

1. The adjudication order dated 3rd August, 2023 imposing penalty under Section 454 (3) of the Companies Act, 2013 read with Rule 3 of the Companies (Adjudication of Penalties) Rules, 2014 amended by the Companies (Adjudication of Penalties) Rules, 2019 for non compliance of the provision of Section 203 (4) of the Companies Act, 2013 read with Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 imposing penalty of Rs. 20 lakh (Rs. 5 lakh each on three of the Directors and Rs. 5 lakh on the Company) and the order passed by the Regional Director (ER), Ministry of Corporate Affairs, Kolkata in appeal, affirming the order passed by the adjudicatory authority, are impugned in the instant writ petition.

2. The petitioner no. 1 is a Company incorporated under the Companies Act, 1956 in the year 1981 and the petitioner nos. 2 to 4 are the Directors and office bearers of the petitioner no. 1. The Company is registered with the Calcutta Stock Exchange which is practically defunct for nearly a decade. The Company claims to be a very small one with only 270 shareholders of which more than 81% holds less than 100 shares and there has been no movement or trading in respect of the shares of the Company for the last twenty years. The Company has been suspended from the Kolkata Stock Exchange with effect from 21st March, 2023.

3. The requirement of having a whole time Company Secretary could not be strictly followed by the petitioners as no suitable candidate for appointment of Company Secretary could be found. The petitioners were able to appoint Company Secretary only on 2nd January, 2023 to comply the provision of Section 203 (1) (ii) of the Companies Act, 2013 and intimated the same to the Registrar of Companies in June, 2023.

4. In September 2022 the Registrar of Companies and the adjudicating officer under the Companies Act issued a notice to the petitioners intimating violation of Section 203 of the Companies Act, 2013 and called upon the petitioners to offer their comments as regards the violation and to state as to why penalty should not be imposed upon them for the said violation. The contraventions were clearly specified in the said notice. The petitioners failed to provide any response to the aforesaid notice.

5. In November 2022 a notice was served upon the petitioners directing appearance for a hearing for adjudication of the penalty. In response thereto one of the Directors of the Company intimated the Registrar of Companies that

they were not able to find out a suitable candidate for the post of Company Secretary and sought for more time for compliance of the requirement of Section 203.

6. The appointment of the Company Secretary was made on 2nd January, 2023 but the said Company Secretary resigned from the post with effect from 1st May, 2024 and the Company thereafter appointed a separate Company Secretary with effect from 1st May, 2024.

7. On the date of the hearing the representative of the petitioners was present and sought for an adjournment. On such prayer, the date of hearing was rescheduled but on the rescheduled date, none appeared on behalf of the petitioners. The hearing stood adjourned once again and finally on 16th June, 2023 the authorized representative of the petitioners appeared and made submission on behalf of the Company. Order was pronounced by the adjudicating officer and the Registrar of Companies on 3rd August, 2023 by imposing penalty for non-compliance of the statutory provision. Being aggrieved by the order of the adjudicating authority, the petitioners preferred a statutory appeal which stood rejected vide order dated 5th March, 2024.

8. According to the petitioners the respondent authorities failed to adhere to the principles of natural justice at the time of passing the impugned order. The issues raised by the petitioners before the adjudicatory authority were not properly considered and the impugned order of penalty was passed mechanically, upon total non-application of mind.

9. The petitioners contend that the adjudicating authority and the appellate authority both acted mechanically. The quantum of penalty imposed

is of the highest amount. Despite disclosing the reason(s) for not being able to appoint a Company Secretary, highest penalty has been imposed.

10. It has been argued that the authority ought to have exercised their discretion while fixing up the quantum of penalty. As the Company is a very small one, imposing such huge amount of penalty is highly prejudicial. The respondent authorities ought to have pragmatically considered the genuine difficulties on the part of the petitioners in not being able to appoint a whole-time Company Secretary.

