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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 11.09.2020

Delivered On : 09.10.2020

C O R A M

The Hon'ble **Mr. A.P.SAHI, THE CHIEF JUSTICE**
and
The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Writ Appeal Nos.569, 718, 720, 721, 841 and 842 of 2020
and
CMP. Nos.8122, 9787, 10648 & 10649 of 2020

W.A. No.569 of 2020

Meethelaveetil Kaitheri Muralidharan ... Appellant/Petitioner

vs.

1.Union of India,
Represented by its Secretary,
Ministry of Corporation Affairs,
Shastri Bhawan,
Dr.Rajendra Prasad Road,
New Delhi-110 001.

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2.The Registrar of Companies Tamil Nadu, Chennai,
Block No.6, B Wing 2nd Floor,
Shastri Bhawan 26,
Haddows Road,
Chennai-600 006.

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W.A. No.718 of 2020

Kamal Aneesmohamed ...Appellant/Petitioner

vs.

1.Union of India,
Represented by its
Ministry of Corporate Affairs,
Shastri Bhawan, Dr. Rajendra Prasad Road,
New Delhi-110 001.

2.The Registrar of Companies,
Tamil Nadu, Chennai,
Block No.6, B Wing, 2nd Floor,
Shastri Bhawan, No.26, Haddaows Road,
Chennai-600 034. ..Respondents/Respondents

W.A. No.720 of 2020

Sathish Kumar Gopal ...Appellant/Petitioner

vs.

1.Union of India,
Represented by its
Ministry of Corporate Affairs,
Shastri Bhawan, Dr. Rajendra Prasad Road,
New Delhi-110 001.

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

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W.A.No.721 of 2020

Govindasamy Balasubramaniam ... Appellant/Petitioner

vs.

1.Union of India,
Represented by its
Ministry of Corporate Affairs,
Shastri Bhawan, Dr. Rajendra Prasad Road,
New Delhi-110 001.

2.The Registrar of Companies,
Tamil Nadu, Coimbatore,
7, AGT Business Park, First Floor, Phase-II,
Avnashi Road, Civil Aerodrome Post,
Coimbatore-641 014, Tamil Nadu. ... Respondents/Respondents

W.A.Nos.841 & 842 of 2020

Paari Senthil Kumar ... Appellant/Petitioner in WA No.841 of 2020

Paari Dhanalakshmi ... Appellant/Petitioner in WA No.842 of 2020

vs.

1.Union of India,
Represented by its Secretary,
Ministry of Corporate Affairs,
Shastri Bhawan, Dr. Rajendra Prasad Road,
New Delhi-110 001.
2.The Registrar of Companies,
Tamil Nadu, Chennai,
Block No.6, B Wing 2nd Floor,
Shastri Bhawan 26,
Haddows Road, Chennai-600 006. ... Respondents/Respondents in WA Nos.841&842/2020

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PRAYER IN W.A.No.569 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 in W.P.No.750 of 2020 and allow the appeal.

PRAYER IN W.A.No.718 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 passed in W.P.No.27463 of 2019 on the file of this Court and allow the said writ petition as prayed for.

PRAYER IN W.A.No.720 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 passed in W.P.No.27467 of 2019 on the file of this Court and allow the said writ petition as prayed for.

PRAYER IN W.A.No.721 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 passed in W.P.No.15637 of 2019.

PRAYER IN W.A.No.841 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 passed in W.P.No.35384 of 2019.

PRAYER IN W.A.No.842 OF 2020: Writ Appeal is filed under Clause 15 of Letters Patent to set aside the order dated 27.01.2020 passed in W.P.No.35388 of 2019.

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For Appellant : Mr.Om Prakash, senior counsel
for Mr.Ilaiyaraja for
M/s.Ramalingam Associates
in W.A. Nos.718 & 720 of 2020

Mr.R.Rajesh in W.A.Nos.569, 841 &
842 of 2020

Mr.P.H.Aravind Pandian, senior counsel
for M/s. C.V.Shailandhran
in W.A. No.721 of 2020

For Respondents: Mr.R.Sankaranarayanan, ASG., assisted by
Mr.S.Janarthanam, SPC for R1&R2 in all WAs

COMMON JUDGMENT

SENTHILKUMAR RAMAMOORTHY J.,

This batch of writ appeals arise out of a common order dated 13.01.2020 whereby the separate writ petitions filed by each Appellant herein to quash the respective disqualification by the Registrar of Companies (the ROC) and for consequential reactivation of the Director Identification Number (DIN) or permission for appointment/reappointment as director were dismissed.

2. The Companies Act, 2013 (CA 2013) deals with disqualifications for appointment as a director in Section 164 which came

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into force on 01.04.2014. Section 164(1) thereof sets out eight grounds of disqualification that are individual director-specific and broadly corresponds to Section 274(1)(a)-(f) of the earlier Companies Act, 1956 (CA 1956). Section 164(2), which bears some resemblance to Section 274(1)(g) of CA 1956 but is wider in scope, on the other hand, deals with default by the company concerned in fulfilling its obligations and the attribution of such default to the directors, thereby resulting in their disqualification. In these cases, we are concerned with Section 164(2)(a) which prescribes that a 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 is not eligible to be re-appointed as a director of the company or appointed as a director of any other company for five years from the date of default. In each of these cases, on the ground specified in Section 164(2)(a) of CA 2013, the name of each Appellant was included in a list of disqualified directors, which was published on the website of the first Respondent. The DIN of each Appellant/director was consequently deactivated. Such disqualification and deactivation were challenged in the writ petitions. The two main grounds on which the disqualification and deactivation were challenged are : (i) prior notice was not issued to the

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Appellant concerned calling upon him to show cause as to why he should not be disqualified as a director; and (ii) the ROC is not entitled to deactivate the DIN of these directors as per CA 2013 and the rules framed thereunder.

