IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.11.2019

\+ **W.P.(C) 9088/2018 &CM Appln. No.35006/2018**

MUKUT PATHAK & ORS. ..... Petitioner

versus

UNION OF INDIA AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr Vaibhav Dang, Advocate.

For the Respondents: Ms Shiva Lakshmi, CGSC and Mr Vikram Jetley, CGSC and Mrs Bharathi Raju, CGSC and Mr Siddharth Singh, Mr Sriram Krishna, Ms Maya Narula, Advocates for UOI.

WITH

\+ **W.P.(C) 4353/2018 & CM Appln. No.16864/2018**

YOGESH KHANTWAL ..... Petitioner

versus

UNION OF INDIA AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr Aseem Malhotra, Advocate.

For the Respondents: Ms Shiva Lakshmi, CGSC and Mr Vikram Jetley, CGSC and Mrs Bharathi Raju, CGSC and Mr Siddharth Singh, Mr Sriram Krishna, Ms Maya Narula, Advocates for UOI.

Mr Ruchir Mishra, Mr Sanjiv Kumar Saxena, Mr M.K. Tiwari, Mr Ramneek Mishra and Mr Abhishek Rana, Advocates for UOI.

WITH

\+ **W.P.(C) 4352/2018**

AARTI KHANTWAL ..... Petitioner

versus

UNION OF INDIA AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr Aseem Malhotra, Advocate.

For the Respondents: Ms Shiva Lakshmi, CGSC and Mr Vikram Jetley, CGSC and Mrs Bharathi Raju, CGSC and Mr Siddharth Singh, Mr Sriram Krishna, Ms Maya Narula, Advocates for UOI.

Mr Ruchir Mishra, Mr Sanjiv Kumar Saxena, Mr M.K. Tiwari, Mr Ramneek Mishra and Mr Abhishek Rana, Advocates for UOI.

WITH

\+ **W.P.(C) 3658/2019& CM Appln. No.23830/2019**

VINEET WADHWA ..... Petitioner

versus

UNION OF INDIA AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr Indraneel Ghosh, Ms Vinita Sahaitya and Mr Kaushik Mandal, Advocates.

For the Respondents: Ms Shiva Lakshmi, CGSC and Mr Vikram Jetley, CGSC and Mrs Bharathi Raju, CGSC and Mr Siddharth Singh, Mr Sriram Krishna, Ms Maya Narula, Advocates for UOI.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petitions, *inter alia*, impugning the list of directors stated to have incurred the disqualification under clause (a) of section 164(2) of the Companies Act, 2013 (hereafter 'the Act') for default on the part of concerned companies in filing the annual returns and financial statements for the financial years 2014-2016. The said list was published on 15.09.2017 and is hereafter referred to as the 'impugned list'. The petitioners also challenge the list of disqualified directors published subsequently for defaults pertaining to the financial years 2012-2014 and 2013-2015. The petitioners impugn the same to the extent that it includes their name. The petitioners further pray that the respondents be directed to allow the petitioners to use their Digital Signature Certificates (DSC) and Director Identification Number (DIN).

2. The petitioners in the present batch of petitions were directors in various companies. By way of the impugned list, the petitioners have been disqualified from being appointed / reappointed as directors for a period of five years under Section 164(2)(a) of the Act. Further,

the names of some of the companies, in which the petitioners were holding the office of directors, have been struck off from the Register of Companies. In WP. (C) 3658 of 2019, the petitioners have been disqualified as directors on account of failure on the part of a company (Logic Eastern India Private Limited) to file its annual returns. It is stated that Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 has been initiated in relation to said company.

3. The impugned action was taken against the petitioners on account of default on the part of the companies in not filing the annual returns for the preceding financial years.

4. The petitioners have challenged the impugned list, essentially, on four grounds. First, that the action of the respondents in disqualifying the petitioners is arbitrary inasmuch as the petitioners were not afforded an opportunity to be heard. The petitioners contend that the said action is in violation of principles of natural justice. Second, that Section 164 of the Act, which mandates the disqualification of directors, being penal in nature, could not be applied retrospectively. Third, that on the plain interpretation of Section 164(2)(a) of the Act, the petitioners cannot be disqualified to act as directors of the companies, which have not defaulted in filing their annual returns and financial statements for a period of three consecutive years. And fourth, that the defaults under Section 164(2) of the Act result in the directors being disqualified from being

appointed/re-appointed as directors but does not result in them demitting office as directors.

5. The respondents dispute the aforesaid contentions and contend that sufficient opportunity had been provided to the petitioners to correct the default of not filing the statutory documents.

6. These petitions were heard together, as the controversy involved in the present petitions is common.

7. In view of the above, this Court will refer to only to the facts of W.P.(C) 9088/2018 for addressing the controversy raised in these petitions.

8. The petitioners in W.P.(C) 9088/2018 were appointed as directors in various companies in the period of 2005-2010.

(i) Petitioner no.1 and 2 were appointed as directors in the company M/s Aryan Cargo Express Pvt. Ltd., registered under the Companies Act, 1956: petitioner no.1 was appointed as a director in the said company on 23.12.2005; and petitioner no.2 was appointed as director in the said company on 19.04.2007. The said appointments were made after obtaining the required security clearance by the Ministry of Home Affairs, through Ministry of Civil Aviation as per Civil Aviation Requirements (CAR).

(ii) Thereafter, on 15.05.2008, petitioner no.1 and 2 were appointed as directors in the company Aryan Express Holding Pvt. Ltd.

(iii) On 01.09.2009, the petitioners were named as directors in the company M/s. Aryan Cargo & Express Logistics Pvt. Ltd.

(iv) On 19.03.2010, the petitioners were also appointed as directors in the company Cargo Logistics Pvt. Ltd.

9. It is stated that the company, M/s. Aryan Cargo Express Pvt. Ltd. commenced its business in March, 2010. It is further stated that financial statements and annual returns of the aforesaid company were completed and uploaded on the website of Registrar of Companies (ROC) upto the financial year 2012-13, but the petitioners failed to submit the aforesaid statements for the subsequent years.

10. In the year 2014, respondent no.1 issued a circular (General Circular No. 34/2014), whereby it floated a scheme called Company Law Settlement Scheme, 2014. The said Scheme was floated to provide an opportunity to the defaulting companies to file their (belated) financial statements and annual returns for the consecutive period of three financial years. The said Scheme also offered an opportunity to the inactive companies *"to get their companies declared as 'dormant company' under Section 455 of the Act by filing a simple application at reduced fees"*.

11. Thereafter, in the year 2015, the petitioners applied for the voluntary closure of companies, namely M/s. Aryan Express Holding Pvt. Ltd. and M/s. Aryan Cargo Logistics Pvt. Ltd., on account of failure to commence the business. It is stated that the said applications were rejected by the ROC.

12. On 12.04.2017, a notice dated 19.03.2017 under Section 248 of the Act was sent to petitioner no.1 and 2, *inter alia*, stating that the company Aryan Cargo Express Pvt. Ltd. had been non-operational for two preceding financial years and therefore the ROC intended to remove the name of company from the Register of Companies. The relevant extract of the said notice is set out below:

> "(1) Pursuant to sub-sections (1) and (2) of Section 248 of the Companies Act, 2013, notice is hereby given that as per available record:-
>
> The Company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455.
>
> (2) Therefore, on the basis of aforesaid ground, I intend to remove the name of company from the register of companies and request you to send your representation along with copies of the relevant documents, if any, within thirty days from the date of receipt of this notice.
>
> (3) Unless a cause to the contrary is shown within the time period above mentioned, the name of the above mentioned company shall be liable to be removed from the register of companies. However,

> the directors of the company shall be liable for appropriate action under the Act.
>
> This notice is also treated as having been served on the directors of the company in terms of the provisions of section 20 of the Companies Act, 2013."

