IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

W.P.A. No. 8450 of 2021

Satya Narayan Banik & Ors.
Versus
Union of India & Ors.

Mr. Rajarshi Dutta,
Mr. Sayantan Bose,
Mr. Rahul Podder,
Ms. A. Banerjee.
Mrs Anyapurba

...For the petitioners.

Mr. Avinash Kankani,
Mr. Siddhartha Lahiri.

...For the UOI.

Hearing Concluded On : 02.02.2022

Judgment On : 11.02.2022

Rajasekhar Mantha, J.

1. The writ petitioners are aggrieved by cessation of office as directors of one M/s. Hahnemann International Pvt. Ltd. The disqualification happened by operation of Section 164 (2) for not filing balance sheets and annual returns for a continuous period of three years from the year 2014-15. The ROC has also deactivated the Director Identification Number of the petitioners for which the

petitioners are aggrieved by. The petitioners have advanced a three-fold argument challenging such disqualification.

(i) That they were not permitted to avail the benefit of the "Company's Fresh Start Scheme of 2020" despite applying by letter dated 11th November, 2020.

(ii) That the petitioners were not afforded a prior hearing before the disqualification as a directors and were hence denied principles of Natural Justice.

(iii) The Registrar of Companies is not authorized to deactivate their Director Identification Numbers (DIN) of the and that such activation of DIN pursuant to the disqualification is not automatic.

2. A large number of decisions have been cited by Mr. Rajarshi Dutta, Learned counsel for the petitioner, Viz. **M. K. Meethelaveetil Kaitheri Muralidharan Vs. Union of India, Represented by its Secretary, Ministry of Corporation Affairs and Another** of a Division Bench of Madras High court reported in **2020 SCC OnLine Madras 2958**; **Jai Shankar Agrahari Vs. Union of India** reported in **2020 SCC OnLine Allahabad 24** and **Imraj Ali Molla Vs. Union of India & Ors**. reported in **2020 SCC OnLine Calcutta 669**.

3. Counsel for the respondents Mr. Avinash Kankani and Mr. Siddhartha Lahiri argued that the petitioners have not claimed

that they are directors of any other companies hence the effects of Section 167 (1)(a) cannot prejudice the petitioners. It is argued that the excuses given by the petitioners for non-filing of balance sheet and annual returns from the year ending 31st March 2015 are not convincing. The reason given by the petitioners is that they had left the job of filing returns and balance sheet to one Moinak Kundu, an accountant of their company. The said accountant did not file the same despite having filed Income Tax and GST returns. The petitioners have not disclosed any action taken against the said Moinak Kundu in this regard. The illness of the petitioner No. 2 is also cited as a ground for not filing the annual returns and balance sheet from the year ending 2015.

4. As for the company's fresh start scheme of 2020, it is submitted by the Mr. Kankani and Mr. Lahiri that the scheme was enforced until 31st December, 2020. By a further circular dated 15th January, 2021 and the Ministry of Corporate Affairs has clarified that the fresh start scheme of 2020 was no longer applicable for filing under the Companies Act, 2013. Reliance is placed by Counsel for the Respondents on a decision of **Gautam Mehra Vs. Union of India & Ors**. being judgement dated 15th October, 2020 passed by a Co-ordinate Bench in WPA No. 22790 of 2019 and **Naresh Kumar Poddar Vs. Union of India, through Secretary, Ministry of Corporate Affairs and Anr.**

Dated 5th January, 2020 in WPO No. 493 of 2019. The respondents also relied upon in the case of **G. Vasudevan Vs. Union of India** passed by a Division Bench of Madras High Court reported in **2019 SCC Online Madras 9631** and the case of **Yashodhara Shroff Vs. Union of India** being a Single Bench decision of Karnataka High Court reported in **2019 SCC OnLine Karnataka 682**.

5. This Court has heard the counsel for the parties at length. The reason given by the petitioners for failing to file annual returns and balance sheet after the year ended on 31st March, 2005, is rather frivolous. A director is a responsible officer of the company and is expected to act with diligence and urgency.