3. By the impugned order, in paragraph 27, the learned single Judge concluded that a notice would be an empty formality in the facts and circumstances because the disqualification occurs *ipso facto* and the issuance of a notice would make no difference.

4. As regards the deactivation of the DIN, the learned single Judge concluded, in paragraph 34, that the DIN can only exist during the period when an individual holds office as a director and, therefore, the deactivation of the DIN is a logical corollary of disqualification. In the present appeals, the said order of the learned single Judge is under challenge.

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5. We heard Mr. Aravind Pandian, the learned senior counsel, assisted by Mr.C.V.Shailandhran, learned counsel for the Appellant in W.A. No.721 of 2020; Mr. Om Prakash, the learned senior counsel, assisted by

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Mr.Ilayayaraja, learned counsel for the Appellant in W.A. Nos.718 and 720 of 2020; Mr. R.Rajesh, the learned counsel for the Appellant in W.A. No.569 of 2020 and W.A.Nos.841 and 842 of 2020; and Mr.R.Sankaranarayanan, the learned Additional Solicitor General of India (ASGI), assisted by Mr.S.Janarthanam, the learned Central Government Standing Counsel (CGSC), for Respondents 1 and 2 in all the appeals.

6. Mr.Aravind Pandian opened his submissions by pointing out that disqualification of directors is provided for and dealt with in Section 164 of the CA 2013. Section 164(1) deals with disqualification for appointment as a director on account of factors such as a declaration that the person concerned is: of unsound mind; an undischarged insolvent; has applied to be adjudicated as an insolvent; has been convicted of an offence and sentenced in respect thereof to imprisonment for not less than six months, etc. He pointed out that Section 164(1) broadly corresponds to Section 274(1)(a)-(f) of the erstwhile CA 1956. However, Section 164(2) is wider than Section 274(1)(g) of CA 1956 and came into effect on 01.04.2014. Section 164(2) provides that no person who is or has been a director of a company which has not filed financial statements or annual

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returns for any continuous period of three financial years or has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared within a maximum period of one year shall be re-appointed as a director of that company (the Defaulting Company) or appointed in any other company for a period of five years from the date of default. Throughout this judgment, the expression 'Defaulting Company' is used to describe the company whose default triggers the disqualification under Section 164(2) in contradistinction with other companies in which the director of the Defaulting Company may be a director.

7. With this background, he advanced his first contention, namely, that the requirement of prior notice is implicit in Section 164(2). He pointed out that the ROC disqualified about 3,09,614 directors under Section 164(2)(a) of CA 2013 by order dated 08.09.2017. Subsequently, another list of disqualified directors aggregating to about 45657 was published on 01.11.2017. These disqualifications were challenged in an earlier batch of writ petitions. Ultimately, by order dated 03.08.2018 in **Bhagavan Das Dhananjaya Das v. Union of India [(2018) 6 MLJ 704] (Bhagavan Das),**

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the said disqualifications were set aside. In the said judgment, the Court held that the principles of natural justice should have been adhered to by issuing a proper notice to all the directors concerned and that this position is fortified by the fact that the default in filing the financial statements or annual returns is a compoundable offence. On that basis, Section 164(2)(a) was construed such that such disqualification cannot be effected without a prior notice.

8. Once again, on 17.12.2018, the ROC released a list of disqualified directors aggregating to about 16084. In these cases, the disqualification was to have effect from 01.11.2017 to 31.10.2022. This list was uploaded on the website on 18.12.2018 and was challenged on the ground that it is in contravention of the law laid down in **Bhagavan Das** with regard to the requirement of prior notice. In addition, the publication of the list of disqualified directors and the deactivation of the DIN were challenged on the basis that Section 164(2) of CA 2013 read with Rule 14 of the Companies [Appointment and Qualifications of Directors] Rules, 2014 [the AQD Rules] do not empower the ROC to either release the list of disqualified directors, in this manner, or to deactivate the DIN. In support

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of this contention, Mr.Aravind Pandian invited the attention of the Court to Rule 14 of the AQD Rules. He pointed out that Rule 14 (1) makes it obligatory that every director shall inform the company concerned about his/her disqualification under Section 164(2) by filing Form DIR-8 before he/she is appointed or re-appointed, respectively, as a director of any other company or by the Defaulting Company. By referring to Rule 14(2), he submitted that the company is required to file Form DIR-9 with the ROC immediately upon the commission of a default in complying with Section 164(2)(a) or (b) by providing the names and addresses of all the directors of the company during the relevant financial years. If the company fails to file Form DIR-9 within a period of 30 days from the date of default, the disqualification under Section 164(2) would become applicable as stipulated in Rule 14(3).

9. Therefore, Mr.Aravind Pandian contended that the ROC enters the picture only if there is default by the company concerned to file Form DIR-9 within the stipulated 30 day period of default. Consequently, the action of the ROC in publishing the list of disqualified directors is without jurisdiction, in these cases, because neither the director concerned nor the

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company concerned had filed Form DIR 8 or 9, respectively. In support of this contention, he relied upon the judgment of the Gujarat High Court dated 18.12.2018 in **Gaurang Balvantlal Shah v. Union of India**, **214 Com. Cas. 199 (2019) (Gaurang Balvantlal Shah)** wherein the Court concluded that the disqualification under 164 (2) would take place automatically on the occurrence of any of the eventualities mentioned therein but the action of the ROC in publishing the list of disqualified directors is not justified and is not in consonance with the provisions of Section 164(2) of CA 2013.