13. In the meanwhile, respondent no.1 introduced another scheme known as "Condonation of Delay Scheme - 2018".

14. Petitioner no.1 replied to the aforesaid notice stating that the operations of the said company were stopped due to financial difficulties and further requested the ROC to allow the petitioner a chance to re-start operations within the then current financial year.

15. Thereafter, ROC issued another notice dated 15.05.2018 to petitioner no.1 reiterating its intention to remove the name of the aforesaid company from the Register of Companies. On 18.06.2018, petitioner no.1 sent a reply to the aforesaid notice stating that efforts had been made to re-launch the operations of the said company.

16. On 15.09.2017, respondent no.1 published the impugned list of disqualified directors, disqualifying 74,920 directors under Section 164 read with Section 167 of the Companies Act, 2013 on-account of non-filing of Annual Returns for block of three consecutive years 2014-16, comprising of financial years 2013-14, 2014-15 and 2015-16. Consequently, the DINs of the aforesaid disqualified directors were blocked and details of these directors regarding their

disqualification for the period from 01-11-2016 to 31-10-2021, were updated.

17. It is submitted by the respondents that the aforesaid list published on 15.09.2017 did not take into account the defaults committed in filing the annual returns for the preceding block of three financial years – financial years 2011-12, 2012-13 and 2013-14 (FYs 2012-14) and financial years 2012-13, 2013-14 and 2014-15 (FYs 2013-2015), respectively.

18. It is further submitted that the said defaulting directors were also disqualified because part of the defaults was post 01.04.2014. For the block of financial years 2012-14 and financial years 2013-15, two separate lists of disqualified directors, both dated 03.10.2017, were published by respondent no.2 under which 37,237 directors were identified as disqualified for the block years 2012-14, for the period 01.11.2014 to 31.10.2019 and 01.11.2015 to 31.10.2020, respectively.

19. A tabular statement of the list of disqualified directors for the aforesaid block years, that is 2012-14, 2013-15 and 2014-16 is set out below:

List	Block Years	Date of Publication of list of disqualified directors	No. of Directors disqualified	No. of Common Directors with 2014-16	No. of directors exclusive in the lists dated	Period of disqualification

				list	03.10.2017	
First	2014-16	15.09.2017	74920	N.A.	N.A.	01-11-2016 to 31.10.2021
Second	2013-15	03.10.2017	34047	33790	257	01-11-2015 to 31-10.2020
Third	2012-14	03.10.2017	37237	36451	786	01-11-2014 to 31-10-2019
				Total	1043	

20. It is stated that thereafter, on 14.08.2018, the petitioners became aware that their DSCs had been blocked and they had been disqualified as directors for a period of five years. The name of M/s. Aryan Cargo & Express Logistics Pvt. Ltd was also struck off from the Register of Companies. The petitioners also came to know about the three separate lists published by respondent no.1 (including the impugned list for the financial years 2012-14, 2013-2015 and 2014-2016), setting out the names of the directors disqualified on account of violation of section 164(2)(a) of the Act. The names of petitioners also featured on these lists and thus they were also disqualified for a span of five years, that is, from 01.11.2014 to 31.10.2019, from 01.11.2015 to 31.10.2020 and from 01.11.2016 to 31.10.2021 respectively. The DSCs of the petitioners were also blocked pursuant to the impugned lists.

21. The learned counsel appearing for the petitioners have assailed the impugned list, essentially, on four grounds. First, it is contended

that the petitioners were not provided an opportunity to be heard inasmuch as no show cause notice was issued to the petitioners intimating them about their disqualification as directors and such omission is in violation of principles of natural justice. It is submitted on behalf of the petitioners that the notice issued to the petitioners under Section 248(1) of the Act cannot be construed as a show cause notice, as a company's name is open to be struck off for failure to carry on business for a period of two financial years, but for incurring a disqualification under Section 164(2) of the Act, the company must default for a minimum period of three financial years.

22. Second, it is contended that the provisions of Section 164 of the Act, being penal in nature, could not be applied retrospectively. It is submitted that the Companies Act, 2013 (the Act) came into force on 01.04.2014 but the petitioners were disqualified as directors for committing defaults for the financial years preceding the first financial year commencing on 01.04.2014. It is further submitted that in terms of the General Circular No. 08/2014 dated 04.04.2014, the provisions of the Companies Act, 1956 would govern the financial years preceding 01.04.2014.

23. Third, that on a plain interpretation of Section 164(2)(a) of the Act, the petitioners cannot be disqualified to act as directors of the companies, which had not defaulted in filing their annual returns and financial statements for a period of three consecutive years.

24. Fourth, that the defaults under Section 164(2) of the Act result in the directors being disqualified from being appointed/re-appointed as directors but does not result in them demitting office as a director.

25. In addition, the petitioners also impugn the action of the respondents in deactivating their DINs and DSCs.

Reasons and Conclusions

26. At the outset, it is relevant to note that the controversy involved in the present petition is limited to interpreting the provisions of Section 164(2) and Section 167(1)(a) of the Act. The petitioners have not challenged the constitutional vires of the aforesaid Sections in these petitions.

27. By virtue of notification dated 26.03.2014, the provisions of Section 164 and 167 of the Act came into effect from 01.04.2014. The principal questions to be addressed are:

> (i) whether the directors of defaulting companies would be disqualified under the provisions of Section 164(2)(a) of the Act on account of defaults committed by the said companies in respect of financial years ending 31.03.2014 and the preceding financial years?
>
> (ii) Whether the impugned action of the respondents in including the name of the petitioners in the list of disqualified directors without issuing any prior notice or affording the

petitioners an opportunity to be heard, is void as being violative of principles of natural justice?

(iii) Whether the directors of a company, which in default of clauses (a) and (b) of Section 164(2) of the Act, are disqualified from being re-appointed as directors in other non-defaulting companies in which they were directors at the time of incurring the disqualification under Section 164(2) of the Act?

(iv) Whether the provisions of Section 167(1)(a) of the Act are applicable in respect to offices of directors, who have incurred the disqualification under Section 164(2) of the Act?

(v) Whether, the Director Identification Number (DIN) and Digital Signature Certificate (DSC) of directors that have incurred the disqualification under Section 164(2) of the Act, can be cancelled on account of them incurring such disqualification?

Whether the provisions of Section 164(2)(a) are retrospective?

28. The first and foremost question to be addressed is whether the provisions of Section 164(2) of the Act operate retrospectively. This controversy arises in the context of the submissions advanced on behalf of the petitioners that considering the defaults in filing financial statements and annual returns for the financial year ending 31.3.2014 (FY 2013-14) and prior years for the purposes of imposing the disqualification under Section 164(2) of the Act, tantamount to

applying the said provisions retrospectively. This, according to the petitioners, is impermissible.

29. Section 164(2) of the Act disqualifies a director from being re-appointed in a company for a period of five years, if the company has (a) not filed financial statements or annual returns for any continuous period of three financial years; or (b) 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. In addition, a director of such a company is also disqualified from being appointed in any other company for a period of five years.

30. Clause (g) of Section 274(1) of the Companies Act, 1956, which was in force prior to 01.04.2014, also contained similar provisions for disqualifying a director of a company that had failed to file the requisite returns for a consecutive period of three years. However, the said provision applied only to public companies and was wholly inapplicable to private companies. The sweep of Section 164(2) of the Act is wider; it not only includes public companies but private companies as well.