6. To leave the responsibility of filing balance sheet and annual returns on an accountant of company is not only irresponsible but amounts to wilful negligence. It is difficult to accept that, the petitioners are diligent enough in filing Income Tax and GST returns but not Balance Sheets and Annual Returns. The illness of the petitioner No.2 cannot be a reason for not filing return for a continuous period of three years. No proof of evidence of such illness has been disclosed in the petition. It is essentially to deter conduct of this nature that Section 164 (2) and 167 (1)(a) have been introduced and applied under the Companies Act, 2013. Hence even on facts the petitioners have not made out any case for relief.

7. Let us now examine as to whether the petitioners were entitled to any prior notice before disqualification under Section 164 (2). It has been held in the case of **Naresh Kumar Poddar (supra)** by a Co-ordinate Bench at Paragraph 25 thereof that since the disqualification under Section 164 (2) and 167 (1)(a) is automatic, by operation of law and leaving no discretion on the authorities, the question of application of principle of natural justice particularly prior hearing does not and cannot arise. In **Gautam Mehra (supra)**, Co-ordinate Bench has also held at Paragraph 92 and 93 that Section 164 (2) and 167 (1) (a), do not call for any prior notice or hearing. The question of applying principle of natural justice, therefore, cannot arise.

8. The language object and purpose of the aforesaid two provisions of the Act of 2013 are clear and explicit and provide for automatic consequences. There are no exceptions. There is no scope of condonation or curing the omission. The Rules of Natural Justice cannot therefore be read into the process of application and operation of Section 164 (2) and 167 (1) of the said Act. The views of the Single Bench of the Karnataka High Court in this regard are well considered and set out hereinbelow.

> **"119.** The object and purpose of making such a provision in the Act need not be reiterated as it has been discussed while answering point No. 1 above, particularly with reference to the judgments of the Bombay and Gujarat High Courts. When the

making of such a provision is justified, the consequences for non-compliance of the same must follow. In this regard the discussion on point No. 1 above is relevant and apposite. There may be a plethora of reasons for non-compliance of Section 164(2) of the Act, the section is not concerned with those reasons, justification or explanations leading to non-compliance of Section 164(2)(a) or (b). The existence of the circumstances mentioned under Section 164(2)(a) or (b) of the Act are sufficient for the directors of defaulting company to be visited with an ineligibility for re-appointment albeit, vicariously.

120. Thus, when the ineligibility for being appointed as a director of the defaulting company or in all the companies is for a period of five years from the date of the default is by operation of law, there is no necessity to give a prior hearing or comply with the provisions of *audi alteram partem* before such consequences visit a director of such a company. The ineligibility is in the nature of suspension of a director for a period of five years. Therefore, in my view, the need to hear a director of a company before the ineligibility to be reappointed as a director of a company in default or to be appointed in any other company on account of default of a company in which he is a director, for a period of five years from the date of default of the company is rightly not envisaged under Section 164(2) of the Act. Even in the absence of a prior hearing the section is valid and not in violation of Article 14 of the Constitution.

121. However, the controversy does not end, as a contention raised by Learned Senior Counsel, Sri Holla is, if not a prior hearing at least a provision for a post-decisional hearing ought to be read into Section 164(2) of the Act. In other words, the question is, whether, a post-disqualification hearing, i.e., the need to hear a director who has been disqualified under Section 164(2) of the Act, is envisaged under Section 164(2) of the Act? The Hon'ble Supreme Court has propounded the notion of post-decisional hearing, if, for certain reasons, a pre-decisional hearing cannot be envisaged. The leading cases in this regard are *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597] and *Swadeshi Cotton Mills* v. *Union of India* [(1981) 1 SCC 664 : AIR 1981 SC 818] .

122. Learned Senior Counsel Dr. Aditya Sondhi placed reliance on *D.K. Yadav* v. *J.M.A. Industries Ltd.* (supra) to contend that the Hon'ble Supreme Court has observed, where a private employer terminated an employee under Certified Standing Orders, due to absence from duty without or beyond the period of sanctioned leave for more than eight days, it is a case of automatic termination which is in violation of principles of natural justice and a duty to act in just, fair and reasonable manner, must be read into Standing Orders. That termination under the Standing Orders without holding any domestic

enquiry or affording any opportunity to the workman was held to be violative of principles of natural justice. Drawing my attention to Clause 13(2)(iv) of the Standing Orders therein, he contended that under the said Standing Orders, an opportunity to explain to the employer his reasons for absence or inability to return to duty on the expiry of leave was provided and therefore, the principles of natural justice was read into the same. Otherwise, it would be arbitrary, unjust and unfair violating Article 14 of the Constitution.