10. In order to buttress the contention that prior notice is mandatory and that the DIN cannot be deactivated, in these circumstances, Mr.Aravind Pandian referred to Section 167(1) of CA 2013 which deals with the circumstances in which a director vacates office. Clause (a) of Sub-section (1) thereto deals specifically with vacating office on account of incurring any of the disqualifications specified in Section 164. The said provision was amended by the insertion of a proviso with effect from 07.05.2018. By virtue of the proviso, it was made clear that if a director incurs disqualification under Section 164(2), he would vacate office as director in all companies other than the Defaulting Company. He pointed

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out that the validity of this provision was impugned before this Court and a Division Bench of this Court upheld the validity of Section 167(1), including the proviso thereto, in **G.Vasudevan v. Union of India [2020 (2) CTC 1] (G.Vasudevan)**. Because Section 167(1), read with the proviso thereto, makes it abundantly clear that the director concerned continues to occupy the office of director of the Defaulting Company, he contended that the necessity of providing a prior notice becomes more important so as to ensure that the Defaulting Company remedies the default. Besides, this underscores the necessity to keep the DIN active and not deactivate the same.

11. The next contention of Mr.Aravind Pandian was that the deactivation of DIN in the event of disqualification is impermissible under law. For this purpose, he referred to the definition of DIN under Rule 2 of the AQD Rules, and to Rule 11 thereof. By drawing the attention of this Court to Rule 11, he pointed out that Rule 11 deals with the cancellation or surrender or deactivation of DIN and enables such deactivation or cancellation only in the situations specified therein. Those situations are if the DIN is found to be a duplicate or obtained in a wrongful manner or by

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fraudulent means. In addition, the DIN may be cancelled or surrendered or deactivated only in the following four individual director-specific situations, namely, if the individual concerned: dies; or has been declared to be unsound mind; or has been adjudicated an insolvent; or if the holder of the DIN applies to surrender the DIN on the basis that he/she has never been appointed as a director in any company and the said DIN was never used for filing a document with any authority.

12. Thus, he contended that Rule 11 does not empower the ROC to deactivate the DIN in the present circumstances. The deactivation of the DIN was considered by three High Courts, namely, the High Courts of Delhi, Gujarat and Karnataka. In **Gourang Balvantlal Shah**, the Gujarat High Court concluded that the DIN could not be cancelled or deactivated merely because one of the companies in which such person was a director had been struck off from the Registrar of Companies under Section 248 of CA 2013. In **Yashodhara Shroff and Others v. Union of India, order dated 12.06.2019 (Yashodara Shroff),** the Karnataka High Court concluded that Section 164(2) of CA 2013 applies prospectively and not retrospectively and, on that basis, directed restoration of the DIN where the

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disqualification of directors was not valid. Similarly, the Delhi High Court in **Mukut Pathak v. Union of India W.P.(C) No.9088 of 2018 (Mukut Pathak),** by order dated 04.11.2019, concluded that there is no provision supporting the respondent's action of cancelling the DIN and the Digital Signature Certificate (DSC) and that the said action is unsustainable. He concluded his submissions by contending that Section 167(1) (a), which is set out below, should be read down so as to apply only to disqualification under Section 164(1) and not under Section 164(2):

> ***"Vacation of office of director:***
>
> *167. (1) The office of a director shall become vacant in case*
>
> *(a) he incurs any of the disqualifications specified in Section 164;...."*

For this principle, he relied on the judgment of the Delhi High Court in **Mukut Pathak** (cited supra).

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13. Mr.Rajesh made submissions on behalf of the appellants in three writ appeals. With specific reference to the facts in W.A. No.569 of 2020, he pointed out that the director concerned, namely, Mr.Muralidharan,

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resigned from the company concerned on 14.05.2011. During the said period, CA 1956 was in force. Therefore, the company concerned was required to file Form 32 so as to inform the ROC about his resignation. This was not done by the company concerned. Therefore, he enclosed a copy of his resignation dated 14.05.2011 with a communication dated 04.08.2012 to the ROC and requested the ROC to ensure that the company concerned files Form – 32.

14. Upon receipt of a notice of default under Section 164(2)(a) of CA 2013, in respect of non-filing of financial statements and annual returns for the financial years 2011-2012 and 2012-2013, he pointed out, by reply dated 21.02.2014, that he had submitted his resignation on 14.05.2011 and that, therefore, his name should be deleted from the notices. In response thereto, the ROC, by communication dated 02.05.2014, called upon the company concerned to appoint a suitable person in the place of Mr.Muralidharan. Thus, he submitted that the ROC was fully aware of his resignation and the failure of the company concerned to file Form – 32. In spite of such knowledge, the ROC included his name in the published list of disqualified directors and also proceeded to deactivate his DIN. From the

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said published list dated 01.11.2018, he also pointed out that Mr.Muralidharan had been disqualified for a period of six years running from 01.11.2016 to 31.10.2022 which exceeds the statutory period of five years.

