

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6605 of 2021

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Praveen Kumar S/o Sri Tara Nand Sinha Resident of Village - Sisia, P.S. and
P.O. - Korha, Katihar - 850108, Bihar and at present residing at Flat No. -404
Baidyanath Place, Jagdeo Path, Patna- 800001.

... .. Petitioner/s

Versus

1. Union of india Through the Secretary, Ministry of Corporate Affairs, Room No. 08A, 5th Floor, "A" wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi- 110001.
2. The Secretary, Ministry of Corporate Affairs, Room No. 08A, 5th Floor, "A" wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi - 110001. Email - secy.mca@nic.in.
3. The Registrar of Companies, Bihar & Jharkhand, Ministry of Corporate Affairs, Maurya lok Complex, Block- "A", 4th Floor, Dak Bungalow Road, Patna - 800001. Email- roc.patna@mca.gov.in.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 15269 of 2021

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M/s Sushila Chemicals Pvt. Ltd., a company incorporated under the Indian Companies Act, 1956, having its factory at Industrial Area, Hajipur, through one of its Director Sri Rabindra Singh aged about 65 Years (Male), Son of Late Dashatath Singh, Resident of GF-21, Sidhibinayak, Abhay Khand, 3rd Indrapuram, I.E. Sahibabad, Gajiabad, Uttar Pradesh-201010.

... .. Petitioner/s

Versus

1. The Union of India, Ministry of Corporate Affairs, 5th Floor, A Wing, Shastri Bhavan, Dr. R.P. Road, New Delhi through its Deputy Director (Policy)
2. The Deputy Director (Policy), Ministry of Corporate Affairs, 5th Floor, A Wing, Shastri Bhavan, Dr. R.P. Road, New Delhi (thorugh its Deputy Director Policy)
3. The Registrar of Companies, 4th Floor, Block-A, Maurya Lok Complex, Dak Bungalow Road, Patna-1, Bihar.

... .. Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 6605 of 2021)

For the Petitioner/s	:	Mr.Chiranjiva Ranjan, Advocate Mr. Amar Kumar Singh, Advocate
For the Respondent/s	:	Dr. K. N. Singh (ASGI) Mr. Manoj Kumar Singh, CGC Mr. Amarjeet, J.C. to ASG



Ms. Prakritita Sharma, J.C. to ASG
Mr. Sriram Krishna, Advocate
Mr. Alok Kumar, CGC
Mr. Devansh Shankar Singh, Advocate
Mr. Shivaditya Dhari Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 15269 of 2021)

For the Petitioner/s :
For the Respondent/s : Mr.Dr. K. N. Singh (ASGI)
Mr. Manoj Kumar Singh, CGC
Mr. Amarjeet, Advocate
Mr. Sriram Krishna, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 29-07-2024

Both the writ petitions challenge the disqualification of Directors. CWJC No. 6605 of 2021 raises the issue of the effect of the Companies (Amendment) Act, 2017 specifically with respect to the introduction of the proviso under Section 164(2) of the Companies Act, 2013 and the insertion of sub-clause (1) in Section 167(1).

2. Shri Amar Kumar Singh, learned Counsel appeared for the petitioner in CWJC No. 6605 of 2021 and none appeared in the other writ petition. Dr. K.N. Singh, learned Additional Solicitor General of India appeared for the respondents, assisted by Shri Alok Kumar, Central Government Counsel.

3. Learned counsel for the petitioner argued that the proviso under Section 164(2) apply squarely in the case of the petitioner in CWJC No. 6605 of 2021. It is pointed out from the



decisions of the various Courts produced along with the rejoinder filed that the proviso introduced enabled the continuation of the petitioner's directorship for a period of six months and for that purpose his Director Identification Number (DIN) should also be restored.

4. For the respondents, it was first pointed out that the term of the disqualification has now expired and the writ petition has become infructuous. It is also argued that the decisions relied on by the petitioner would have no application in so far as deciding the effect of the introduction of the proviso under Section 164(2). In fact, a judgment of the High Court of Bombay which directed consideration of the defaulting Company's case under the Condonation of Delay Scheme, 2018 (CODS-2018) had been stayed by the Hon'ble Supreme Court.