31. It is important to note that none of the learned counsel appearing for the respondents, canvassed the proposition that the provisions of Section 164(2) of the Act would relate back to a period prior to its enactment. Thus, concededly, the said Section is applicable prospectively.

32. Whilst, there is no dispute that the provisions of Section 164(2) of the Act must be applied prospectively; there is much controversy whether the defaults in relation to the financial year ending 31.03.2014 can be taken into account while considering defaults in filing financial statements or annual returns, for the continuous period of three financial years. Thus, the controversy, essentially, relates to whether the default as contemplated in clause (a) of Section 164(2) of the Act, in respect of a financial year prior to the said provision coming into force, could be considered for the purposes of the said Section.

33. The impugned list was published on 15.09.2017 and includes the names of directors of companies that had defaulted in filing annual returns for the financial years 2013-14, 2014-15, 2015-16. Such directors had been disqualified for the five year period commencing from 01.11.2016 to 31.10.2021. The petitioners contend that the default for the financial year ending 31.03.2014 cannot be considered since the same was prior to Section 164 of the Act coming into force.

34. The Karnataka High Court, Gujarat High Court and Madras High Court have also considered a similar challenge. (See: ***Yashodhara Shroff v. Union of India: W.P. No. 52911/2017 and connected matters, decided on 12.06.2019***; ***Bhagavan Das Dhananjaya Das v. Union of India and Ors.: W.P. Nos. 25455/2018 and other connected matters, decided on 03.08.2018*** and ***Gaurang Balvantlal Shah v. Union of India: Manu/GJ/1278/2018***). All of the aforesaid Courts are unanimous in their opinion that the provisions of

Section 164 apply prospectively. In ***Yashodhara Shroff*** (*supra*), the Karnataka High Court had observed as under:-

> "When for the first time under the 2013 Act the disqualification of a director of a private company is stipulated under the Act in the form of Section 164(2), the said provision must be given only a prospective operation."

35. In ***Gaurang Balvantlal Shah*** (*supra*), the Gujarat High Court had observed as under:-

> "Such provision of disqualification for the director of a company – public or private company, has been incorporated for the first time in Section 164(2) of the Act of 2013. Such being the case, the said provision has to be construed as having prospective effect. If retrospective effect is given to it, that would destroy, alter and affect the right of the Directors of private company existing under the Act of 1956."

36. The essential question to be addressed is whether the consideration of the default committed in filing financial statements and annual returns for the financial years 2013-14 would amount to applying the provisions of Section 164(2) of the Act retrospectively. It is well settled that no statute shall be construed to apply retrospectively, unless such a construction appears clear from the language of the enactment or otherwise necessary by implication. It is also equally trite that a statute is not retrospective merely because it affects existing rights or because a part of the requisites for its action is drawn from a time antecedent to its passing.

37. In ***Queen v. The Inhabitants of St. Mary, Whitechapel: (1848) 12 QB 120***, the Court had observed "*the statute which is in direct operation prospective cannot be properly called a retrospective statute because a part of the requisites for that action is drawn from the time antecedents to its passing.*"

38. The aforesaid proposition is also stated in ***Halsbury's Laws of England, 4th Edn., Volume 44, Paragraph 921*** in the following words:

> "'Retrospective' is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general however the Courts regards as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects even if for the future only the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time and antecedents to its passing."

39. It is also relevant to refer to the definition of the word "retrospective". The same is defined in Judicial Dictionary by K.J. Aiyar, Butterworth as under:-

> ""Retrospective" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp.

> 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past."

40. Indisputably, the Parliament exercises the sovereign power to legislate in respect of the matters other than those specified in List II of the Seventh Schedule to the Constitution of India. In those matters, the State Legislatures exercise the legislative powers. Subject to the rigors of Article 20(1) of the Constitution of India, there is no restriction on the Parliament or any State Legislature to enact any law with retrospective effect. However, it is also settled that no law shall be read as applicable retrospectively unless it is expressly enacted or necessarily implied. A retroactive law impairs vested rights acquired under the existing laws. It seeks to reopens past transactions and affects accrued rights. It is for this reason that retrospective application of a law is not readily inferred.

41. The question whether a law is retrospective has to be viewed in the context whether it divests a person of accrued rights, or creates new obligations, or attaches a disability in respect of transactions or actions done in the past.

42. It is apposite to bear the aforesaid in mind while examining the issue whether consideration of the defaults in filing financial statements and returns pertaining to financial year 2013-14, for the

purposes of Section 164(2) of the Act, amounts to retrospective application of Section 164(2) of the Act.

43. It is necessary to bear in mind that there is no dispute that the Companies Act, 1956, as well as the Act (Companies Act, 2013) expressly oblige a company to file its financial statements and its annual returns within the stipulated period. In terms of proviso to Section 96(1) of the Act, a company is required to hold an annual general body meeting within a period of six months from the end of the financial year. Thus, the company is obliged to hold its annual general meeting before 30th September of the next financial year following the close of the financial year. In terms of Section 92(4) of the Act, the annual return for a financial year is to be filed within a period of sixty days from the Annual General Meeting (hereafter 'AGM') or the last date on which the AGM of a company ought to have been held. The final accounts of the company are required to be filed within a period of thirty days from the holding of the AGM. In cases where such meeting has not been held, the financial statements have to be filed within a period of thirty days from the last date of holding of such AGM. (See: *Sub-section (1) and (2) of Section 137 of the Act*)

44. Thus, even though the financial year ending 31.03.2014 had ended prior to Section 164 of the Act coming into force, the AGM in respect of that financial year was required to be held by 20.09.2014, that is, after the Section 164 of the Act had come into force. Any default in holding this meeting would invite the consequences under

the Act. In terms of Section 137(1) of the Act, the financial statements for the financial year ending 31.03.2014 were required to be filed within thirty days of holding of the AGM or of the last date for holding such AGM. The annual returns for the financial year ending 31.03.2014 is required to be filed within a period of sixty days of holding of the AGM or on the last date on which such meeting ought to have been held. Similar obligations also existed under the Companies Act, 1956.

45. In view of the above, if a company had failed to file its annual returns within a period of thirty days from the holding of the AGM or from the last date for holding such meeting for the financial year 2013-14, it would be in default under the provisions of the Act. There is no reason for excluding such default for the purposes of considering defaults in respect of three financial years as contemplated under Section 164(2) of the Act. Plainly, a director cannot be heard to contend that he had acquired a vested right not to be penalised for this default since it pertains to filing returns for a financial year that had closed prior to Section 164 of the Act coming into force. The date on which such default occurred is after the date on which Section 164 of the Act had become effective. This Court finds it difficult to understand as to which right of the petitioners has been impaired by considering such default for the purposes of Section 164 of the Act.

46. The penal consequences of not filing returns for three consecutive financial years would be attracted on section 164 of the Act coming into force. Section 164 of the Act came into force on

01.04.2014 and thus, the failure of a company/its directors to file annual returns (for three financial years) thereafter would result in the directors incurring the disqualification as specified under Section 164(2) of the Act. It is of little consequence that such defaults relate to filing annual returns that pertain to a period prior to 01.04.2014. Undisputedly, the concerned companies (and vicariously the petitioners) were obliged to file the financial statements for the financial year 2013-14 after 01.04.2014. As noticed above, the failure to do so would be in violation of Section 137(2) of the Act and this Court finds no reason why such defaults should not be considered for the purposes of Section 164 of the Act. Merely, because the returns to be filed pertain to a period prior to 01.04.2014, is of no relevance considering that the default in doing so has occurred after the provisions of section 164 of the act had become applicable.