15. His next contention was that the ROC does not have the power to deactivate the DIN for reasons cited earlier by Mr.Aravind Pandian. He further submitted that the principles of natural justice were violated by not providing a prior notice to the directors who were declared as disqualified. His next contention was that the ROC does not have the power either to publish the list of disqualified directors or to deactivate the DIN. In support of this contention, he referred to the Companies [Registration Offices and Fees] Rules, 2014 and, in particular, to Rules 5 and 11 thereof. Rule 5 deals with the powers and duties of registrars. This Rule empowers registrars to exercise such powers and discharge such duties as are conferred on them by the CA 2013 or the rules made thereunder or delegated to them by the Central Government. However, neither under CA 2013 nor under any rules framed pursuant thereto, registrars are empowered to either publish a list of disqualified directors or to deactivate the DIN. Rule 11 of the aforesaid

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Rules deals specifically with vacation of office or removal of directors. This Rule provides that in the event of vacation of office or removal of directors, the ROC shall verify the documents as to correctness of the contents before approving or invalidating Form DIR-12. Therefore, he submitted that the power to publish the list of disqualified directors and the power to deactivate DIN of such disqualified directors is not contained in CA 2013. Even under Section 164(2) read with Section 172, he pointed out that only punishment is prescribed for default in compliance with section 167(2). He also relied upon the Division Bench judgment of the Allahabad High Court in **Jai Shankar Agrahari v. Union of India, 2020 SCC online Allahabad 24 (Jai Shankar Agrahari)**. In that case, the Allahabad High Court considered the question as to which would be the relevant financial years to be reckoned for the purpose of disqualification under Section 164(2) of CA 2013, and concluded that the first applicable financial year would be 2014-15 and not any of the years prior thereto. By reference to this conclusion, he contended that the ROC had applied Section 164(2) from the financial year 2013-14, which is clearly contrary to the conclusion of the Allahabad High Court. With reference to the question as to whether the principles of natural justice are applicable before resorting to

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disqualification under Section 164(2), he pointed out that the Allahabad High Court concluded that the principles of natural justice cannot be completely excluded by imposing an embargo thereon. Consequently, it is necessary to at least issue notice to the person concerned. With reference to whether the ROC is empowered to deactivate the DIN, he pointed out that the Allahabad High Court concluded that there is no provision to deactivate the DIN and that, therefore, the said deactivation cannot be sustained.

16. In response and to the contrary, Mr.Sankaranarayanan, the learned Additional Solicitor General, made submissions on behalf of the Respondents. His first contention was with regard to constructive notice. In support of the contention regarding constructive notice, he referred to **Gower and Davies, Principles of Modern Company Law, Eighth Edition, 2008 (Gower),** and pointed out as to how **Gower** had underscored the importance of filing public documents such as financial statements and annual returns so as to keep stakeholders informed about the affairs of the company. In effect, his contention is that filing these financial statements and annual returns are of paramount importance inasmuch as constructive notice of the affairs of the company concerned is thereby provided to all

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stakeholders by filing and making available these critical documents in the public domain. According to him, Section 164(2) was introduced so as to ensure that this obligation is fulfilled by companies in public interest.

17. His second contention was that the grounds of disqualification under Section 164(1) of CA 2013 are personal to the director concerned and may require a verification of material facts and circumstances. Therefore, before it is determined that a director is disqualified under Section 164(1), a prior notice may be required so as to verify the relevant material facts. By contrast, Section 164(2) does not require such prior verification. In order to substantiate this contention, he pointed out that the financial statements and annual returns are required to be filed with the ROC by the company concerned. Therefore, the ROC is fully aware as to whether such financial statements and annual returns have been filed for the relevant period by the company concerned. If these documents are not filed, the disqualification under Section 164(2) is triggered *ipso facto.* Therefore, the issuance of prior notice becomes an empty formality. Even with regard to disqualification under Section 164(2)(b), he contended that the relevant information with regard to failure to repay deposits or to pay interest on

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such deposits or to redeem the debentures or to pay dividend would be evident from the documents available with the ROC. Consequently, verification by calling for the relevant documents or information from the director concerned is not necessary. In response to a question as to whether the attribution of default to particular directors can be decided without prior notice, he submitted that the ROC would act on the basis of records available with it. For example, the ROC would disqualify persons who are shown as directors of the Defaulting Company and would, thereafter, extend such disqualification to other companies in which such persons are directors. By relying upon the judgment in **S.Subramania Aiyar v. United India Life Insurance Co. Ltd., AIR 1928 Mad. 1215**, he contended that the directors of a company, who are responsible for filing financial statements and annual returns and are responsible for the default in doing so, cannot absolve themselves of liability. He also relied on a few judgments, such as **S.L. Kapoor v. Jagmohan (1980) 4 SCC 379; KSRTC v. S.G. Kotturappa (2005) 3 SCC 409;** and **Board of Directors, HPTC v. K.C. Rahi (2008) 11 SCC 502** for the proposition that compliance with natural justice is situation-specific and cannot be put in a straight-jacket. With regard to DIN, he referred to Sections 152 to 155 CA 2013 and pointed

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out that it is mandatory for every individual who intends to be appointed as a director of a company to apply for a DIN. Once the DIN is granted, the company concerned is required to inform the ROC about the DIN. Similarly, in all returns under CA 2013, the DIN is required to be mentioned. With reference to the AQD Rules, he pointed out that Rule 11 thereof makes it abundantly clear that a hearing is mandatory only if the DIN is proposed to be cancelled or deactivated on the ground that it was obtained in a wrongful manner or by fraudulent means. This Rule implies that such prior opportunity of being heard is not necessary if a DIN is cancelled or deactivated on any other ground.

18. By drawing reference to Rule 14 of the said Rule, he contended that Rule 14(2) makes it obligatory on the company concerned to file DIR 9 with the ROC along with the names and addresses of all the directors of the company during the relevant financial years. Therefore, the ROC would have all the relevant information to publish the list of disqualified directors and to deactivate the DIN of such directors. Consequently, the prior notice requirement would be an empty formality.