5. On facts, we first refer to CWJC No. 6605 of 2021, the petitioner in which was a Director in two Companies, as revealed from Annexure-1 (Divyansh Creation Private Limited) and Annexure-2 (Oasis Creative Construction Private Limited). Annexure-1 indicates that the petitioner was a Director from 23.04.2012 and Annexure-2 indicates the petitioner's directorship in the second Company having commenced from 18.04.2016. Divyansh Creation Private Limited was declared a



non-compliant Company for reason of the statutory returns having not been filed. The petitioner who was a Director was disqualified as per Annexure-3 for the period 01.12.2017 to 30.11.2022. The petitioner's contention is that as per the introduction of the proviso under Section 164(2), which even if it acts prospectively, the petitioner's directorship shall be restored and continued for a period of six months.

6. As far as CWJC No. 15269 of 2021 is concerned, it is filed by a Company challenging the disqualification of the Directors. It is averred in the writ petition that the petitioner Company was a running unit using coal as raw material and due to the supply of coal having been stopped, for reason of termination of the agreement with the Coal Company, the activities of the petitioner Company also came to a stand still. It is admitted that from 2015-16 the petitioner's Company was not able to file annual accounts and annual returns and the Company was struck off as being inactive and the Directors disqualified. The petitioner Company approached the National Company Law Tribunal, Kolkata Bench, Kolkata which issued Annexure-1 order directing restoration of the original status of the Company and also directed filing of all the pending statutory document(s) including annual accounts and annual returns for



the years 2015-16 to 2018-19, with prescribed fees/additional fee/fine as decided by the Registrar of Companies within 45 days. A cost of Rs. 40,000/- was also imposed for the restoration directed therein. Obviously, the Company did not comply with the orders passed by the NCLT. The writ petition also refers to the General Circular No. 12/2020 dated 30.03.2020 introducing the Companies Fresh Start Scheme 2020, condoning the delay in filing of the documents and the General Circular No. 30/2020 dated 28.09.2020 which took into account the large scale disruption of activities caused by the pandemic and deciding to extend the scheme till 31.12.2020.

7. In so far as CWJC No. 6605 of 2021 is concerned, the petitioner was appointed as a Director in Divyansh Creation Private Limited on 23.04.2012. Admittedly, as stated in the counter affidavit, the name of the Company was struck off from the Register of Companies in the month of June, 2017 and the consequent disqualification under Section 164 (2)(a) of the Companies Act for a period of five years, came in the month of October, 2017. As was rightly pointed out by the respondents, the disqualification has ended as on 30.11.2022 and there is no further cause to be agitated as of now. Definitely, there can be no setting aside of the disqualification which has worked itself



out when the writ petition was pending. In fact, the writ petition itself was filed only in the year 2021 when the disqualification was of the year 2017.

8. Obviously, the petitioner has filed the writ petition in 2021 relying on the Amendment Act of 2017. Section 164(2) (a) provides that no person who is or has been a Director of a Company which has not filed financial statements or annual returns for any continuous period of three financial years shall be eligible to be re-appointed as a Director of that Company or appointed in another Company for a period of five years from the date on which the said Company failed to do so. The said provision deals with a re-appointment or a fresh appointment in the very same Company or in any other Company for a period of five years from the date on which the Company in which he was a Director had not filed financial statements or annual returns; which default also continued for a period of three financial years. Section 167(1) provides that the office of a Director shall become vacant in case he incurs any of the disqualifications specified in Section 164. Hence, by virtue of the disqualification under Section 164, the Director of a defaulting Company would not only be prohibited from being re-appointed in that Company or appointed in any other



Company, but also would be prevented from continuing in any other directorship, since there is an automatic vacation of such Directorship under Section 167(1)(a).

9. The proviso to Section 164(2) reads as under:-

“Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.”

10. The said proviso, incorporated by the amendment of 2017, is not declared to be retrospective and words employed being “he shall not incur the disqualification for a period of six months from the date of his appointment” makes it clearly prospective in nature. Obviously, the proviso was incorporated to ensure that a Director newly appointed to a defaulting Company shall not incur the disqualification for a period of six months from the date of his appointment so that he could enable the default to be cured in the six month period. There is no question of the said provision being applicable to the petitioner in CWJC No. 6605 of 2021.

11. The petitioner in CWJC No. 6605 of 2021 was a Director of the Company which was struck off from the rolls in October 2017. As early as on 23.04.2012, when the Company was found to be defaulting for a continuous period of three



years, the petitioner was a Director in office. The Company on the continued default admittedly was struck off from the Register of Companies. The proviso introduced in 2017 has no application to the case of the petitioner.