123. Reliance was also placed on *Hyderabad Karnataka Education Society* v. *Registrar of Societies*, (supra) wherein it was held that under Rule 7(A) of the appeUant/Society therein, if an ordinary member did not pay his annual subscription in advance in the month of December and in case of his failure to pay subscription before the end of March of any year, he automatically ceased to be a member of the Society therein, was contrary to Section 2(b) of the Karnataka Societies Registration Act, 1960. In order to save the Rule from the vice of unreasonableness and arbitrariness, it was held that it would be open to the alleged defaulter-ordinary member, to point out to the society relevant grounds or defence before the year in question ran out, and if his defence was accepted by the authorities concerned of the society, then his membership would not be hit by the provisions of Rule 7(A). The Hon'ble Supreme Court stated that if an opportunity would be given to the defaulting member to show sufficient cause for non-payment of dues and once such a case is made out by a defaulting member to the satisfaction of the society then he would not have incurred automatic cessation of his membership for that year.

124. It was also thus contended by the Learned Senior Counsel that at least a post-disqualification hearing must be provided under Section 164(2) of the Act after a director is visited with disqualification on the circumstances stated under the said provision. However, the aforesaid cases deal with termination from employment or cessation of membership of a society, as the case may be, in which circumstances, principles of natural justice must be complied with. But the present case is not one of cessation of directorship permanently, but it is only a suspension for a period of five years on the coming into existence the circumstances mentioned in the section. It is by operation of law and not by passing of an administrative order by exercise of discretion. No order disqualifying a director of a defaulting company need be made. It is not by an administrative process but by a legislative intent and by operation of law.

125. Reliance has also been placed on another decision of the Hon'ble Supreme Court in the case of *C.B. Goutam* v. *Union of India* [(1993) 1 SCC 78] , wherein the constitutional validity of Chapter XX-C of the Income Tax Act, 1961 was questioned.

Section 269-UD of the said Act permitted compulsory purchase by the Central Government of immoveable property. The said provision did not contain an opportunity to be heard before an order for compulsorily purchase of property by the Central Government was made. Although, Chapter XX-C did not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase was made under Section 269-UD of the said Act, by quoting Judge Learned Hand of the United States of America, it was observed, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C "to make a fortress out of the dictionary". The Hon'ble Supreme Court observed that an opportunity to show cause must be given before an order for purchase by the Central Government was made by an appropriate authority under Section 269-UD and same must be read into Chapter XX-C. it was observed that even if the reasons must be recorded in writing before the purchase is made under Section : 269-UD, the same is not a substitute for a provision requiring a reasonable opportunity of being heard, before such an order is made. It was held that the requirement of an opportunity to show cause being given before an order for purchase by the Central Government was made by an appropriate authority under Section 269-UD must be read into the provisions of Chapter XX-C and that there was nothing in the language of Section 269-UD or any other provision in the said Chapter which would negate such an opportunity of being heard is given. If such a requirement was not read into the provisions of the said Chapter, it would be open for challenge on the ground of violation of Article 14 on the ground of non-compliance with principles of natural justice. By holding so, the vires of the said provision was upheld.

126. The aforesaid judgment is also not applicable to the present case as in the aforesaid case, an order had to be made giving reasons before taking action under Section 269-UD of the Income Tax Act, 1961. But under the Act, the ineligibility to be re-appointed or appointed as a director, as the case may be, is by operation of law. It affects the entire class of directors of all defaulting companies. It does not affect an individual director or any particular company as such. It is also not necessary to pass any administrative order disqualifying a director of a defaulting company. As already observed it is by operation of law as per the intention of Parliament. Further, the consequence is temporary, for a period of five years and not a permanent one.