47. Merely because an enactment draws on events that are antecedent to its coming in force does not render the said enactment retrospective. We may consider an illustration where an Act provides for a higher punishment for a second offence. Thus, a person committing an offence for the second time after such enactment has come into force would suffer enhanced punition even though the first offence was committed prior to such enactment coming in force. This is so because the punishment is for the second offence and merely because it also takes into account an event that had occurred prior to the Act coming in force, the same would not render the said enactment as retrospective. Such a law would not suffer from the vice of being *ex*

post facto. This is so because it neither impairs any vested or accrued right nor imposes any new disabilities in respect of events that had occurred earlier.

48. It is relevant to refer to the decision of the Supreme Court in ***Sajjan Singh v. The State of Punjab: (1964) 4 SCR 630***. In that case, the Supreme Court had considered the case of the appellant who was convicted and sentenced under Section 5(2) of the Prevention of Corruption Act, 1947. The appellant was found to be in possession of assets disproportionate to his legitimate source of income. It was contended on his behalf that the pecuniary resources and properties acquired before 11.03.1947, that is, prior to the Prevention of Corruption Act. 1947 coming into force, could not be taken into consideration for the purposes of Section 5(3) of the said statute since the same would amount to enforcing it with retrospective effect.

49. The Supreme Court rejected the aforesaid contention. The Court referred to Maxwell on Interpretation of Statute, 11th Edition and observed that a statute cannot be stated to be retrospective "*because a part of the requisites for its action is drawn for a time antecedent of its passing*".

50. A *fortiori*, in this case the respondents are not seeking to draw on any default or event, which had occurred or an action which was required to be taken, prior to Section 164 of the Act coming into force.

51. In view of the above, this Court is in respectful disagreement with the view of the Karnataka High Court, Madras High Court and

Gujarat High Court in ***Yashodhara Shroff v. Union of India; Bhagavan Das Dhananjaya Das v. Union of India and Ors.*** and ***Gaurang Balvantlal Shah v. Union of India*** (*supra*) inasmuch as the said Courts have held that the defaults for the financial year ending 31.03.2014 cannot be considered for determining whether a director had incurred the disqualification under Section 164(2) of the Act.

52. Concededly, Section 164(2) of the Act operates prospectively. However, such prospective operation would entail taking into account failure to file the financial statements pertaining to the financial year ending 31.03.2014 on or before 30.10.2014. This Court is of the view that the taking into account such default does not amount to a retrospective application of Section 164 of the Act and the contentions advanced by the petitioners in this regard, are unmerited.

53. The impugned list of disqualified directors published on 15.09.2017 contained names of 74,920 individuals who had been disqualified to act as a director on account of failure of the concerned companies to file their annual returns for the financial years ending 31.03.2014, 31.03.2015 and 31.03.2016 (FY 2013-4, FY 14-15 and FY 15-16) . These directors were disqualified to act as such with effect from 01.11.2016 to 31.10.2021. Apart from this list, the respondents had also published two other lists. These lists were published on 03.10.2017 (hereafter referred to as the 'the second list' and 'the third list'). The second list contained names of 34,047 persons who were disqualified to act as directors for the defaults committed by the concerned companies in respect of financial years

ending on 31.03.2013, 31.03.2014 and 31.03.2015 (FY 2012-13, FY 13-14 and FY 14-15). Such persons were disqualified to act as a directors with effect from 01.11.2015 to 31.10.2020. The third list contained the names of 37,237 directors who were disqualified for defaults pertaining to the financial years ending 31.03.2012, 31.03.2013 and 31.03.2014 (FY 2011-12, 2012-13 and FY 2013-14).

54. The second and the third list cannot be sustained. This is, principally, for two reasons. First of all, the disqualification of directors under the said lists is premised on the defaults committed prior to Section 164 of the Act coming into force. The default in filing the financial statements / annual returns for the financial year ending 31.03.2013 had occurred on the failure of the concerned companies to file the same by 31.10.2013. This was prior to the Section 164(2) of the Act coming into force. Similarly, the third list is also premised on the failure to file financial statements / annual returns pertaining to FY 2011-12 and FY 20120-13. These were to filed latest by 31.10.2012 and 31.10.2013. It is relevant to note that it is not the contention of the respondents that defaults prior to 01.04.2014 could be taken into account for the purposes of Section 164 of the Act. It is not their contention that the default committed by not filing the returns for the financial year ending 31.03.2014 by 31.10.2014 (which would be a default after Section 164 of the Act had come into force) would trigger the consequences of Section 164(2) of the Act since the said default was committed after the Section 164 of the Act had come into force. No such contention was advanced, perhaps, because it would be

inconsistent with respect to the period for which disqualification is stated to have been incurred. Clearly the respondents cannot contend that a director who has been disqualified to act as such on account of defaults committed for the financial years ending 31.03.2012, 31.03.2013 and 31.03.2014 can be held to be responsible for any defaults for a period of five years thereafter since, according to them, he would have been disqualified to act as a director after incurring the disqualification under section 164(2) of the Act. As mentioned in the third list, such persons would suffer the disqualification for the period 01.11.2014 to 31.12.2019. All the names included in the third list, except names of 786 persons, are common with the names in the first list.

55. In the aforesaid context, Ms Shiva Laxmi, learned counsel appearing for the respondents, after seeking instructions, conceded that the second and third list was inconsistent in respect of disqualification period as specified in the impugned list. Since neither the petitioners nor the respondents have argued that the defaults committed prior to 01.04.2014 can be considered for imposing the disqualification under Section 164 of the Act; the second and the third list, published on 03.10.2017, cannot be sustained. The same are, accordingly, set aside.

Whether a prior notice and an opportunity of being heard was required to be afforded to the petitioners before including their names in the impugned list and whether the impugned list is void as being violative of principles of natural justice?

56. It is contended on behalf of the petitioners that the respondents have violated the principles of natural justice by including their names in the impugned list of disqualified directors and therefore the same is liable to be set aside. It is earnestly contended that since disqualification of a director has serious adverse consequences, it is necessary for the respondents to afford an opportunity of hearing before any such action is taken. It is contended that failure to do so has rendered the impugned list of disqualified directors void.

57. The question whether principles of natural justice are applicable is required to be considered in the context of the statutory provisions. In ***Union of India v. J.N. Sinha*** : ***(1970) 2 SCC 458*** the Supreme Court had observed that the rules of natural justice do not supplant the law but supplement it. It is trite law that a party whose rights and interests are likely to be affected adversely, must be provided an opportunity of representing his case. Such a requirement is now accepted as an intrinsic part of fair procedure. However, since the principles of natural justice are only meant to supplement the law, they are read as a part of the decision making process only in cases where such principles are not excluded expressly or by necessary implication.

58. In ***Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and Others*** : ***(2015) 8 SCC 519*** , the Supreme Court had briefly traced the genesis of the principles of natural justice and had observed as under:-

> "The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong."

59. The Supreme Court further referred to the views of Professor D.J. Gallian and had observed as under:-

> "It, thus, cannot be denied that principles of natural justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."

60. It is clear from the above that the principles of natural justice have been accepted as a part of procedural law, where it is necessary to supplement it. The question whether such principles are required to be read into any law must be considered in the context of the basic scheme of the statutory provisions.