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19. His next contention was that several opportunities were provided to defaulting companies and their directors by launching schemes to condone delay and for rectification. In this connection, he referred to the Company Law Settlement Scheme 2014 dated 12.08.2014 and to the Condonation of Delay Scheme 2018 dated 29.12.2017. By relying upon the aforesaid Schemes, he pointed out that defaulting companies and their directors had sufficient opportunity to rectify or cure these defects. Unfortunately, in spite of such opportunities, these companies and directors failed to take necessary action to ensure compliance. In these facts and circumstances, the publication of the list of disqualified directors and, consequently, the deactivation of DIN was fully justified. On this issue, he emphasized out that the deactivation is automatic or self-operating. He also pointed out that there is a provision to be registered as a dormant company under Section 455 of CA 2013. Accordingly, if a company is not carrying on business, it is possible for such a company to apply for and register itself as a dormant company. Once this is done, it would not be necessary to comply with Section 164(2) of CA 2013. He concluded his submissions by pointing out that the expression 'public interest' is used in several provisions of CA 2013 and emphasized that actions taken in public interest, such as the

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disqualification and deactivation of DIN, should not be interfered with by the Court.

20. By way of rejoinder, Mr.Aravind Pandidan submitted that the provision for reactivation of DIN by filing DIR 10 under Rule 14 (5) of the AQD Rules does not solve the problem inasmuch as Form DIR 10 cannot be filed until the entire disqualification period of 5 years ends. In this connection, he referred to the judgment of the learned singe Judge in paragraph 27 wherein it was concluded that belated filing of these documents is not permitted, and contended that this finding is patently erroneous inasmuch as Section 403 of CA 2013 permits the filing of documents belatedly with late filing fees. By drawing reference to the celebrated judgment in the case of **Life Insurance Corporation v. Escorts Ltd. (1986) 1 SCC 264,** he contended that a statutory provision cannot be interpreted by drawing reference to the form prescribed for its implementation. He further submitted that this is not a case of suspending the DIN but of deactivation thereof. By comparing Section 164(2) and Section 274(1)(g) of CA 1956, he pointed out that Section 274(1)(g) enabled publication of the list of disqualified directors whereas Section

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164(2) does not. With regard to the schemes for rectification and condonation of delay, he pointed out that the said schemes are amnesty schemes in respect of prosecution and are not in the context of disqualification or deactivation.

21. Mr.Om Prakash pointed out that the filing of Form DIR-8 and 9 did not constitute notice to the director concerned in respect of the proposed disqualification. He further submitted that Form DIR-10 is not a solution because it cannot be filed until the disqualification period ends. He finally submitted that CA 2013 and the rules framed thereunder do not contain any provision for adjudication in case of such disqualification. In effect, there is no remedy for disqualified directors either in respect of their disqualification or in respect of deactivation of DIN.

22. We considered the submissions of the learned senior counsel/learned counsel for the respective parties and examined the materials on record.

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23. The first question that arises for consideration is whether a prior notice is required before disqualifying a director under Section 164(2) of CA 2013. In order to answer this question, it is necessary to examine the text of Section 164 of CA 2013.

Section 164 is as under:

"164. Disqualifications for appointment of director

(*1*) A person shall not be eligible for appointment as a director of a company, if—
(*a*) he is of unsound mind and stands so declared by a competent court;
(*b*) he is an undischarged insolvent;
(*c*) he has applied to be adjudicated as an insolvent and his application is pending;
(*d*) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:
Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;
(*e*) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
(*f*) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others,

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and six months have elapsed from the last day fixed for the payment of the call;
(*g*) he has been convicted of the offence dealing with related party transactions
under section 188 at any time during the last preceding five years; or
(*h*) he has not complied with sub-section (*3*) of section 152.
(*2*) **No person who is or has been a director of a company which—**
(*a*) has not filed financial statements or annual returns for any continuous period of three financial years; or
(*b*) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, **shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so. (**emphasis added).
(*3*) A private company may by its articles provide for any disqualifications for
appointment as a director in addition to those specified in sub-sections (*1*) and (*2*):
Provided that the disqualifications referred to in clauses (*d*), (*e*) and (*g*) of sub-section
(*1*) shall not take effect—
(*i*) for thirty days from the date of conviction or order of disqualification;
(*ii*) where an appeal or petition is preferred within thirty days as aforesaid against
the conviction resulting in sentence or order, until expiry of seven days from the date
on which such appeal or petition is disposed off; or
(*iii*) where any further appeal or petition is preferred against order or sentence

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within seven days, until such further appeal or petition is disposed off."

24. The other provision of relevance in CA 2013 is Section 167(1) which, after the amendment with effect from 07.05.2018, is as under:

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 (emphasis added);
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.
(*b*) he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;
(*c*) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
(*d*) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
(*e*) he becomes disqualified by an order of a court or the Tribunal;
(*f*) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

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Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

(*g*) he is removed in pursuance of the provisions of this Act;

(*h*) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

25. Section 164(1) deals with eight disqualifications and the common characteristic as regards these disqualifications would be evident on examining the clauses thereof. By way of illustration, Section 164(1)(a),(b), and (c) , respectively, deal with a person who is: declared by a competent court to be of unsound mind; declared as an undischarged insolvent; convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. The other sub-clauses also deal with a personal disability or default by the individual director concerned and thus it is abundantly clear that the disqualification under each clause of Section 164(1) is individual director-specific. Consequently, in order to apply Section 164(1) to a particular director, it would be necessary to determine

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whether the disqualifications prescribed in any of the clauses of Section 164(1) are actually applicable to the director concerned.

26. By contrast, Section 164(2) deals with disqualifications that arise not on account of a personal disability or default but on account of default by a company, i.e. the Defaulting Company, in which such person is a director. Thus, clause (a) of Section 164(2) deals with failure by the Defaulting Company in filing financial statements or annual returns for any continuous period of three financial years; and clause (b) thereof deals with failure by the Defaulting Company to: repay deposits; pay interest on deposits; redeem debentures on the due date or pay interest thereon; and to pay dividend within the stipulated period. In both cases, such default is attributed to the directors of the Defaulting Company who stand disqualified as a consequence.