127.*Swadeshi Cotton Mills* v. *Union of India*, (supra), is a leading judgment on post-decisional hearing. In the said case, the facts were that on 13.04.1978, the Government of India, in exercise of power under Section 18-AA(1)(a) of the Industries (Development and Regulation) Act, 1951, passed an order for taking over the management of Swadeshi Cotton Mills Limited by the National Textile Corporation Limited, stating that the Central Government

was satisfied from the documentary and other evidence in its possession, that the persons in charge of the six industrial undertakings, had, by creation of encumbrances on the assets of the said industrial undertakings, brought about a situation which had affected and was likely to further affect the production of articles manufactured or produced in the said industrial undertakings and that immediate action was necessary to prevent such a situation. The company assailed the said order on the ground that compliance of principle of *audi alter partem* was in-built in Section 18-AA(1) of the said Act and its non-observance had vitiated the order. The Hon' ble Supreme Court by a majority judgment held that the provision did not exclude *audi alteram* partem rule and observed that it was not reasonably possible to construe Section 18-AA(1) of the said Act as universally excluding either expressly or by an inevitable intendment, the application of *audi alteram partem* rule of natural justice at the pre-taking-over stage, regardless of the facts and circumstances of the particular case. However, in the said case, Hon'ble Chinnappa Reddy, J., dissented by observing that the exclusion of natural justice, where such exclusion is not express, has to be implied by reference to the subject, the statute and the statutory situation. Where an express provision in the statute itself provides for a post-decisional hearing, the other provisions of the statute will have to be read in light of said provision and the provision for post-decisional hearing may then clinch the issue where pre-decisional natural justice appears to be excluded on the other terms of the statute.

128. In *Sahara India (Firm), Lucknow* v. *Commissioner of Income Tax, Central-I*, (supra), the question was whether in every case where the assessing officer issues a direction under Section 142(2)(a) of the Income Tax Act, 1961, the assessee has to be heard before such an order is passed. After referring to the development of law on the principles of natural justice, it was held that Section 142(2)(a) of the said Act led to serious civil consequences and therefore, even in the absence of express provision for affording an opportunity of a pre-decisional hearing to an assessee, the requirement of observance of principles of natural justice had to be read into the said provision. In the said case, it was held that the proceedings before an assessing officer are deemed to be judicial proceedings.

129. In *Institute of Chartered Accountants of India* v. *L.K. Ratna*, (supra), the question, inter alia, was whether a member of the Institute of Chartered Accountants of India was entitled to a hearing by a Council of the Institute after the Disciplinary Committee had submitted its report to the Council of its enquiry into allegations of misconduct against the member. It was held that a member accused of misconduct was entitled to a hearing by the Council when, on receipt of report of the Disciplinary Committee, it proceeded to find whether he is or is not guilty.

> **130.** However, one significant aspect noted is that a post-decisional hearing is envisaged when a decision making authority in the first instance makes a decision which is tentative and after giving an affected person a right of hearing, makes a final decision. In other words, a post-decisional hearing is normally envisaged in the exercise of administrative power. But, the question is as to whether a postdisqualification hearing is envisaged when a consequence occurs on account of an operation of law as in Section 164(2) of the Act. Having regard to the object and reasons of having a provision in the nature of Section 164(2) of the Act, in my view, even a post-decisional hearing, is not contemplated. Hence, in my view the need to provide or read the requirement of a post-disqualification hearing under Section 164(2) of the Act also does not arise.
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> **131.** The reasons for the same are not far to see. In the circumstances, it is held that Section 164 of the Act applies by operation of law on the basis of circumstances stated therein. The said provision does not contemplate any hearing, either pre or post-disqualification hearing. In fact, no decision in the nature, of administrative or quasi-judicial decision is envisaged. It is by operation of law on the occurrence of the circumstances mentioned in Section 164(2) of the Act the publication of the list of disqualified directors is only a ministerial Act and not by-an administrative process involving the making of a decision on the facts, by application of law or by exercise of discretion; it is neither an adjudicatory process. The disqualification is by operation of law on an emerging and coming into existence of a set of facts. There is no legal infirmity in the said provision as there is no violation of principles of natural justice and Article 14 of the Constitution is not violated. Accordingly, point No. 2 is answered against the petitioners."