11. Prayer has been made to set aside the order passed by the adjudicatory authority and the order passed by the appellate authority affirming the order passed by the adjudicatory authority.

12. In support of the aforesaid submission the petitioners rely on the order delivered by a coordinate Bench of this Court on 3rd May, 2024 in **WPO 349 of 2024** in the matter of **Apex Traders and Exporters Ltd. & Anr. -vs- The Registrar of Companies, West Bengal, Ministry of Corporate Affairs & Anr.** wherein, under similar circumstances, the Court was of the opinion that there was non-application of mind on the part of the authority while adjudicating the subject issue and while considering the imposition of penalty. In the absence of any real consideration worth the name of the mitigating circumstances of the Company and the small size of the Company, including its number of shareholders and share capital, and taking into consideration the fact that a whole-time Company Secretary was already appointed and functioning, the Court was pleased to set aside the adjudication order and the order passed by the appellate authority. The Court directed reconsideration of the case of the petitioners afresh by taking into account and on considering

the mitigating circumstances relied upon by the petitioners upon affording opportunity of hearing to decide the issue of imposition of penalty.

13. The petitioners rely on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Mary Pushpam -vs- Telvi Curusumary & Ors.*** reported in **(2024) 3 SCC 224** wherein the Court deliberated on the doctrine of precedents and the rule of 'judicial discipline and propriety'. The Court held that when a decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding subject to right of the Bench of such co-equal coram to take a different view and refer the question to a Larger Bench. It is the only course of action open to a Bench of co-equal strength, when faced with the previous decision taken by a Bench with the same strength.

14. The petitioners contend that facts in the present case being more or less the same as in the matter of Apex Traders (supra), similar relief, as granted by the coordinate Bench, ought to be granted in this case.

15. Learned advocate representing the respondents opposes the submission made on behalf of the petitioners. It has been submitted that the provision under the Companies Act is a mandatory one and there is no scope to differentiate between a small and a big company. There is a statutory requirement of law for appointment of a whole-time Company Secretary in every company as may be prescribed.

16. The said provision is in place with effect from 1st April, 2014. The subject Company is in existence long prior thereto. The penal provision has come into effect on and from the year 2018 and the Company is bound to act in accordance with the statutory provisions.

17. It has been submitted that the petitioners have admitted that a whole-time Company Secretary was appointed only on 2nd January, 2023 evidencing the default on the part of the petitioners in appointing a whole-time Company Secretary prior thereto.

18. It has been argued that the Registrar of Companies does not have any discretion to waive the penalty after the default has been noticed and found to be true. The reason for arriving at the quantum of penalty has also been mentioned in the adjudication order.

19. It has been denied that there has been violation of the principles of natural justice or that the impugned orders were passed mechanically. It has also been denied that there has been non-application of mind at the time of passing the impugned orders. There has neither been any illegality nor perversity in the orders as alleged.

20. As regards the order passed by the coordinate Bench in Apex Traders (supra) it has been submitted that the said order is an ex parte one and the stand of the respondents were not before the said Bench when the issue was decided.

21. In support of the submission that the Registrar of Companies does not have any discretion with regard to imposition of penalty, reliance has been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of **Chairman, SEBI -vs- Shriram Mutual Fund & Anr.** reported in **(2006) 5 SCC 361** wherein the Court was of the opinion that *mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. Penalty is attracted as soon as contravention of the statutory obligation is established and, therefore, the intention of the parties committing such violations becomes

immaterial. The Court made it clear that breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. Unless any of the Statute indicates the need to establish the element of *mens rea*, it is sufficient to prove that the default has occurred.

22. Prayer has been made to dismiss the writ petition.

23. I have heard and considered the submissions made on behalf of both the parties and have perused the materials on record.

24. The fact that the petitioners did not appoint a whole-time Company Secretary in accordance with the statutory provision is not disputed. It is admitted that prior to 2nd January, 2023 the Company did not have a whole-time Company Secretary. The petitioners cite mitigating situations and hardship in finding out a suitable candidate for the post of Company Secretary.