12. Now, we come to the various decisions referred to by the Counsel on either side. In so far as the decision of the High Court of Mumbai referred to by the respondents, it is produced as Annexure-F along with the counter affidavit filed; being *Shailendarjit Charanjit Rai & Anr. v. The Registrar of Companies, Maharashtra, Mumbai & Anr.* (Writ Petition No. 148 of 2018 and analogous cases dated 22.03.2018). The question raised was with respect to the default as per Section 164(2) pertaining to the years 2013-14 to 2015-16. The contention of all the Companies therein, was with respect to the activities of the Companies having come to a stand still for various reasons. The contention was also that the petitioners were desirous of availing the CODS-2018; which was not possible since the Companies had been struck off from the Register of Companies. The learned Judges directed the petitioners to take immediate steps in consonance with the provisions under Section 248(2) of the Companies Act, 2013 read with CODS-2018 within a period of seven days from the



date of judgment. Despite the fact that the period as per the CODS-2018 was still current, the Hon'ble Supreme Court stayed the order passed in the batch of writ petitions.

13. In this context, we specifically refer to the judgment of a learned Single Judge of the High Court of Delhi, produced as Annexure-6 in the rejoinder filed on behalf of the petitioner. Again the question raised was with respect to disqualification of the Companies and the entitlement to avail the benefit of the CODS-2018. The same was allowed specifically noticing so in Paragraphs 13 and 16 of the decision:-

“13. The Scheme is fresh lease of life given to defaulting companies, which are not yet declared “Inactive”, to file their returns and do their businesses in accordance with law. The purpose being one to enable business, to limit the economic disruption caused due to COVID-19, ought to be interpreted in the manner so as to not render the objective of the Scheme, a failure. The scheme is an ENABLER and not a DISABLER for defaulting but active companies”

“16. Since the deadline for the Scheme is 30th September, 2020, the DIN number of the petitioner would be activated within two working days, in order for the Petitioner to file the documents in respect of DCDPL.”

14. We extracted the same from the judgment of the learned Single Judge of the High Court of Delhi only to



understand the CODS-2018, which is not produced herein. We also have to observe that there is no contention raised in the writ petition or prayer made, to avail the opportunity under CODS-2018. We refer to the same only for the purpose of completeness and since the judgments were referred to by the learned Counsel for the petitioner.

15. As per the above extract from the decision of the High Court of Delhi, it has to be found that only ‘defaulting but active companies’ can avail the scheme; i.e. CODS-2018 and the deadline for such filing of returns, was 30.09.2020; far earlier to the filing of the writ petition itself.

16. One other contention which would be available, though not argued by the petitioner is from a judgment of a Division Bench of the High Court of Madras at Annexure-13 being *Meethelaveetil Kaitheri Muralidharan & Another v. Union of India & Another; 2020 0 Supreme (Mad) 1759*. A Division Bench of the Madras High Court found that Section 164(1) which deals with 8 disqualifications are concerned with the personal disability or default of the individual Director; while in contrast Section 164(2) deals with disqualifications that arise on account of default by the Company in which the person is a Director and not on account of a personal disability or



default. It was held that there can be no automatic disqualification under Section 164(2), since the disqualification would involve two stages; the first stage being the determination as to whether the Company concerned committed a default and the second stage as to whether the default could be attributed to one or a set of Directors for which a prior notice and an inquiry would be necessary.

17. We find the proviso inserted under Section 164(2) by the Amendment Act of 2017 to be not applicable to the petitioner in CWJC No. 6605 of 2021. The Company in which the petitioner was a Director, which had defaulted, has already been struck off from the Register of Companies and there is no question of any avilment of CODS-2018; the time for which has also expired. The contention available to the petitioner of no notice having been issued, would not survive, since the period of disqualification has expired. We find absolutely no reason to entertain the writ petition and dismiss the same.

18. As far as CWJC No. 15269 of 2021, the contention is with respect to the entitlement to file the annual accounts and annual returns for the defaulting years and obtain restoration. Admittedly, the Company had approached the NCLT, Kolkata which had permitted the same on conditions,



which order was not at all complied with by the Company. We see absolutely no reason to entertain the said writ petition also and the same also stands dismissed.

19. Ordered accordingly.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree.

(Partha Sarthy, J)

P.K.P./-

AFR/NAFR	
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