HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD
(Special Original Jurisdiction)

MONDAY, THE THIRTY FIRST DAY OF AUGUST
TWO THOUSAND AND TWENTY

PRESENT
THE HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION NO: 13436 OF 2020

Between:

1. Smt. Kalyani Polavaram, W/o. Sri. Polavaram Vanamali Aged about 69 years, R/o. Plot No.564/A/12, Road No.92, Near NTV Office, Jubilee Hills, Hyderabad, Telangana-500033.
2. Smt. Praneeta Polavaram, D/o. Sri. Polavaram Vanamali Aged about 43 years, R/o. Plot No.564/A/12, Road No.92, Near NTV Office, Jubilee Hills, Hyderabad, Telangana-500033.
3. Sri. Polavaram Vanamali, S/o. Sri. Polavaram Rangiah Naidu Aged about 74 years, R/o. Plot No.564/A/12, Road No.92, Near NTV Office, Jubilee Hills, Hyderabad, Telangana-500033.

...PETITIONERS

AND

1. The Ministry of Corporate Affairs, Government of India, A Wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi, Delhi 110001.
2. The Registrar of Companies, (Telangana) 2nd Floor, Corporate Bhawan, GSI Post, Tattiannaram Nagole, Bandlaguda, Hyderabad-500 068.

...RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to pass an order or direction or any other proceedings one in the nature of Writ of Mandamus declaring the action of the respondent in so far as deactivating the Director Identification Number of Petitioner No.1 to 3 i.e., DIN. 00863486 of Petitioners No.1, DIN 03377755 of Petitioner No.2 and DIN 01292305 Petitioners No.3, as arbitrary, illegal, without jurisdiction, contrary and violative of the principles of natural justice besides violating the Petitioners rights guaranteed under Article 14 and Article 19 (1) (g) of the Constitution of India and by setting a side the same and consequently direct the respondents to restore / reactivate the Director identification Number of Petitioner No.1 to 3 i.e., DIN. 00863486 of Petitioners No.1, DIN 03377755 of Petitioner No.2 and DIN 01292305 Petitioners No.3 respectively which enables them to file statutory returns in active companies

IA NO: 1 OF 2020

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to stay the disqualification of directorship of the petitioners by activating the DINs of Petitioner DIN: 00863486 of Petitioners No.1, DIN 03377755 of Petitioner No.2 and DIN 01292305 Petitioners No.3, pending disposal of the above writ petition.

Counsel for the Petitioners : SRI P.ANIL MUKHERJI

Counsel for the Respondents : SRI NAMAVARAPU RAJESHWAR RAO
ASSISTANT SOLICITOR GENERAL

The Court made the following: ORDER

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Writ Petition No.13436 OF 2020

ORDER:

Learned counsel for the petitioner as well as Sri Namavarapu Rajeshwar Rao, learned Assistant Solicitor General of India, appearing for the respondents submits that the *lis* in this Writ Petition is squarely covered by the Common Orders of this Court in WP No.5422 of 2018 & batch, dated 18.07.2019.

In view of the same and for the reasons alike in the Common Order in WP No.5422 of 2018 & batch, dated 18.07.2019, this Writ Petition is also allowed.

There shall be no order as to costs. As a sequel thereto, miscellaneous applications, if any, pending in this Writ Petition, shall stand disposed of.

SD/-N.CHANDRA SEKHAR RAO
ASSISTANT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To

1. The Ministry of Corporate Affairs, Government of India, A Wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi, Delhi 110001.
2. The Registrar of Companies, (Telangana) 2nd Floor, Corporate Bhawan, GSI Post, Tattiannaram Nagole, Bandlaguda, Hyderabad-500 068.
3. One cc to Sri P.Anil Mukherji, Advocate [OPUC]
4. One cc to Sri Namavarapu Rajeshwar Rao (Assistant Solicitor General) [OPUC]
5. Two CD Copies
   (along with a copy of Common Order dated 18/07/2019 in WP No.5422 of 2018 and batch)

Kj.