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27. Hence, in order to apply and enforce Section 164(2), it is necessary to attribute the default of the Defaulting Company to specific directors. This raises the question as to whether CA 2013 or the rules framed thereunder contain the criteria for such attribution of responsibility for

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default. The only guidance that Section 164(2) contains is that such disqualification could apply either to a current or former director of the Defaulting Company as is evident from the phrase “person who is or has been a director” in Section 164(2). We should, therefore, turn to the AQD Rules to ascertain whether it is possible, on that basis, to identify the directors who would incur disqualification under Section 164(2). Rule 14 of the AQD Rules is as under:

> **"Rule 14:Disqualification of directors under sub-section (2) of section 164**:
>
> (1) Every director shall inform to the company concerned about his disqualification under sub-section (2) of section 164, if any, in Form DIR-8 before he is appointed or re-appointed.
>
> (2) Whenever a company fails to file the financial statements or annual returns, or fails to repay any deposit, interest, dividend, or fails to redeem its debentures, as specified in sub-section (2) of section 164, the company shall immediately file Form DIR-9, to the Registrar furnishing therein the names and addresses of all the directors of the company during the relevant financial years.
>
> (3) When a company fails to file the Form DIR-9, within a period of thirty days of the failure that would

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attract the disqualification under sub-section (2) of Section 164, officers of the company specified in clause (60) of section 2 of the Act shall be the officers in default.

(4) Upon receipt of the Form DIR-9 under sub-rule (2), the Registrar shall immediately register the document and place it in the document file for public inspection.

(5) Any application for removal of disqualification of directors shall be made in Form DIR-10."

Rule 14(2) of the AQD Rules specifies that the Defaulting Company shall file Form DIR-9 immediately upon the occurrence of default in complying with Section 164(2) with the names and addresses of the directors during the relevant period. If this is not done within 30 days, Rule 14 (3) specifies that persons defined as officers of the company in Section 2(60) would be the officers in default, and would consequently be liable for disqualification. Section 2(60) of CA 2013 contains a definition of an "officer who is in default" and self-evidently deals with all officers in default and not only directors. The clauses therein that deal with directors are as under:

"Section 2(60) "officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to

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any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:-

(i) whole-time director;

(ii) Key managerial personnel;

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has given his or their consent in writing to the Board to such specification, or to all the directors, if no director is so specified;

....

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the dame, or where such contravention had taken place with his consent or connivance;"

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As is evident from Section 2(60), as regards directors, the relevant categories are: a whole-time director; key managerial personnel; where there is no key managerial personnel, every specified director or every director if not so specified; or every director who is aware of the contravention by virtue of receipt of or participation in board proceedings or if the contravention has taken place with his consent or connivance. From the cases that emanated from Section 5 of CA 1956, which dealt with "an officer who is in default", it is evident that the application of Section 2(60) of CA 2013 to a set of specific directors, even in the context of Section 164(2), would not be devoid of dispute and contest.

28. When Section 164(2) of CA 2013 is read with Rule 14 of the AQD Rules, it appears that, if Form DIR-9 is filed, the Registrar of Companies could rely on the names and addresses of directors that were provided by the Defaulting Company. Such reliance may not, however, be bereft of controversy especially when neither statute nor rule sets out the criteria for the preparation of such list. In any event, in all the cases at hand, such a list was not provided because the Defaulting Company did not file DIR-9. In such case, Rule 14(3) provides for resort to Section 2(60) of CA

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2013. As stated above, on perusal thereof, it is evident that the statutory prescription is generic except with regard to the managing director and whole-time director and, consequently, insufficient to fix responsibility and attribute the default to a specific set of directors. As a corollary, an enquiry would be necessary. However, the scope of enquiry under Section 164(2) would vary from that under Section 164(1). In specific, the first question under Section 164(2) would be whether the company concerned has defaulted in fulfilling the obligations specified in Clauses (a) or (b). As regards Section 164(2)(a), the learned ASGI contended that this determination would be fairly straight forward. While this contention has some basis, such determination may not necessarily be devoid of challenge as would be evident from the following. As per the proviso to Section 96 (1) of CA 2013, the first annual general meeting (AGM) may be held by a company within nine months from the last date of the preceding financial year and the subsequent AGM's within six months from the last date of the preceding financial year. The time limit for filing the financial statements runs from the date of AGM and Section 137(1) of CA 2013 provides that the same should be filed within 30 days from the date of the AGM. Consequently, the prescribed time limit for filing the financial statements

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would vary depending on the date of AGM and, as a corollary, the date of default in filing the financial statements would also vary, including with reference to whether it is the first AGM or a subsequent AGM. It could become even more complicated if the AGM is not held as the time limits would run from the last date prescribed for holding the AGM in such situation. As regards the annual return, as per Section 92(4) of CA 2013, it is required to be filed within sixty days of the AGM. Once again, the date of default would vary depending on the date of AGM as also if the AGM is not held.