9. The object and purpose of Section 164(2) and 167(1) is indeed laudable. It is aimed at ensuring good governance and maintenance of high standards of probity and protection of the interest of Shareholders. Transparency in the activities of Companies is very vital for ensuring an enduring business atmosphere in an economy.

10. Upholding the constitutional vires of Section 164 (2) and 167 (1) (a) and the companies introduced subsequently, a Single Bench of

Karnataka High Court in **Yashodhara Shroff (supra)** decision has also held at paragraph 138 that the said Sections are not ultra vires for not incorporating the principles of natural justice. The said decision of **Yashodhara Shroff (supra)** has been upheld by a Division Bench of the Madras High Court in **G.Vasudevan (supra)** where it was held that Section 167 (1) (a) of the Companies Act, 2013 as amended by Companies (amendment) Act, 2017 is not untra vires under Article 14 or 19 (1) (9) of the Constitution of India.

11. The views of the DB of the Madras High Court in the Vasudevan decision are set out hereinbelow.

> **"15.** As stated above, Section 164(2) is nearly identical to, and has borrowed from, Section 274(1)(g) of the Companies Act 1956, the object and purpose of these two Sections can be accepted as being the same. It is thus vital to analyse the justification behind Section 274(1)(g) of the erstwhile Companies Act. In this regard, reference can be made to two judgments one of the Gujarat High Court in *Saurashtra Cement Ltd.* v. *Union of India*, (2006) SCC OnLine Guj 258 and the other of the Bombay High Court in *Snowcem India Ltd.* v. *Union of India*, (2004) SCC OnLine Bom 1085. In both these cases, the vires of Section 274(1)(g) was challenged as being violative of the fundamental rights enshrined in the Constitution of India. In the former judgment the Section was challenged claiming violation of Article 14 of the Constitution of India and in the later, it was also challenged as being violative of Articles 14,19, 21 as well as the principles of natural justice. The statement of object and reasons behind Section 274(1)(g) of the Companies Act 1956 has been referred to in paragraph 15,16 and 17 of the former judgment are as follows:—
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> > *"…**15.** The Statement of Objects and Reasons for enactment of section 274(1)(g) reads a under:*
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> > *"The Government introduced a comprehensive Companies Bill, 1997 in Rajya Sabha on August 14, 1997, and the same was referred to standing committee of Parliament for examination and report thereon. The process of examination, however, is not yet over and is till to take some more time. The passing of this Bill is thus likely to be delayed further. It is however considered desirable by the Government that some more important changes in the Companies Act, 1956, are brought*

out in order to provide immediately certain measures for good corporate governance and for protection of investors. These measures are as follows… (xiv) to provide that in case of a public company which does not file annual accounts and annual returns continuously for the last three years, the directors of such companies will be debarred from becoming the director of other public companies for five years. Similarly, in the case of any public company which fails to repay its depositors on maturity of deposit amount/debentures, dividend and interest on deposits/debentures on due dates. The whole-time directors of defaulting companies as on such date will be debarred from becoming a director of any other public company for a period of five years."

16. According to newly amended Act, a person shall not be capable of being appointed "director" of a company, if such person is already a director of a public company which has not filed annual accounts and annual returns for any continuous three financial years commencing on and after the first date of April 1998, or has failed to repay its deposits or interest thereon or redeem its debentures on due date or pay dividend and such failure continue for one year or more and such person shall not be eligible to be appointed as a director of any other public company for a period of 5 years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns under sub-clause (a) or has failed to repay its deposits or interest or redeem its debentures on due date or pay dividend referred to in clause (b). The purpose of the amendment is to disqualify certain person from directorship in public companies. The intention and the purpose of the above amendment is to disqualify errant directors, protect the investors from mismanagement, ensure compliance in filing of annual accounts and annual returns. The purpose of the said provision is as such not to punish those who are disqualified but to save the community from the consequences of mismanagement and also to prescribe some standards of corporate managership. It appears that the primary purpose of the disqualification is not to punish the individual but to protect the public against future conduct by person whose past record as directors shows a great danger to creditors and others. Failure is often a sign of incompetence from which the community should be protected. Thus, considering the Statement of Objects and Reasons, what emerges is that the above amendment will ensure proper governance of companies, transparency in working of companies and also ensure more effective enforcement. The said provision has been enacted with the intention and purpose of:

(i) disqualifying errant directors;

(ii) protecting the investors from mismanagement;

(iii) ensuring compliance and filing of annual accounts and annual returns which are the means of disclosure to all stakeholders;

(iv) increasing compliance rate of filing statutory documents; and

(v) infusing good corporate governance in the regulations of corporate affairs and to protect the interest of the investors.