HIGH COURT

DATED:31/08/2020

ORDER

WP.No.13436 of 2020

Allowing the Writ Petition without costs.

(6) vvv 4/9/20

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

W.P.NOs.5422, 12184, 13520, 13783, 13855, 14166, 24051, 30993, AND 40953 OF 2018, 5547, 5582, 5669, 5687, 5785, 6047, 6087, 6140, 6484, 6753, 6858, 6958, 6981, 7001, 7008, 7014, 7046, 7069, 7073, 7105, 7432, 7454, 7572, 7595, 7732, 7765, 7768, 7824, 7978, 8111, 8223, 8586, 8590, 9333, 9340, 9381, 9468, 9563, 9584, 9623, 9726, 9737, 10058, 10099, 11208, 11223, 11239, 11263, 11889, 11991, 12018, 12036, 12040, 12069, 12108, 12144, 12186, 12194, 12200, 12209, 12215, 12217, 12243, 12260, 12262, 12288, 12342, 12350, 12417, 12432, 12472, 12498, 12506, 12574, 12598, 12621, 12702, 12735, 12740, 12845, 12850, 12865, 12866, 13013, 13618, 13730, 13749, 13779, 13788, 13839, 13855, 13878, 13912, 13917, 13945, 14101, 14174, 14207, 14350, 14361, 14390, 14392, 14397, 14409, 14582 AND 14597 OF 2019

COMMON ORDER

Since, the issue involved in all the writ petitions is one and the same, they are heard together and are being disposed of by this common order.

2. The petitioners are the directors of the private companies, registered under the Companies Act, 2013 (18 of 2013) (for short 'the Act'). Some of the such companies are active, and some of them have been struck off from the register of companies under Section 248(1)(c) of the Act, for not carrying on any business operation for the specified period mentioned in the said provision, and for not making any application within the specified period, for obtaining the status of a dormant company under Section 455 of the Act.

3. The petitioners, who were directors of the struck off companies, and who are presently directors of active companies, during the relevant period in question, failed to file financial statements or annual returns for a continuous period of three years. Therefore, the 2nd respondent passed the impugned order under Section 164(2) of the Act, disqualifying them as directors, and further making them ineligible to be re-appointed as directors of that company, or any other company, for a period of five years from the date on which the respective companies failed to do so. The Director Identification Numbers (DINs) of the petitioners were also deactivated. Aggrieved by the same, the present writ petitions have been filed.

4. This court granted interim orders in the writ petitions directing the 2nd respondent to activate DINs of the petitioners, to enable them to function other than in strike off companies.

5. Heard the learned counsel appearing for the petitioners in all the writ petitions, Sri K.Lakshman, learned Assistant Solicitor General appearing for the respondents – Union of India.

6. Learned counsel for the petitioners, contend that before passing the impugned order, notices have not been issued, giving them opportunity, and this amounts to violation of principles of natural justice, and on this ground alone, the impugned orders are liable to be set aside.

7. Learned counsel submits that Section 164(2)(a) of the Act empowers the authority to disqualify a person to be a director, provided he has not filed financial statements or annual returns of the company to which he is director, for any continuous period of three financial years. Learned counsel further submits that this provision came into force with effect from 1.4.2014, and prior thereto i.e., under Section 274(1)(g) of the Companies Act, 1956 (1 of 1956), which is the analogous provision, there was no such requirement for the directors of the private companies. They contend that this provision under Act 18 of 2013, will have prospective operation and hence, if the directors of company fail to comply with the requirements mentioned in the said provision subsequent to the said date, the authority under the Act, is within its jurisdiction to disqualify them. But in the present cases, the 2nd respondent, taking the period prior to 1.4.2014, i.e., giving the provision retrospective effect, disqualified the petitioners as directors, which is illegal and arbitrary.