25. The issue to be decided is whether the authority could have applied its discretion while adjudicating the default on the part of the petitioners.

26. In Apex Traders (supra) the Court interpreted the expression 'liability' used in Section 203(5) of the Companies Act, 2013. The Court was of the opinion that the language of Section 203(5) confirms discretion on the Registrar of Companies to impose penalty. Such discretion also includes the converse, that is, the discretion not to impose penalty or to impose lesser penalty. The liability has been found to be subject to adjudication by the Registrar of Companies. Such discretion associates with it, responsibility of the adjudicating authority to consider any mitigating or alleviating circumstances

which might have visited the Company for not adhering to the statutory provision.

27. The Hon'ble Supreme Court in the matter of Chairman, SEBI (supra) interpreted the words 'shall be liable' under the SEBI Act and the regulations framed thereunder and held the same as mandatory provision for imposition of monetary penalties for breaches or non-compliance with the provisions of the Act and the regulations. The Court took note of the fact that, the legislature in its wisdom had not included *mens rea* or deliberate or wilful nature of default as a factor to be considered by the adjudicating officer in determining the quantum of liability to be imposed on the defaulter. The provisions of penalty for non-compliance with the mandate of the Act are with an object to have an effective deterrent to ensure better compliance of the statutory provisions.

28. The Court clearly laid down that penalty is attracted as soon as the contravention of the statutory obligation contemplated by the Act and the regulations are established and intention of the parties committing such violation becomes wholly irrelevant. Once contravention is established, the penalty is to follow.

29. The Court was of the view that the power to impose penalty would be severely curtailed if the presence of *mens rea* is to be considered. The same would set the stage for various market players to violate statutory regulations with impunity and subsequently claim ignorance of law or lack of *mens rea* to escape imposition of penalty. Imputing *mens rea* against the plain language of the statute would frustrate the entire purpose and the object of the Act to secure strict compliance of the statutory provisions.

30. The ratio laid down in the matter of Chairman, SEBI (*supra*) leaves no doubt in the mind of the Court that there is no scope to avoid or waive penalty once violation in the statutory provision is detected as the Companies Act, 2013 does not provide for any *mens rea* to justify the default. The Court reiterated that when a penalty is imposed by an adjudicatory officer, it is done so in adjudicatory proceedings and not by way of fine as a result of prosecution of an accused in a criminal proceeding. For arriving at the said decision, the Hon'ble Supreme Court took into consideration provisions of the SEBI Act, FERA, Income Tax Act and the Orissa Sales Tax Act.

31. Here, the Company admits that whole-time Company Secretary was not appointed and cites various reasons for the same. In such a situation when default is admitted by the Company, the Court has to follow the law laid down by the Hon'ble Supreme Court being the law of the land under Article 141 of the Constitution of India. Therefore, the impugned order of the adjudicating authority affirmed by the appellate authority holding the Company and its Directors guilty of the offence cannot be faulted.

32. What remains for consideration is whether the authority could have exercised discretion in fixing the quantum of penalty and whether the quantum of penalty imposed is proper or not? In Chairman, SEBI (*supra*) the Court held that quantum of penalty is discretionary.

33. Section 203(5) of the Companies Act, 2013 lays down that if the Company contravenes the provisions of the Section, the Company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees. Every Director in default shall be punishable with fine which may extend to fifty thousand rupees and where the

contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.

34. In the instant case, the contravention continued for years together. The adjudicating authority gave benefit to the Company for the COVID period and calculated the fine. The authority exercised its discretion in doing so. Such exercise of discretion does not appear to be illegal, erroneous or arbitrary, requiring interference. Hence, the Court is not inclined to interfere with the same.

35. The writ petition fails and is hereby dismissed.

36. No costs.

37. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)