61. In ***Maneka Gandhi v. Union of India and another*** : ***(1978) 1 SCC 248***, the Supreme Court had explained that the exceptions to the Rule of *audi alteram partem* are really not exceptions to procedural fairness in the true sense but in the context of certain laws are not considered applicable, as nothing unfair can be inferred by excluding such procedure. The relevant extract of the said decision is set out below:-

> "….. There are certain well recognised exceptions to the audi alteram partem rule established by judicial decisions and they are summarised by S.A. de Smith in Judicial Review of Administrative Action, 2nd ed., at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the audi alteram partem rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for

promptitude or the urgency of the situation so demands."

62. In ***Union of India v. J.N. Sinha*** (*supra*), the Supreme Court had observed as under:-

> "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice." So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would defeat the very purpose or where it is expected that the person affected would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the passport authority or the Government to revoke or impound the passport. But that by itself would not justify denial of an opportunity to the holder of the passport to state his case before a final order is passed. It cannot be disputed that the legislature has not by express provision excluded the right to be heard…."

63. In ***Swadeshi Cotton Mills v. Union of India*** : ***(1981) 1 SCC 664***, the Supreme Court of India referred to the earlier decisions in ***Maneka Gandhi v. Union of India*** (*supra*), ***State of Orissa v. Dr. Bina Pani Dei*** : ***AIR 1967 SC 1269*** and ***A.K. Kraipak v. Union of India*** (supra) and held as under:-

> "31. The rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (Per Hegde, J. in A.K. Kraipak, (1969) 2 SCC 262. If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power. (See Union of India v. Col. J.N. Sinha, (1970) 2 SCC 458. 33. The next general aspect to be considered is : Are there any exceptions to the application of the principles of natural justice, particularly the audi alteram partem rule ? We have already noticed that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought by implication due to the presence of certain factors : such as, urgency, where the obligation to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature……"

64. It is also important to note that the principles of natural justice are not inflexible. As noticed above, the object of including principles of natural justice where the statutory provisions are silent in that regard, is to ensure procedural fairness. When it comes to applicability of the principles of natural justice, it is not apposite to follow a dogmatic approach; principles of natural justice admit a considerable degree of flexibility and said rules can be suitably modified where it is expedient to do so.

65. Bearing the aforesaid in mind, this Court may now proceed to examine the statutory provisions and the applicability of the *audi alteram partem* rule. Section 164 (2) of the Act merely sets out the conditions, which if not complied with would disqualify an individual a person from being reappointed or appointed as a director. To put it in a converse manner, the said sections sets out a qualifying criterion for directors to be appointed or re-appointed, in negative terms. This provision does not entail any decision-making process on the part of the Authorities administering the Act. No Authority is required to exercise any discretion or take any judicial or quasi-judicial decision regarding disqualification of a director. The Authority is also not required to pass any order disqualifying an individual. Clearly, in these circumstances, the rule of *audi alteram partem* would be inapplicable. As noticed above, such rules are meant to supplement the law to ensure procedural fairness. Such principles are also to be followed while taking administrative decisions to ensure fairness in action. In ***Dharampal Satyapal Ltd*** (*supra*), Dr A.K. Sikri, J had

observed that such principles "*are a kind of code of fair administrative procedure in the decision making process*". It is difficult to understand as to how such principles would assist in the administrative procedure where an authority is not required to take any qualitative decision. The question whether a person fulfils the stipulated qualifications leaves little room for debate. As observed above, the administrative authorities are not required to take any qualitative decision in this regard. In the aforesaid view, this Court is unable to accept that exclusion of the *audi alteram partem* rule results in any procedural unfairness.

66. It is also important to note that the rationale for enacting Section 164(2) and Section 167(1)(a) of Act was to meet the malady of a large number of inoperative and shell companies. Current information of such companies is available with the Registrar of Companies as the persons in control of such entities had consistently failed and neglected to file the requisite returns. Undisputedly, in a large number of cases, withholding of information was willful as the information pertained to shell companies, which were incorporated to serve a limited purpose. The purpose of debarring such directors from participating in any corporate entity as a direction is to ensure that persons who take up the mantle of becoming directors of companies are conscious of their responsibility of ensuring that the companies comply with the statutory requirement.

67. There is also a paradigm shift in administering the Act from a predominantly manual driven mode to an electronic one. One of the

principal function performed by the Registrar of Companies, is to maintain records which was being done manually. The current policy is to now maintain such records digitally and with the limited manual intervention. A part of the routine functions, which do not require any application of mind, are now driven by appropriate computer software programs.

68. The Rules framed under the Act thus provide for electronic filing of records and an electronic tracking of the defaults on the part of the companies and their directors. The impugned list of directors is also a result of such an exercise carried out by the respondents. Importing the rule of prior hearing would clearly stultify and obstruct the said process.

69. As noticed above, this Court is of the view that the principles of *audi alteram partem* are not applicable given the nature of the provisions of Section 164(2) of the Act. However, even if it is assumed that disqualifying a director entails an administrative decision, there is a qualitative decision required to be taken by the authorities, the rule of affording a prior hearing cannot be readily inferred as a part of Section 164(2) of the Act. This is so because the same would have the effect of obstructing and rendering the provision inefficient.

70. In ***Yashodhara Shroff v. Union of India*** (*supra*), the Karnataka High Court rejected the contention that the rule of *audi alteram*

partem is applicable in the context of Section 164(2) of the Act. The Court had observed as under:-

> "127. 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 the 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."

71. A similar view was expressed by the Gujarat High Court in ***Gaurang Balvantlal Shah v. Union of India*** (*supra*), in the following words :-

> "…..As such, there is no procedure required to be followed by the respondent authorities for declaring any person or Director ineligible or disqualified under the said provision. A person would be ineligible to be appointed as Director, if he falls in any of the Clauses mentioned in Sub-section (1) and the person is or has been a Director in a company, and the company makes defaults as contemplated in Clause (a) of (b) of Sub-section (2) thereof, he would be ineligible to be reappointed in the said defaulting company and

> appointed in any other company. The ineligibility is incurred by the person/director by operation of law and not by any order passed by the respondent authorities, and therefore, adherence of principles of natural justice by the respondents is not warranted in the said provision, as sought to be submitted by learned Advocates for the petitioners."

72. In ***Bhagavan Das Dhananjaya Das v. Union of India and Ors*** (*supra*), the Madras High Court has taken a contrary view. This Court is in respectful disagreement with the aforesaid view and concurs with the view of the Gujarat High Court in ***Gaurang Balvantlal Shah v Union of India*** (*supra*).

73. In view of the above, the contention that the impugned list is void as having been published without following the principles of natural justice, is rejected.

Re: Interpretation of provisions of Section 164(2) of the Act.

74. It was earnestly contended on behalf of the petitioners that the petitioners may be disqualified to act as directors of the concerned companies that had committed defaults as contemplated under Section 164(2)(a) of the Act – that is, had failed to file financial statements or annual returns for a continuous period of three financial years – but they are not disqualified to act as a directors of companies that are not in default. It was contended by Ms Sahaitya that in terms of Section 164(2) of the Act, a director of a defaulting company would not be eligible for being reappointed in that company or being appointed in any other company for a period of five years. She submitted that the

word ‘appointed’ and ‘re-appointed’ cannot be read as synonyms. She stated that since two separate expressions – ‘appointed’ and ‘reappointed’ – have been used by the legislature in the same statutory provision, the same must be given different meanings. On the strength of the aforesaid principle, she contended that a person who has incurred the disqualification under Section 164(2) of the Act, cannot be appointed in any other company but can be re-appointed. She contended that in this view, there was no impediment for a director to be re-appointed in a company that had not committed any default as specified in clauses (a) and (b) of Section 164(2) of the Act. She contended that a director of a defaulting company is disqualified from being appointed in any company in which he was not serving as a director at the material time. In other words, if a person was a director of a defaulting company but was also a director of other companies that were not in default, he would be disqualified from being re-appointed in defaulting company or for being appointed in any company other than the non-defaulting companies in which he was already a director. But he could be re-appointed in those non-defaulting companies where he had been appointed as a director prior to incurring the disqualification under section 164(2) of the Act. According to her, the expression “other companies” ought to be read as non-defaulting companies in which the director was not holding the office of a director at the material time.