8. With regard to deactivation of DINs, learned counsel for the petitioners submit that the DINs, as contemplated under Rule 2(d) of the Companies (Appointment and Qualification of Directors), Rules, 2014 (for

short 'the Rules), are granted for life time to the applicants under Rule 10(6) of the said Rules, and cancellation of the DIN can be made only for the grounds mentioned in clauses (a) to (f) under Rule 11 of the Rules, and the said grounds does not provide for deactivation for having become ineligible for appointment as Directors of the company under Section 164 of the Act. Learned counsel further submits that as against the deactivation, no appeal is provided under the Rules, and appeal to the Tribunal under Section 252 of the Act is provided only against the dissolution of the company under Section 248 of the Act.

9. Learned counsel further submits that 1st respondent - Government of India represented by the Ministry of Corporate Affairs, has floated a scheme dated 29.12.2017 viz., Condonation of Delay Scheme - 2018, wherein the directors, whose DINs have been deactivated by the 2nd respondent, allows the DINs of the Directors to be activated. However, such scheme is not applicable to the companies which are struck off under Section 248(5) of the Act. In case of active companies, they can make application to National Company Law Tribunal under Section 252 of the Act, seeking for restoration, and the Tribunal can order for reactivation of DIN of such directors, whose DIN are deactivated. However, under Section 252 only the companies, which are carrying on the business, can approach the Tribunal and the companies, which have no business, cannot approach the Tribunal for restoration. They submit that since the penal provision is given retrospective operation, *de hors* the above scheme, they are entitled to invoke the jurisdiction of this court under Article 226 of the Constitution of India.

10. With the above contentions, learned counsel sought to set aside the impugned orders and to allow the writ petitions.

11. On the other hand learned Assistant Solicitor General submits that failure to file financial statements or annual returns for any continuous period

of three financial years, automatically entail their disqualification under Section 164(2)(a) of the Act and the statute does not provide for issuance of any notice. Hence, the petitioners, who have failed to comply with the statutory requirement under Section 164 of the Act, cannot complain of violation of principles of natural justice, as it is a deeming provision. Learned counsel further submits that the petitioners have alternative remedy of appeal under Section 252 of the Act, and hence writ petitions may not be entertained.

12. To consider the contention of the learned Assistant Solicitor General with regard to alternative remedy of appeal under Section 252 of the Act, the said provision is required to be considered, and the same is extracted as under for better appreciation:

> **252. Appeal to Tribunal**:
>
> (1) Any person aggrieved by an order of the Registrar, notifying a company as dissolved under Section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies;
>
> Provided that before passing an order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned:
>
> Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under Section 248, file an application before the Tribunal seeking restoration of name of such company.
>
> (2) A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.
>
> (3) If a company, or any member or creditor or worker thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal or an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of Section 248, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company has not been struck off from the register of companies.

A reading of above provision goes to show that if the company is dissolved under Section 248 of the Act, any person aggrieved by the same, can file an appeal. Thus the said provision provides the forum for redressal against the dissolution and striking off the company from the register of companies. It does not deal with the disqualification of the directors, and deactivation of their DINs. In the present case, the petitioners are only aggrieved by their disqualification as directors and deactivation of DINs, but not about striking off companies as such. Hence, Section 252 of the Act, cannot be an alternative remedy for seeking that relief, and the contention of the learned Assistant Solicitor General, in this regard, merits for rejection.