17. *The vires of section 274(1)(g) of the Companies Act came to be considered by the Division Bench of Bombay High Court in the case of* Snowcem India Ltd. *v.* Union of India, *[2005] 124 Comp Cas 161 : [2005] 60 SCL 50, and the Division Bench of the High Court has upheld the vires of section 274(1)(g) of the Companies Act by holding that:*

"(1) The Statement of Objects and Reasons for enactment of section 274(1)(g) is for better corporate governance and protection of investment of the depositors. Such amendment would ensure transparency in the functioning of the company and would lead to the protection of investment and investors for better corporate governance. According to the wisdom of the Legislature, this can be achieved by enhancing penalty/punishment for contribution so as to ensure better compliance with the provision of the Act;

(2) Article 21 of the Constitution is not at all attracted;

(3) Section 274(1)(g) of the Act does not violate the directors' fundamental rights guaranteed under article 19(1)(g) of the Constitution of India. The amendment does not debar the petitioners from carrying on any business, trade or occupation, only that the person have been rendered incapable of becoming directors in other companies and the said amendment became imperative in view of a large number of companies becoming defaulters;

(4) The said amendment does not violate the rules of natural justice;

(5) Section 274(1)(g) does not penalize the company. It is only the directors who are rendered incapable of functioning as directors for certain period. The amendment has been carried out primarily to ensure that directors of the company discharge their obligation properly. They should be more vigilant and careful and ensure that investors do not lose their life time savings;

(6) Once a person becomes a director, it is his primary duty to ensure that there is proper governance and investors' money is protected;

(7) The amendment is not violative of article 14;

(8) Amendment to section 274(1)(g) has been made primarily in larger public interest to protect large number of investors, particularly small and poor investors who had invested their

life time savings with these companies and in majority of the case neither principal amount nor interest is paid."

(emphasis supplied)

17. A perusal of the above extract reveals that the Bombay High Court in *Snowcem India Ltd.* v. *Union of India*, has held that Section 274(1)(g) of the Companies Act 1956, would not violate Article 19 or 14 of the Constitution of India as it does not restrict an individual's freedom to carry on his business, trade or occupation, does not create any unreasonable classification and merely acts as a penal measure in cases where a Director has failed to carry out his duties. Additionally it held that Section 274(1)(g) of the Companies Act 1956, was a necessary provision as it was in the interest of ensuring good corporate governance and transparency.

18. Further, Gujarat High Court in *Saurashtra Cement Ltd.* v. *Union of India*, (2006) SCC OnLine Guj 258, at paragraph 24 and 27 held as under:—

*"…**24.** It is also the submission on behalf of the petitioners that section 274(1)(g) is ultra vires the statement of objects and reasons and/or the above provision has no nexus to the objects sought to be achieved, namely good corporate governance and protection of the investors. Section 274(1)(g), is reproduced hereinabove and the statement of objects and reason is also reproduced hereinabove. The primary object of enactment of section 274(1)(g) is better corporate governance as well as protection of investment of the depositors. The intention and purpose of the above amendment is to disqualify the errant directors and to protect the investors from mismanagement. The amendment becomes absolutely imperative to protect large number of investors, particularly small and poor investors who had invested their life time savings with such companies and in majority of the cases neither the principal amount nor the interest is paid back. It is an admitted position that so far as petitioner No. 1 company is concerned, the said company is unable to redeem the debentures which fell due on September 30, 2003. Thus, it cannot be said that section 274(1)(g) has no nexus to the objects sought to be achieved, namely good corporate governance and protection of investors.*