29. For purposes of Section 164(2), the default has to extend across three consecutive financial years. Therefore, such determination of default would necessarily have to be preceded by the fixation of the relevant period. From the impugned disqualification list, the disqualification period runs from 1.11.2017 to 31.10.2022, except with regard to the appeal filed by Mr. Muralidharan where the disqualification period runs from 01.11.2016-31.10.2022. The following details are available in the disqualification list : ROC details; name and DIN of the director; the name and Company Identification Number (CIN) of the company; whether the company is active

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or struck-off; whether the director is disqualified; and the period of disqualification. The criteria on which the disqualified list of directors was prepared is unavailable and even the default period is conspicuously absent. From the limited information on record, by inferential reasoning, except in the appeal filed by Mr.Muralidharan, it appears that the financial years 2014-15 to 2016-17, i.e. a block of three consecutive financial years, were reckoned for this purpose. All these years relate to the period after the entry into force of Section 164 of CA 2013. Nevertheless, the matter does not rest there. Once such determination is made, the next question would be as to who were the directors of the company concerned during the relevant period. This is a much more complicated issue to determine in the absence of clear statutory stipulation.

30. The reasons why this question is complicated should be discussed now, and for this purpose, the same financial years 2014-15 to 2016-17 may be used as the test case. As discussed above, the AGM is required to be held within a period of six months from the date of completion of the relevant financial year. Thus, for the financial year 2014-15, on the assumption that the financial year ends on 31st March, such

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financial year would run from 01.04.2014 to 31.03.2015; the company concerned is entitled to hold the AGM on or before 30th September 2015 provided it is not the first AGM, and file the financial statements within 30 days from the date of the AGM. The same position would prevail in the financial year 2015-16 and 2016-17. In order to decide attribution for the purpose of Section 164(2)(a), a material question would be as to who were the directors during the relevant period. Some of the plausible criteria on which responsibility may be attributed are as under:

(i) All directors who held office throughout the period from 01.04.2014 to 31.10.2017;

(ii) All directors who held office throughout the period from 01.04.2014 to 31.03.2017;

(iii) All directors who held office at any time during the period 01.04.2014 to 31.10.2017;

(iv) All directors who held office at any time during the period 01.04.2014 to 31.03.2017;

(v) All directors who held office on 31.10.2017; or

(vi)All directors who held office on 31.03.2017

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31. In each of the above illustrations, the director concerned could set up an arguable and potentially reasonable defence. For example, in illustration (i), assuming that the director was appointed after 31.03.2017, the director could contend that he/she was not a director during any of the three relevant financial years; and in illustration (ii), assuming the director resigned on 31.03.2017, he/she could contend with some force that he/she would have ensured that the financial statements would have been filed if he/she had continued in office until 31.10.2017. Likewise, in illustration (iii) assuming the director concerned resigned on 30.09.2014, he/she could legitimately contend that he/she cannot be held responsible when he/she resigned during the course of the first of the three relevant financial years.

32. The situation is as complicated in the context of non-filing of annual returns. As stated earlier, companies are permitted to hold the AGM within six months after the close of the preceding financial year. Thus, a company whose financial year ends on 31st March can hold its AGM on or before 30th September of that year. The time limit for filing the annual returns runs from the date of AGM and the prescribed time limit is sixty days therefrom. Consequently, the annual return can be filed on or before

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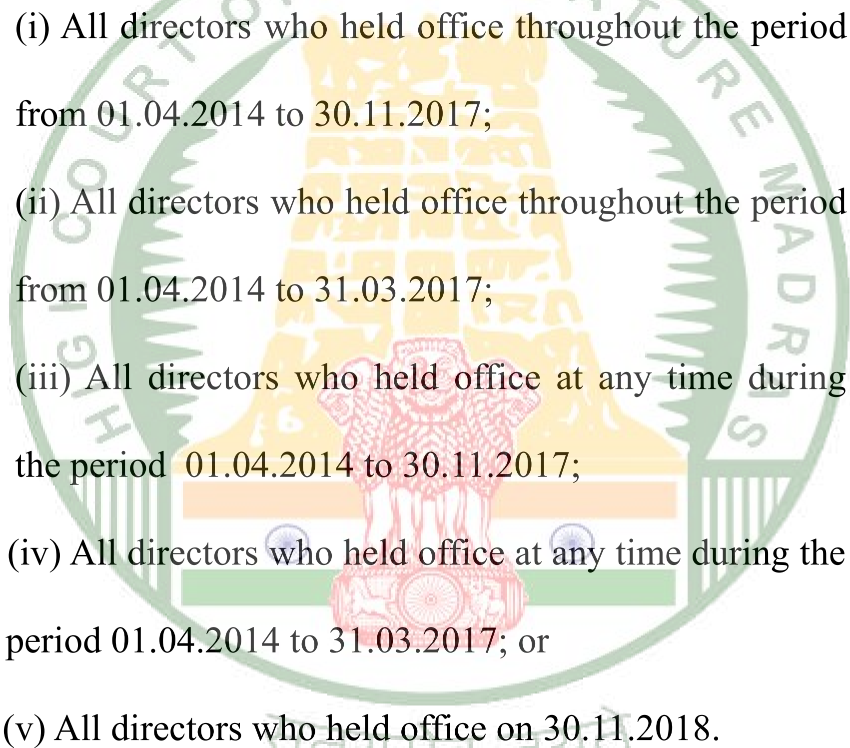
30th November of the relevant year. Thus, in order to determine as to who were the directors during the relevant time, once again, several options are available. By way of illustration, the plausible criteria to decide on attribution could be any of the following:



(i) All directors who held office throughout the period from 01.04.2014 to 30.11.2017;

(ii) All directors who held office throughout the period from 01.04.2014 to 31.03.2017;

(iii) All directors who held office at any time during the period 01.04.2014 to 30.11.2017;

(iv) All directors who held office at any time during the period 01.04.2014 to 31.03.2017; or

(v) All directors who held office on 30.11.2018.