13. Under Section 164(2)(a) of the Act, if the Director of a company fails to file financial statements or annual returns for any continuous period of three financial years, he shall not 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. The said provision under the Act 18 of 2013, came into force with effect from 01.04.2014, and the petitioners are disqualified as directors under the said provision. At this stage, the issue that arises for consideration is - whether the disqualification envisaged under Section 164(2)(a) of the Act, which provision came into force with effect from 01.04.2014, can be made applicable with prospective effect, or has to be given retrospective operation? In other words, the issue would be, from which financial year, the default envisaged under Section 164(2)(a) of the Act, has to be calculated, to hold the director of the company liable? In this regard, the learned counsel brought to the notice of this Court, the General Circular No.08/14 dated 4.4.2014 issued by the Ministry of Corporation affairs, which clarifies the applicability of the relevant financial years. The relevant portion of the said circular is as under:

> "A number of provisions of the Companies Act, 2013 including those relating to maintenance of books of account, preparation, adoption and filing of financial statements (and documents required to be attached thereto), Auditors reports and the Board of Directors report (Board's report) have been brought into force with

effect from 1st April, 2014. Provisions of Schedule II (useful lives to compute depreciation) and Schedule III (format of financial statements) have also been brought into force from that date. The relevant Rules pertaining to these provisions have also been notified, placed on the website of the Ministry and have come into force from the same date.

The Ministry has received requests for clarification with regard to the relevant financial years with effect from which such provisions of the new Act relating to maintenance of books of account, preparation, adoption and filing of financial statements (and attachments thereto), auditors report and Board's report will be applicable.

Although the position in this behalf is quite clear, to make things absolutely clear it is hereby notified that the financial statements (and documents required to be attached thereto), auditors report and Board's report in respect of financial years that commenced earlier than 1st April shall be governed by the relevant provisions/schedules/rules of the Companies Act, 1956 and that in respect of financial years commencing on or after 1st April, 2014, the provisions of the new Act shall apply."

A reading of the above circular makes it clear the financial statements and the documents required to be attached thereto, auditors report and Board's report in respect of financial years that commenced earlier than 01.04.2014, shall be governed by the provisions under the Companies Act, 1956 and in respect of financial years commencing on or after 01.04.2014, the provisions of the new Act shall apply.

14. At this stage it is required to be noticed that the analogous provision to Section 164(2)(a) of the Act 18 of 2013, is Section 274(1)(g) of Act 1 of 1956. The said provision under Act 1 of 1956 is extracted as under for ready reference:

Section 274(1) A person shall not be capable of being appointed director of a company, if –

...

(g) such person is already a director of a public company which, -

(A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or

(B) ....

Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of five 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).

A reading of the above provision under Act 1 of 1956, makes it clear that if a person capable of being appointed director of a company and 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 day of April 1999, shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns. So the statutory requirement of filing annual accounts and annual returns, is placed on the directors of a 'public company'. There is no provision under the Act 1 of 1956, which places similar obligations on the directors of a 'private company'. Therefore, non-filing of annual accounts and annual returns by the directors of the private company, will not disqualify them as directors under the provisions of Act 1 of 1956.

15. Under Section 164(2) of the new legislation i.e., Act 18 of 2013, no such distinction between a 'private company' or a 'public company' is made and as per the said provision goes to show that no person who is or has been a director of a 'company', fails to file financial statements or annual returns for any continuous period of three financial years, will not be eligible for appointment as a director of a company. As already noted above, the said provision, came into force with effect from 01.04.2014.

16. Coming to the facts on hand, the 2nd respondent has disqualified the petitioners under Section 164(2)(a) of the Act 18 of 2013, for not filing financial statements or annual returns, for period prior to 01.04.2014. The action of the 2nd respondent runs contrary to the circular issued by the Ministry of the Corporate Affairs, and he has given the provisions of Act 18 of 2013, retrospective effect, which is impermissible.

17. The Apex Court in ***COMMISSIONER OF INCOME TAX (CENTRAL)-I, NEW DELHI v. VATIKA TOWNSHIP PRIVATE LIMITED***[1] has dealt with the general principles concerning retrospectivity. The relevant portion of the judgment is thus:

> 27. A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However,

[1] (2015)1 SCC1

conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-à-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arises by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cheriflen des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [(1994) 1 Ac 486]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note that cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association, [(2005) 7 SCC 396], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors., [(2006) 6 SCC 289]. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (*sic* not) confronted with any such situation here.

31. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attached towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.

43. There is yet another very interesting piece of evidence that clarifies that provision beyond any pale of doubt viz., the understanding of CBDT itself regarding this provision. It is contained in CBDT Circular No.8 of 2002 dated 27.8.2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to section 113 was made. In this circular, various amendments to the Income tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective.

> For example, Explanation to section 158-BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with the amendments in Section 158-BE, would be prospective i.e., will take effect from 1.6.2002."

18. Thus, the Apex Court in the above judgment, has made it clear that unless a contrary intention appears, a legislation has to be presumed to have prospective effect. A reading of Section 164 of the Act does not show that the legislation has any intention, to make the said provision applicable to past transactions. Further, the Apex Court in the above judgment at paragraph No.43, found that the circular issued by the authority after passing of the legislation, clarifying the position with regard to applicability of the provisions, has to be construed as an important piece of evidence, as it would clarify the provision beyond any pale of doubt. In the present case, as already noted above, the Ministry of Corporation affairs has issued the circular No.08/2014 dated 4.4.2014 clarifying that financial statements commencing after 01.04.2014, shall be governed by Act 18 of 2013 i.e., new Act and in respect of financial years commencing earlier to 01.04.2014, shall be governed by Act 1 of 1956. At the cost of repetition, since in the present cases, as the 2nd respondent / competent authority, has disqualified the petitioners as directors under Section 164(2)(a) of the Act 18 of 2013, by considering the period prior to 01.04.2014, the same is contrary to the circular, and also contrary to the law laid down by Apex Court in the above referred judgment.

19. If the said provision is given prospective effect, as per the circular dated 4.4.2014 and the law laid down by the Apex Court, as stated in the writ affidavits, the first financial year would be from 01-04-2014 to 31.03.2015 and the second and third years financial years would be for the years ending 31.03.2016 and 31.03.2017. The annual returns and financial statements are to be filed with Registrar of Companies only after the conclusion of the annual general meeting of the company, and as per the first

proviso to Section 96(1) of the Act, annual general meeting for the year ending 31.03.2017, can be held within six months from the closing of financial year i.e., by 30.09.2017. Further, the time limit for filing annual returns under Section 92(4) of the Act, is 60 days from annual general meeting, or the last date on which annual general meeting ought to have been held with normal fee, and within 270 days with additional fee as per the proviso to Section 403 of the Act. Learned counsel submit that if the said dates are calculated, the last date for filing the annual returns would be 30.11.2017, and the balance sheet was to be filed on 30.10.2017 with normal fee and with additional fee, the last date for filing annual returns is 27.07.2018. In other words, the disqualification could get triggered only on or after 27.07.2018. But the period considered by the 2nd respondent in the present writ petitions for clothing the petitioners with disqualification, pertains prior to 01.04.2014. Therefore, when the omission, which is now pointed out, was not envisaged as a ground for disqualification prior to 1.4.2014, the petitioners cannot be disqualified on the said ground. This analogy is traceable to Article 20(1) of the Constitution of India, which states that *"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence"*. In view of the same, the ground on which the petitioners were disqualified, cannot stand to legal scrutiny, and the same is liable to be set aside.

20. A learned Single Judge of the High Court of Karnataka in ***YASHODHARA SHROFF vs. UNION OF INDIA***[2] considering Section 164(2)(a) of the Act and other provisions of the Act, and various judgments, passed an elaborate order and held that the said provision has no retrospective operation. The observations of the learned Judge, pertaining to

[2] W.P.No.52911 of 2017 and batch dated 12.06.2019

private companies, which are relevant for the present purpose, are extracted as under:

