the concerned individual;

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN:

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

Explanation.- For the purposes of clause (b) –

(i) the term “wrongful manner” means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation;

(ii) the term “fraudulent means” means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.

36. As is evident from the above, Rules 9 and 10 deals with the application for allotment of DIN. Rule 10 (6) specifies that the DIN is valid for the life time of the applicant and shall not be allotted to any other person. Rule 11 provides for the cancellation or surrender or deactivation of the DIN. It is very clear upon examining Rule 11 that neither cancellation nor deactivation is provided for upon disqualification under Section 164(2) of CA 2013. In this connection, it is also pertinent to refer to Section 167(1) of CA 2013 which provides for vacating the office of director by a director of a Defaulting Company. As a corollary, it follows that if a person is a director of five companies, which may be referred to as companies A to E, if the default is committed by company A by not filing financial statements or annual returns, the said director of company A would incur disqualification and would vacate office as director of companies B to E. However, the said person would not vacate office as director of company A. If such person does not vacate office and continues to be a

director of company A, it is necessary that such person continues to retain the DIN. In this connection, it is also pertinent to point out that it is not possible to file either the financial statements or the annual returns without a DIN. Consequently, the director of Defaulting Company A, in the above example, would be required to retain the DIN so as to make good the deficiency by filing the respective documents. Thus, apart from the fact that the AQD Rules do not empower the ROC to deactivate the DIN, we find that such deactivation would also be contrary to Section 164(2) read with 167(1) of CA 2013 inasmuch as the person concerned would continue to be a director of the Defaulting Company.

37. In light of the above analysis, we concur with the views of the Delhi High Court in **Mukut Pathak**, the Allahabad High Court in **Jai Shankar Agrahari** and the Gujarat High Court in **Gaurang Balvantlal Shah** to the effect that the ROC is not empowered to deactivate the DIN under the relevant rules. In **Yashodhara Shroff,** the Karnataka High Court upheld the constitutionality of Section 164(2) and proceeded to hold that a prior or post decisional hearing is not necessary. For reasons detailed in preceding paragraphs, we disagree with the view of the Karnataka High Court that prior notice is not required under Section 164(2) of CA 2013.

38. In the result, these appeals are allowed by setting aside the impugned order dated 27.01.2020. Consequently, the publication of the list of disqualified directors by the ROC and the deactivation of the DIN of the Appellants is hereby quashed. As a corollary to our conclusion on the deactivation of DIN, the DIN of the respective directors shall be reactivated within 30 days of the date of receipt of a copy of this order. Nonetheless, we make it clear that it is open to the ROC concerned to initiate action with regard to disqualification subject to an enquiry to decide the question of attribution of default to specific directors by taking into account the observations and conclusions herein. No costs. Consequently, connected miscellaneous petitions are closed."

3.In the light of the above, this writ petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

19.10.2022

Index: Yes/ No
Internet : Yes/No
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