75. The above contention is unsubstantial. A plain reading of Section 164(2) does not indicate this legislative intent. It provides that

no person who is or has been a director of company shall be eligible to be re-appointed as a director of 'that company' or appointed in any 'other company'. The expression 'other company' is used to refer to all companies other than the company which has committed the defaults as specified in clauses (a) and (b) of Section 164(2) of the Act. It is also relevant to note that the term appointment would include any 'reappointment' as well.

Whether the directors incurring a disqualification under section 164(2) of the Act, would demit their office as a director in all companies in terms of section 167(1)(a) of the Act.

76. Section 167 of the Act reads 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;
>
> (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: 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.

(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1).

77. A plain reading of Clause (a) of Section 167 (1) of the Act indicates that a Director would demit office if he incurs the

disqualification under Section 164 of the Act. The proviso to Clause (a) of Section 167(1) of the Act was introduced with effect from 07.05.2018, by virtue of the Companies (Amendment) Act, 2018.

78. It was contended by the petitioners that Clause (a) of Section 167(1) as it stood prior to introduction of the proviso could apply only individuals who incurred the disqualification as specified in Section 164(1) of the Act not to those who incurred the disqualification under Section 164(2) of the Act. It was contended that introduction of the proviso brought about a material change in the import of clause(a) of Section 167(1) of the Act and therefore the same would be applicable only prospectively. The learned counsel appearing for the petitioners relied upon the decision of the Bombay High Court in ***Kaynet Finance Limited vs Verona Capital Limited: Appeal Lodging No. 318 of 2019 in Arbitration Petition No. 716 of 2019 and Notice of Motion Lodging No. 662 of 2019, decided on 09.07.2019*** in support of their contention. In that case, the Division Bench of the Bombay High Court had read down the provisions of Section 167)(1)(a) of the Act to be applicable only in cases where a director had incurred disqualification under Section 164(1) of the Act. The said clause was held wholly inapplicable in cases where a director had incurred disqualification under Section 164(2) of the Act. The Court had reasoned that directors of company that had defaulted in filing returns and financial statements for a period of three consecutive years would be disqualified from being appointed in that company by virtue of Clause (a) of Section 164(2) of the Act. If Section 167(1)(a) was read

to apply to such directors, it would lead to an absurd situation where no person could possibly act as a director of a defaulting company. This would be so because a director would demit his office as soon as he was appointed. The Court observed that "it could not have been the intention of law to create an absurdity."

79. At this stage, it would be necessary to refer to the provisions of Section 164 of the Act, which sets out circumstances in which a person is disqualified for being appointed as a director. The said Section reads 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, 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.

(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—

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

80. It is seen from the above that a person is disqualified from being appointed as a Director if (a) he is of an unsound mind; (b) he is an undischarged insolvent; (c) he has applied for being adjudicated as an insolvent and his application is pending; (d) he is convicted of an offence involving moral turpitude and sentenced to imprisonment for a period of not less than six months; (e) an order disqualifying him from being appointed as a director has been passed by any Court; (f) he has not paid any calls in respect of any shares of any company held by him; (g) he has been convicted of an offence with related party transactions under Section 188 of the Act; (h) or he has not complied with the provisions of Sub-Section 3 or he has not secured a Director Identification Number (DIN) as required in terms of Section 152(3) of the Act.

81. As is apparent from the above, the conditions as set out in sub-section (1) of Section 164, which disqualify a person from being appointed as a Director are directly attributable to him/her. In contrast

to the above, the provisions of sub-section (2) of Section 164 of the Act stipulates the defaults committed by a defaulting company, which results in the directors of that company incurring the disqualification being vicariously responsible for such defaults. It is possible that a particular director may not be, in fact, directly responsible for such defaults; nonetheless, he is disqualified to act as a director on account of being responsible for the affairs of the defaulting company by virtue of his holding the office of a director.

82. A person who has incurred the disqualification under section 164 (1) of the Act is not eligible for being appointed as a director of any company. Any person who has incurred the disqualification under sub-section (2) of section 164 of the Act is not eligible for being re-appointed as a director of the company that has defaulted in terms of clause (a) and (b) of subs-section (2) of section 164 of the Act. He is also disqualified for being appointed to any other company for a period of five years. In terms of Section 164, a person who has incurred the disqualification is not eligible for appointment as a director. The disqualification under Sub-Section (2) of Section 164 is applicable only to a person who is or was a director. Such disqualification thus, operates on his reappointment in the defaulting company or for an appointment in any other company. A plain reading of Sub-Section (2) of Section 164 indicates that his functioning as a director in companies, in which he holds such office at the time of incurring the disqualification, is not affected. Such disqualification

triggers in respect of appointment in the future after he has incurred the disqualification.

83. Section 164 of the Act has replaced the provisions of Section 274(1) of the Companies Act, 1956. Section 274(1)(g) was inserted in the Companies Act, 1956 with effect from 13.12.2000. The said provision was only applicable to directors of a public company, which had defaulted in filing its annual accounts and annual returns for a period of three financial years or had failed to meet its specified payment obligations.

84. There is no difficulty in the operation of Section 164 of the Act on a standalone basis. The controversy, essentially, arises in the context of clause (a) of Section 167 (1) of the Act. In terms of Clause (a) of Section 167(1) of the Act, the office of a director becomes vacant in case he incurs any disqualification as specified under Section 164 of the Act. Thus, whereas Section 164 disqualifies a person from being appointed/reappointed as a director, the import of Section 167(1)(a) is that such a director demits his office immediately on incurring such disqualification.

85. Insofar as the conditions that disqualify a person disqualified from acting as a director under Section 164(1) are concerned, there is no difficulty in reading such conditions to also result in the particular director demitting office in terms of section 167(1)(a) of the Act. This is so because the conditions as stipulated in section 164(1) of the Act are attributable to the individual and not to all directors of a company.

In other words, a person who was disqualified from being appointed as a director on account of being (a) of an unsound mind; (b) an undischarged insolvent; (c) an applicant for being adjudicated as an insolvent; (d) convicted of an offence involving moral turpitude and sentenced for imprisonment for not less than six months; (e) disqualifying for being appointed as a director by an order passed by any Court; (f) a defaulter on account of not paying calls in respect of any shares of any company held by him; (g) convicted of an offence with respect to related party transactions under Section 188 of the Act; or (h) not compliant with the provisions of section 152(3) of the Act.

86. The problem, essentially, arises in implementing the provisions of Section 167(1) (a) in respect of directors who have incurred disqualification under Section 164(2) of the Act. This is so because the disqualification incurred in Sub-Section (2) are not directly on account of reasons attributable to an individual director but on account of defaults committed by a company. Any person who *is* or *has been* a director of a company, which commits the defaults as set out in clauses (a) and (b) of Sub-Section (2) of Section 164 of the Act, incurs the disqualification for being appointed/reappointed as a director. If the provisions of Section 167(1)(a) of the Act are applied in such a case, all directors of such a defaulting company would demit their office as directors immediately on incurring the disqualification under section 164(2) of the Act. In addition, such directors would also cease to be directors of any other company in which they are directors. This results in an absurd situation where a defaulting company can never

appoint a director. This is so because as soon as the person – who is otherwise eligible for being appointed as a director and has not incurred any disqualification either under sub-section (1) or (2) of Section 164 of the Act – is appointed as a director of a company that has committed the defaults as stipulated in clauses (a) or (b) of Section 164(2) of the Act; he would immediately incur the said disqualification and consequently demit office of not only that company but any other company in which he is a director.