> 208. In view of the aforesaid discussion, I have arrived at the following conclusions:
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> (a) It is held that Section 164(2)(a) of the Act is not *ultra virus* Article 14 of the Constitution. The said provision is not manifestly arbitrary and also does not fall within the scope of the doctrine of proportionality. Neither does the said provision violate Article 19(1)(g) of the Constitution as it is made in the interest of general public and a reasonable restriction on the exercise of the said right. The object and purpose of the said provision is to stipulate the consequence of a disqualification on account of the circumstances stated therein and the same is in order to achieve probity, accountability, and transparency in corporate governance.
>
> (b) That Article *(sic)* Section 164(2) of the Act applies by operation of law on the basis of the circumstances stated therein, the said provision does not envisage any hearing, neither pre-disqualification nor post-disqualification and this is not in violation of the principles of natural justice, is not *ultra vires* Article 14 of the Constitution.
>
> (c) That Section 164(2) of the Act does not have retrospective operation and is therefore, neither unreasonable nor arbitrary, in view of the interpretation placed on the same.
>
> (d) . . .
>
> (e) Insofar as the private companies are concerned, disqualification on account of the circumstances stated under Section 164(2)(a) of the Act has been brought into force for the first time under the Act and the consequences of disqualification could not have been imposed on directors of private companies by taking into consideration any period prior to 01.04.2014 for the purpose of reckoning continuous period of three financial years under the said provision. The said conclusion is based on the principal drawn by way of analogy from Article 20(1) of the Constitution, as at no point of time prior to the enforcement of the Act, a disqualification based on the circumstances under Section 164(2) of the Act was ever envisaged under the 1956 Act vis-à-vis directors of private companies. Such a disqualification could visit a director of only a public company under Section 274(1)(g) of 1956 Act and never a director of a private company. Such disqualification of the petitioners who are directors of private companies is hence quashed.
>
> (f) . . .
>
> (g) Consequently, where the disqualification under Section 164(2) of the Act is based on a continuous period of three financial years commencing from 01.04.2014, wherein financial statements or annual returns have not been filed by a public or private company, the directors of such a company stand disqualified and the consequences of the said disqualification would apply to them under the Act.
>
> . . . .

21. A learned Single of the High Court of Gujarat at Ahmedabad in ***GAURANG BALVANTLAL SHAH S/O BALVANTLAL SHAH vs. UNION OF INDIA***[3] expressed similar view as that of the leaned single Judge of High Court of Karnataka (1 supra), and held that Section 164(2) of the Act of 2013, which had come into force with effect from 1.4.2014 would have prospective, and not retrospective effect and that the defaults contemplated under Section 164(2)(a) with regard to non-filing of financial statements or

[3] r/Special Civil Application No.22435 of 2017 and batch dated 18.12.2018

annual returns for any continuous period of three financial years would be the default to be counted from the financial year 2014-15 only and not 2013-14.

22. A learned single Judge of the High Court of Madras in ***BHAGAVAN DAS DHANANJAYA DAS vs. UNION OF INDIA***[4] also expressed similar view. The relevant portion is as under:

> 29. In fine,
>
> (a) When the New Act 2013 came into effect from 1.4.2014, the second respondent herein has wrongly given retrospective effect and erroneously disqualified the petitioner – directors from 1.1.2016 itself before the deadline commenced wrongly fixing the first financial year from 1.4.2013 to 31.3.2014.
>
> (b) By virtue of the new Section 164(2)(a) of the 2013 Act using the expression 'for any continuous period of three financial year" and in the light of section 2(41) defining "financial year" as well as their own General circular No.08/14 dated 4.4.2014, the first financial year would be from 1.4.2014 to 31.3.2015, the second financial year would be from 1.4.2015 to 31.3.2016 and the third financial year would be from 1.4.2016 to 31.3.2017, whereas the second respondent clearly admitted in paras 15 and 22 of the counter affidavit that the default of filing statutory returns for the final years commences from 2013-14, 2014-15 and 2015-16 i.e, one year before the Act 2013 came into force. This is the basic incurable legal infirmity that vitiates the entire impugned proceedings.
>
> . . .