*…**27.** So far as the submission on behalf of the petitioners that a person may be a director in many companies and some companies may be profit making company and some company may be loss making company and therefore to disqualify a director to be a director of other profit making companies or becoming a director of a company which is unable to repay the deposits or redeem the debentures, has no nexus with the statement of objects and reasons, i.e., to protect the interest of investors and/or it will not be in the interest of a loss making company and such directors either will be disqualified and/or prior thereto they will resign and therefore the management of the loss making company will be in the hands of those persons who know nothing about the business, operation and*

management of the company. It is required to be noted that on the aforesaid ground a provision of a statute cannot be declared "ultra vires". One has to consider the very provision of the statute and the purpose for the said provision. The purpose is to see that under the threat of the aforesaid provision, the whole board of directors may act vigilantly and may see to it that the company is revived and the affairs of the company are managed in such a manner that ultimately deposits are repaid and/or debentures are redeemed. Otherwise, no company would try to improve their affairs and ultimately try to protect the interest of the investors. The purpose of the provision is not to punish those who are so disqualified only but to save the community from the consequences of mismanagement and to protect the public against future conduct of persons whose past records as directors shows them to be a danger to creditors and others. The hon'ble Supreme Court in R.K. Garg *v.* Union of India, *(1981) 4 SCC 675, 690 : [1982] 133 ITR 239, has held as under (page 255):*

> *"… laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes J., that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in the case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved…*

The court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry; that exact wisdom and nice adaption of remedy are not always possible and that judgment is largely a prophecy based on meagre and uninterpreted experience. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts, cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture *v.* Central Reig Refining Co., *[1950] 94 L. Ed. 381, be converted into tribunals for relief from such crudities and inequities If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact*

> *suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues."*
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> **19.** A perusal of the above extract makes it clear that Section 274(1)(g) of the Companies Act 1956 was made to protect investors rights and to ensure that Directors of companies act vigilantly in preventing any misfeasance or discrepancy which may affect investors and the public. It is thus held that the underlying object of Section 274(1)(g) is facilitating good corporate governance and it cannot be declared unconstitutional without considering the purpose that the provision serves."

12. It appears to this Court that the decision of **G. Vasudevan (supra)** was not placed before the Division Bench of the Madras High Court which delivered the **M. K. Muralidharan decision (supra)**.

13. This Court is in very respectful agreement with the views of the Single Bench of the Karnataka High Court in **Yashodhara Shroff (supra)** and Division Bench of Madras High Court in **G. Vasudevan (supra)**. A Special Leave petition against the decision of the DB in Vasudevan Case being SLP © 11072 of 2020 has been dismissed by the Hon'ble Supreme Court on 20th November 2020.

14. The Court is also inclined to and approves the views taken by Co-ordinate Benches of this Court in **Naresh Kumar Poddar (supra)** and **Gautam Mehra (supra).** This Court is unable to agree with the views of the Co-ordinate Bench in the case of **Imraj Ali Molla (supra)**. This Court with respect is in disagreement with the views of the Allahabad High Court in **Jai Shankar Agrahari (supra)** and the Madras High Court in the **M. K. Muralidharan case (supra)**.

15. This Court is of the view that the object and purposes of Section 164 and 167, as amended is to ensure probity and the highest standard of

governance in Companies both public and private. A failure to file balance sheet and the annual returns for three consecutive years amounts to deliberate and wilful negligence. The public at large dealing with such companies cannot be put to the uncertainty, whim and fancy of recalcitrant directors. After all the requirements and compliances mandated under the Companies Act, are not only for the benefit of the shareholders of a particular company but also for the public at large, which rely upon such compliances, in assessing the conduct of and in deciding their relations with such companies.

16. This Court is also of the view that the provisions of the 2013 Act have an overriding effect on the Companies (Appointment and Qualifications of Director) rules of 2014. The said rules can, therefore, not have any manner of application or confer in right on the petitioners, insofar as their disqualification as directors.

17. On the power of the ROC to deactivate the DIN of the petitioners it would be necessary to go into whether the provisos to the two Section 164(2) and 167(1), introduced subsequently by amendment. The issue has been discussed at length in the **Yashodhara decision (supra)**. This Court cites with agreement and approval the said views taken at paragraphs 195 to 200 of the said decision.