87. Concededly, this is not the legislative intent of including Section 167 in the Act. Ms Shiva Lakshmi, learned counsel appearing for respondent had contended that Section 167 should be read along with the proviso to Section 167(1)(a) which was introduced with effect from 07.05.2018. She stated that the proviso is clarificatory and therefore is applicable retrospectively. In terms of the proviso to clause(a) of section 167(1), the office of a director of defaulting company would not fall vacant on the directors incurring the disqualification under section 164(2) of the Act. She further submitted that any person appointed as a director of a company that had already committed defaults as stipulated in clauses (a) and (b) of Section 164 of the Act would not demit office by virtue of proviso to Section 167(1)(a) of the Act.

88. The question whether the proviso to Section 167 (1)(a) is clarificatory, and should be read as implicit in section 167(1)(a) even prior to its enactment, cannot be examined by reading the proviso in isolation. Sections 164(2) and 167(1)(a) of the Act as in force prior to

07.05.2018 are required to be interpreted on the basis of their plain language as existing prior to 07.05.2018. It is important to examine the interplay of these sections in order to understand the statutory scheme. The proviso to Section 167 (a) as introduced by the Companies (Amendment) Act, 2018 with effect from 07.05.2018, also cannot be read in isolation and without reference to the proviso to Section 164 (2), which was introduced by the same amending enactment.

89. The proviso to section 164 (2) provides that any person who has been appointed as a director of a company which is in default of clauses (a) or (b) of Sub-Section (2) of Section 164 of the Act would not incur the disqualification for a period of six months. Clearly, this proviso is not clarificatory. It is a substantive provision to enable a company to appoint directors (other than those who had incurred any disqualification) to enable them to cure the defaults. The legislature has provided a window of six months for curing the defaults and to enable the incoming directors appointed on the board of the defaulting companies to avoid disqualification under Section 164 (2) of the Act. There is no possibility to read such a window of six months in Section 164 (2) of the Act prior to 07.05.2018; that is, prior to enactment of the proviso to section 164(2) of the Act.

90. This also leads to the question as to why it was necessary to introduce the proviso to Section 164 (2) of the Act. It is obvious that such a proviso was also necessary if the provisions of Section 167(1)(a) were to be extended to result in vacation of office occupied by persons who had incurred the disqualification under Section 164(2)

of the Act. In absence of such a provision, the incoming directors– who are otherwise eligible for being appointed as a directors and had not incurred any disqualification either under Sub-Section (1) or under Sub-Section (2) of Section 164 of the Act – would demit office in all other non-defaulting companies on being appointed on the board of a company that had already committed defaults under clauses (a) and (b) of section 164(2) of the Act. With the inclusion of the aforesaid proviso, a person appointed as a director of a defaulting company would not incur such disqualification for a period of six months. Consequently, he would also not cease to be a director of any company by application of Section 167(1)(a) of the Act. Extending the punitive measure under section 167(1)(a) to such directors, would expose the said section to a challenge on the ground of being manifestly unreasonable and arbitrary.

91. This scheme was reinforced by introduction of the proviso to Section 167 (1)(a) of the Act. In addition, the proviso to Section 167(1)(a) of the Act also cleared the path for implementing Section 167 (1)(a) in respect of offices held by directors of a defaulting company who had incurred the disqualification under Section 164 (2) of the Act.

92. It is clear from the import of the two provisions as introduced by the Companies (Amendment) Act, 2018 with effect from 07.05.2018 that the same cannot be read as clarificatory. This is so because the plain language of section 164 and 167 of the Act did not any such statutory scheme. More importantly, this is not the only interpretation that would resolve the absurdity presented by the plain

language of the said sections. Thus, such a scheme – as introduced by enactment of the two provisions – could not be read as a part of Section 164 and 167(1) of the Act.

93. It is also relevant to mention that section 167(1) of the Act provides for a punitive measure against directors of a defaulting company. Plainly, such provisions cannot be readily inferred to apply retrospectively.

94. In view of the above, the scheme of Section 164 of the Act read with Section 167(1)(a) of the Act, for the period prior to 07.05.2018, must be determined on the basis of the plain language of the said provisions as in force prior to 07.05.2018. The legislative scheme of those provisions stand materially amended by introduction of the provisions with effect from 07.05.2018.

95. Indisputably, the plain language of Section 164(2) read with Section 167(1)(a) of the Act leads to an absurd situation as discussed earlier. In this view, the rule of literal interpretation cannot be applied for interpreting the provisions of Section 167(1)(a) of the Act. In ***Kaynet Finance Limited v. Verona Capital Limited*** (*supra*), the Bombay High court had resolved this issue by reading down the provisions of Section 167 (1) (a) to apply to cases of disqualification falling under Section 164(1) of the Act and not 164(2) of the Act. In other words, Clause (a) of Section 167 (1) has been read as, "*he incurs any of the disqualification specified in Section 164 (1)*" instead of *"he*

incurs any of the disqualification specified in Section 164". This Court respectfully concurs with this view.

96. There is compelling reason for limiting the scope of Section 167(1)(a) for the disqualification incurred under Section 164(1) of the Act. As noticed above, the disqualifications under Section 164(1) of the Act are directly attributable to the individuals incurring such disqualifications. These include an individual being declared insolvent, of being unsound mind, and being convicted of an offence involving moral turpitude. Clearly, such persons cannot continue to hold the office of a director on incurring such disqualifications. It would be irrational to await for the reappointment of a director for Section 164 to trigger in respect of companies in which such individuals stand appointed as directors. Thus, the Parliament in its wisdom has enacted clause (a) of section 167(1) of the Act to provide for such directors to immediately vacate their office as a director, on incurring the disqualifications under section 164(1) of the Act.

97. Although, the challenge to the constitutional vires to the provisions of section 164(2) and 167(1) of the Act have not been raised in any of these petitions, however, it is apposite to observe that reading down the provisions of Section 167 (1) (a), as has been done by the Bombay High Court in ***Kaynet Finance Limited*** (*supra*), would also obviate the challenge to the provisions of Section 167(1)(a) of the Act as being arbitrary and unreasonable.

98. In view of the above, the petitioners would not demit their office on account of disqualifications incurred under Section 164 (2)

of the Act by virtue of Section 167(1)(a) of the Act prior to the statutory amendments introduced with effect from 07.05.2018. However, if they suffer any of the disqualifications under Section 164(2) on or after 07.05.2018, the clear implication of the provisos to Section 164(2) and 167(1)(a) of the Act are that they would demit their office in all companies other than the defaulting company.

Whether the act of the respondents in deactivating the DIN of the directors is sustainable?

99. Sub-Section (3) of Section 152 of the Act proscribes any person from being appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under Section 154 of the Act. Section 153 of the Act contains provisions regarding the application for allotment of a DIN. The said Section is set out below: -

> "**153. Application for allotment of Director Identification Number.—** Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees as may be prescribed."

100. It is apparent from the above that the application for a DIN is required to be made by any person who intends to be appointed as a director. There is no impediment for a person who has been temporarily disqualified from acting as a director, to apply for a DIN.