23. In view of the above facts and circumstances and the judgments referred to supra, as the impugned orders in present writ petitions disqualifying the petitioners as directors under Section 164(2)(a) of the Act, have been passed considering the period prior to 01.04.2014, the same cannot be sustained, and are liable to be set aside to that extent.

24. As far as the contention regarding issuance of prior notice before disqualifying the petitioners as directors is concerned, Section 164(2)(a) is required to be noticed, and the same is extracted as under for ready reference:

> **164. Disqualification for appointment of director:**

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[4] W.P.No.25455 of 2017 and batch dated 27.07.2018

> (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) . . .
>
> Shall be eligible to be re-appointed as a director of that company or appointed in other companies for a period of five years from the date on which the said company fails to do so.

A reading of the above provision makes it clear that it provides disqualification on happening of an event i.e., if a person who is or has been a director of a company has not filed financial statements or annual returns for any continuous period of three financial years, shall be ineligible to be re-appointed as a director of that company or appointed in any other company for a period of five years from the date on which the said company fails to do so. The provision does not provide for issuance of any prior notice or hearing. A learned single Judge of the High Court of Karnataka in Yashodara Shroff v. Union of India (1 supra), as well as the learned single Judge of the High Court of Gujarat at Ahmedabad in Gaurang Balvantlal Shah s/o Balvantlal Shah vs. Union of India (2 supra), after analyzing various provisions of the Act and Rules framed thereunder, and by relying on various judgments of the Apex Court, held that Section 164(2)(a) of the Act applies by operation of law on the basis of the circumstances stated therein, the said provision does not envisage any hearing, neither pre-disqualification nor post-disqualification and this is not in violation of the principles of natural justice and hence, is not *ultra vires* Article 14 of the Constitution. I concur with the said reasoning.

25. Thus, from the above, it is clear that Section 164(2)(a) of the Act is a deeming provision and the disqualification envisaged under the said provision comes into force automatically by operation of law on default and Legislature did not provide for issuance of any prior notice, but the respondents notified disqualification even before it incurred, and deactivated DINs, which is illegal arbitrary and against provisions contained in Section 164(2)(a) of the Act.

26. The next grievance of the petitioners is with regard to deactivation of their DINs. The contention of the learned counsel for the petitioners is that except for the grounds mentioned under Rule 11 (a) to (f) of the Rules, the DINs cannot be cancelled or deactivated, and the violation mentioned under Section 164(2)(a) of the Act, is not one of the grounds mentioned under clauses (a) to (f) of Rule 11, and hence for the alleged violation under Section 164(2)(a) of the Act, DIN cannot be cancelled.

27. Rule 10 of the Rules provide for allotment of DIN and under sub rule (6) of Rule 10, it is allotted for life time. Rule 11 provides for cancellation or deactivation. Rule 11, which is relevant for the present purpose, is extracted as under for ready reference:

> **11. Cancellation or surrender or deactivation of DIN**: The Central Government or Regional Director (Northern Region), Noida or any officer authorized 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) the DIN was obtained in a wrongful manner or by fraudulent means;
> (c) of the death of the concerned individual;
> (d) the concerned individual has been declared as a person of unsound mind by a competent Court;
> (e) if the concerned individual has been adjudicated an insolvent;
>
> Provided that before cancellation or deactivation of DIN pursuant to clause (b), an opportunity of being heard shall be given to the concerned individual;
>
> (f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN;
>
> Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.
>
> Explanation: for the purposes of clause (b) -
>
> (i) The terms "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.

28. Clauses (a) to (f) of Rule 11, extracted above, provides for the circumstances under which the DIN can be cancelled or deactivated. The said grounds, are different from the ground envisaged under

Section 164(2)(a) of the Act. Therefore, for the alleged violation under Section 164 of the Act, DINs cannot be cancelled or deactivated, except in accordance with Rule 11 of the Rules.