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In the second illustration above, if certain directors had resigned prior to 30.11.2017, they would have an arguable case to contend that they should not incur disqualification because they could have made good the default if they had continued in office until 30.11.2017. Similarly, in illustration (iii) above, the directors who were appointed after 31.03.2017 would also have a

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reasonable basis to contend that they should not be made liable for the default inasmuch as they assumed office after the conclusion of the three financial years in question.

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 stated 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

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possibility of only one conclusion or the absence of prejudice, as laid down in **S.L. Kapoor 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.

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 preceding paragraphs.

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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:

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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

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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

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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

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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;

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(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.

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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

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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

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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

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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.

(A.P.S.,CJ,) **(S.K.R.,J,)**
09.10.2020

Speaking Order

Index :Yes

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THE HON'BLE CHIEF JUSTICE
and
SENTHILKUMAR RAMAMOORTHY J.,

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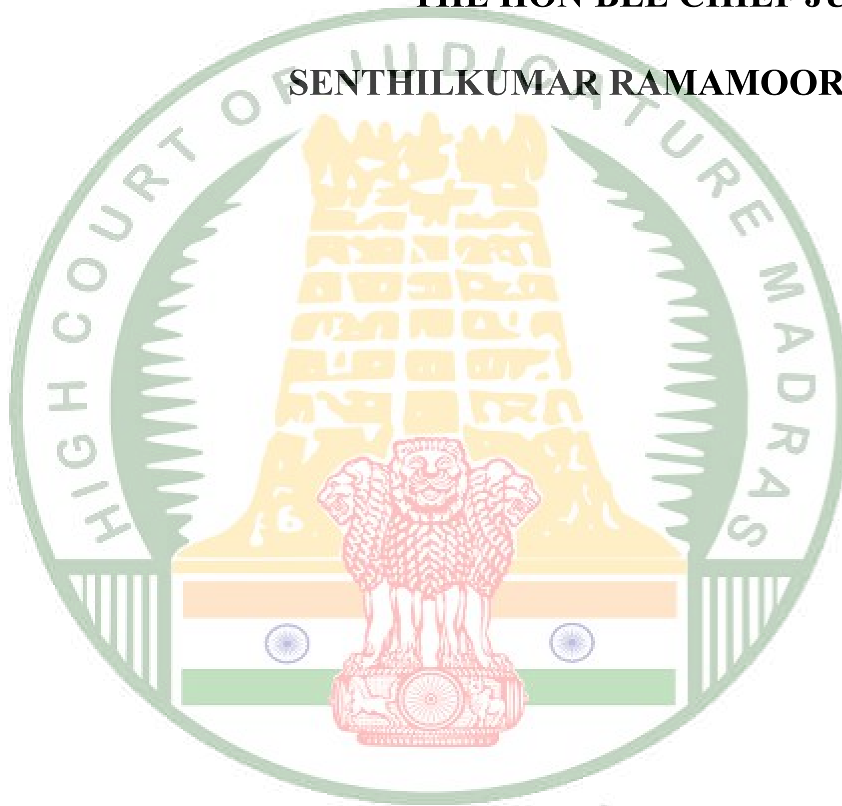

Pre-Delivery Common Judgment in

Writ Appeal Nos.569, 718, 720, 721, 841 and 842 of 2020 & CMP. Nos.8122, 9787, 10648 & 10649 of 2020

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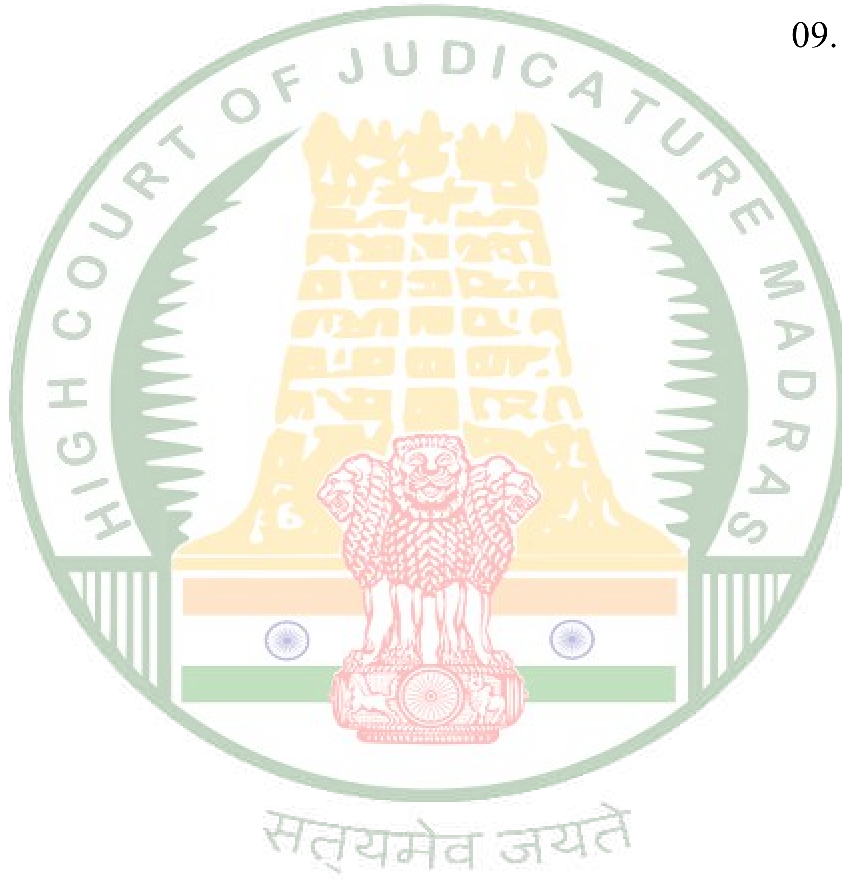

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