> **"195.** I find considerable force in the argument of petitioners' counsel as, on 01.11.2016, when the petitioners were disqualified, while they had to vacate the office of the director, it necessarily referred to the defaulting company under Section 164(2) of the Act. But, realizing the fact that if all the directors in the defaulting company had to vacate office, then such Board of

Directors would be bereft of directors and would lead to an absurd situation, the proviso was inserted to the effect that a director of a defaulting company shall not vacate office of the director in the defaulting company. Therefore, the said portion of the proviso could be construed to be clarificatory in nature and therefore, would have a retrospective effect.

196. But, while saying so, the proviso also states that a director of a defaulting company would vacate office of the director in all other companies in which he is a director. The same was not envisaged under Section 167(1)(a) of the Act prior to insertion of the proviso, but by the insertion of the proviso such an immediate consequence is also envisaged. It has also been held above that such a consequence cannot be held to be arbitrary or in violation of Article 14 and 19(1) of the Constitution, but the proviso having come into force on 07th May 2018 cannot have a retrospective operation so as to affect the petitioners herein who were all disqualified on 01.11.2016 i.e., prior to 07th May 2018. That, on account of such disqualification, they cannot be made to vacate the office of the director in all other companies in which they are directors while continuing as a director in the defaulting company. That part of the proviso has to be construed to be prospective and it would imply that the petitioners herein would continue as directors of the defaulting company and would not have to vacate office of the director in all other companies in which they are directors. The proviso would therefore apply only to those directors who sustain disqualification subsequent to 07.05.2018 when the proviso was introduced. Consequently, under Section 167(1)(a) of the Act, a director of a defaulting company who has been disqualified prior to 07.05.2018 would not have to vacate his office of such a company or in any other company. Further, the petitioners who were also protected by the interim order passed by this Court would continue to be the directors of the defaulting company till their term of office ends.

197. In the result, point No. 6 is answered by holding that the proviso to Section 167(1)(a) of the Act is not *ultra vires* Articles 14 and 19(1)(g) of the Constitution. The words **"provided that where he incurs disqualification under sub-Section (2) of Section 164, the office of the director shall become vacant……, other than the company which is in default under that sub-Section"** being clarificatory in nature has retrospective operation, while the words **"in all the companies"** being introduced for the first time by way of proviso, pursuant to Amendment Act, 2017, has prospective operation and the proviso would apply only to those directors who sustain a disqualification pursuant to 07.05.2018. While saying so, the doctrine of severability as applicable to interpretation of statutes is applied.

> **198.** In view of the fact that under the proviso to Section 167(1) (a) of the Act, the director of a defaulting company continues to hold the office of Director despite disqualification, his DIN cannot be cancelled. On the issue of cancellation of DIN, reference was made to Companies (Appointment and Qualification of Directors) Rules, 2014. Under Rule 14, the consequences of disqualification of directors under Section 164(2) of the Act are mentioned. That every director shall inform to the company concerned about his disqualification under sub-Section (2) of Section 164 of the Act in Form DIR-8 before he is appointed or re-appointed. Further, 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 address of all the directors of the Company during the relevant financial year.
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> **199.** That cancellation or surrender or deactivation of DIN is stipulated in Rule 11. It is contended that Rule 11 does not permit cancellation of or deactivation of DIN on account of disqualification of a director under Section 164(2) of the Act at all. That DIN could be cancelled on account of the death of a director or a director being declared as a person of unsound mind by a competent Court or being adjudicated as a insolvent or for other reasons, but, not for suffering a disqualification under Section 164(2) of the Act.
>
> **200.** I find sufficient force in the contention of the Learned Counsel for the petitioners in that regard. Hence, DIN cannot be cancelled on account of a disqualification sustained under Section 164(2) of the Act, but at the same time the company must comply with filing Form DIR-9. Point Nos. 5 and 6 are accordingly answered."

18. It is, therefore, held that deactivation of the DIN of the petitioners is not automatic.

19. In view of the above the DIN of the petitioners shall be revived subject to the company having filed DR-9 within prescribed or extended time. The said DIN shall not be applied to entitle the petitioners to act as directors in any other company.

20. The writ petition is, therefore, allowed to the limited extent indicated hereinabove.

21. There shall be no order as to costs.

22. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(*Rajasekhar Mantha, J.*)