29. Learned Single Judge of the Gujarat High Court in the decision cited 2 supra, held as under:

> "29. This takes the Court to the next question as to whether the respondents could have deactivated the DINs of the petitioner as a consequence of the impugned list? In this regard, it would be appropriate to refer to the relevant provisions contained in the Act and the said Rules. Section 153(3) provides that no person shall be appointed as a Director of a company, unless he has been allotted the Director Identification Number under Section 154. Section 153 requires every individual intending to be appointed as Director of a Company to make an application for allotment of DIN to the Central Government in such form and manner as may be prescribed. Section 154 states that the Central Government shall within one month from the receipt of the application under Section 153 allot a DIN to an applicant in such manner as may be prescribed. Section 155 prohibits any individual, who has already been allotted a DIN under Section 154 from applying for or obtaining or possessing another DIN. Rules 9 and 10 of the said Rules of 2014 prescribe the procedure for making application for allotment and for the allotment of DIN, and further provide that the DIN allotted by the Central Government under the said Rules would be valid for the life time of the applicant and shall not be allotted to any other person.
>
> 30. Rule 11 provides for cancellation or surrender or deactivation of DIN. Accordingly, the Central Government or Regional Director or any authorized officer of Regional Director may, on being satisfied on verification of particulars of documentary proof attached with an application from any person, cancel or deactivate the DIN on any of the grounds mentioned in Clause (a) to (f) thereof. The said Rule 11 does not contemplate any *suo motu* powers either with the Central Government or with the authorized officer or Regional Director to cancel or deactivate the DIN allotted to the Director, nor any of the clauses mentioned in the said Rules contemplates cancellation or deactivation of DIN of the Director of the "struck off company" or of the Director having become ineligible under Section 164 of the said Act. The reason appears to be that once an individual, who is intending to be the Director of a particular company is allotted DIN by the Central Government, such DIN would be valid for the life time of the applicant and on the basis of such DIN he could become Director in other companies also. Hence, if one of the companies in which he was Director, is "struck off", his DIN could not be cancelled or deactivated as that would run counter to the provisions contained in the Rule 11, which specifically provides for the circumstances under which the DIN could be cancelled or deactivated.
>
> 31. In that view of the matter, the Court is of the opinion that the action of the respondents in deactivating the DINs of the petitioners – Directors along with the publication of the impugned list of Directors of "struck off" companies under Section 248, also was not legally tenable. Of course, as per Rule 12 of the said Rules, the individual who has been allotted the DIN, in the event of any change in his particulars stated in Form DIR -3 has to intimate such change to the Central Government within the prescribed time in Form DIR-6, however, if that is not done, the DIN could not be cancelled or deactivated. The cancellation or deactivation of the DIN could be resorted to by the concerned respondents only as per the provisions contained in the said Rules."

30. In view of the above facts and circumstances and the judgment referred to supra, the deactivation of the DINs of the petitioners for alleged violations under Section 164 of the Act, cannot be sustained.

31. For the foregoing reasons, the impugned orders in the writ petitions to the extent of disqualifying the petitioners under Section 164(2)(a) of the Act and deactivation of their DINs, are set aside, and the 2nd respondent is directed to activate the DINs of the petitioners, enabling them to function as Directors other than in strike off companies.

32. It is made clear that this order will not preclude the 2nd respondent from taking appropriate action in accordance with law for violations as envisaged under Section 164(2) of the Act, giving the said provision prospective effect from 01.04.2014 and for necessary action against DIN in case of violations of Rule 11 of the Rules.

33. It is also made clear that if the petitioners are aggrieved by the action of the respondents in striking off their companies under Section 248 of the Act, they are at liberty to avail alternative remedy under Section 252 of the Act.

34. All the writ petitions are accordingly allowed to the extent indicated above.

35. Interlocutory applications pending, if any, shall stand closed. No order as to costs.

A.RAJASHEKER REDDY,J

DATE: 18—07—2019
AVS