101. In terms of Section 154 of the Act, the Central Government is required to allot a DIN to any applicant within a period of one month

from receipt of the application under Section 153 of the Act. Section 155 expressly proscribes an individual from having more than one DIN. No individual who has been allotted a DIN can apply for or possess any other DIN. Section 156 of the Act requires a director to inform his DIN to the company(ies) in which he is a director. Section 157 of the Act obliges a company to inform the DIN of its directors to the Registrar of Companies. Section 158 of the Act makes it obligatory for a director to indicate his DIN while furnishing any return or information or particulars as required under the Act.

102. It is at once clear that the provisions pertaining to DIN are only to ensure that any person acting as a director has a unique identity to identify him. Plainly, this is for purposes of administering the Act in an efficient manner. He is not required to give up this identification number only because he is temporarily disqualified for being appointed as a director.

103. The Central Government had notified the Companies (Directors Identification Numbers) Rules 2006. The said rules came into force on 01.11.2006. It is relevant to note that the said rules did not provide for deactivation of DIN of any individual irrespective of whether he was a director or not. On 15.03.2013 the Central Government notified the Companies (Directors Identification Number) (Amendment) Rules 2013, whereby the Companies (Directors Identification Number) Rules, 2006 were amended. The amendments, *inter alia*, introduced Rule 8 in the said Rules relating to cancellation or de-activation of

DIN. Rule 8 of the said Rules as introduced with effect from 15.03.2013, reads as under:-

> "**8. Cancellation or Deactivation of DIN.-** The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director, upon being satisfied on verification of particulars of proof attached with the application received from any person seeking cancellation or deactivation of DIN, in case –
>
> (a) the DIN is found to be duplicate;
>
> (b) the DIN was obtained by wrongful manner or fraudulent means;
>
> (c) of the death of the concerned individual;
>
> (d) the concerned individual has been declared as lunatic by the competent Court;
>
> (e) if the concerned individual has been adjudicated an insolvent;
>
> then the allotted DIN shall be cancelled or deactivated by the Central Government or Regional Director (NR), Noida or any other officer authorised by the Regional Director (NR):
>
> Provided that before cancellation or deactivation of DIN under clause (b), an opportunity of being heard shall be given to the concerned individual."

104. Several provisions including Section 164 of the Companies Act, 2013 were notified and came into force with effect from 01.04.2014.

105. The Central Government also notified the Companies (Appointment and Qualification of Directors) Rules, 2014 which superseded the earlier Rules framed under the Companies Act, 1956. These Rules also included certain rules pertaining to the Directors

Identification Number and included certain provisions similar to those provided in Companies (Directors Identification Number) Rules, 2006. Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 is relevant and is set out below:-

> **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 11alongwith fee as specified in Companies (Registration Offices and Fees) Rules, 2014 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 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."

106. Neither any of the provisions of the Companies Act nor the Rules framed thereunder stipulate cancellation or deactivation of DIN on account of a director suffering a disqualification under Section 164(2) of the Act. It is relevant to note that Rule 11 of the Company (Appointment and Qualification of Directors) Rules, 2014 was amended with effect from 05.07.2018 to provide for deactivation of DIN in the event of failure to file Form DIR-3-E-KYC within the period as stipulated under Rule 12A of the said Rules. The amendment so introduced also does not empower the Central Government to cancel or deactivate the DIN of disqualified directors.

107. It is also material to refer to Rule 14 of the said Rules. In terms of Rule 14(1) of the said Rules, every director is obliged to inform the company concerned, about his disqualification under sub-section (2)

of Section 164 of the Act in Form DIR-8. In terms of Sub-rule (2) of Rule 14 of the said Rules, a company, which has committed the defaults as stated in clauses(a) or (b) of section 164(2) of the Act, is required to file Form DIR-9 furnishing the names and addresses of all its directors, with the Registrar of Companies. Sub-rule (5) also contemplates filing of an application for removal of the disqualification of directors. None of the provisions of Rule 14 of the said Rules indicates that the DIN of directors incurring the disqualification under section 164(2) of the Act, is required to be deactivated.

108. It is important to note that whereas a DIN is necessary for a person to act as a director; it is not necessary that a person who has a DIN be appointed as a director. Section 164(2) only provides for temporary disqualification for a period of five years for a person to be appointed/re-appointed as a director. Thus, it is not necessary that the DIN of such person to be deactivated.

109. It is also material to note that sub-section (2) of section 167of the Act provides for a punishment for any person who functions as a director knowing that his office has become vacant on account of his disqualification as specified in Section 167(1) of the Act. Thus, Section 167 includes a mechanism for enforcing the rigors of Section 167(1) of the Act. In the present case, the respondents have sought to cancel/deactivate the DIN of directors disqualified under Section 164 (2) of the Act. This has been done to enforce the provisions of Section 167 (1) of the Act. Clearly, this is not supported by any statutory

provision. This Court is of the view that the Central Government having framed the rules specifying the conditions in which a DIN may be cancelled, cannot cancel the same on any other ground and without reference to such rules.

110. Similarly, there is also no provision supporting the respondents' action of cancelling the DSC of various directors. The said action is therefore unsustainable.

111. In view of the above, this Court finds no infirmity with the impugned list to the extent it includes the names of the petitioners as directors disqualified under Section 164(2) of the Act. This Court also rejects the contention that the impugned list is void as having been drawn up in violation of the principles of natural justice.

112. However, the Court finds merit in the contention that the petitioners cannot be stated to have demitted their office as directors by virtue of Section 167(1) of the Act. As held above, the provisions of Section 167(1) of the Act are wholly inapplicable to directors who had incurred disqualification under Section 164(2) of the Act. As noticed above, the defaulting companies in which the petitioners were directors have been struck off from the Register of Companies (except in W.P.(C) 3658/2019 where the proceedings have been initiated under the Insolvency and Bankruptcy Code, 2016). Plainly, the petitioners cannot hold office in those companies that have been struck off from the Register of Companies. However, as it is held that Section 167(1) was inapplicable in respect of disqualifications that

were incurred under Section 164(2) of the Act, the petitioners continue to be directors of other companies which had not committed any defaults in terms of clauses (a) and (b) of Section 164(2) of the Act.

113. As discussed above, the Scheme of Section 164(2) and Section 167(1)(a) of the Act was materially amended by the Companies Amendment Act, 2018 by introduction of the provisos to Section 164(2) and Section 167(1)(a) of the Act with effect from 07.05.2018. All directors who incur disqualification under Section 164(2) of the Act after the said date, would also cease to be directors in other companies (other than the defaulting company) on incurring such disqualification. However, the operation of the provisos to Section 164(2) and Section 167(1)(a) of the Act cannot be read to operate retrospectively. The proviso to Section 167(1) of the Act imposes a punitive measure on directors of defaulting companies. Such being the nature of the amendment, the same cannot be applied retrospectively. It is well settled that the Statute that impairs an existing right, creates new disabilities or obligations – otherwise than in regard to matters of procedure – cannot be applied retrospectively unless the construction of the Statute expressly so provides or is required to be so construed by necessary implication. Therefore, the office of a director shall become vacant by virtue of Section 167(1)(a) of the Act on such director incurring the disqualifications specified under Section 164(1) of the Act. It shall also become vacant on the directors incurring the disqualification under Section 164(2) of the Act after 07.05.2018. However, the office of the director shall not become

vacant in the company which is in default under sub-section 164(2) of the Act.

114. As discussed above, there is also much merit in the contention that the DIN and DSC of the petitioner could not be deactivated. Accordingly, the respondents are directed to reactivate the DIN and DSC of the petitioners.

115. It is clarified that the petitioners would continue to be liable to pay penalties as prescribed under the Act.

116. The petitions are disposed of in the aforesaid terms. All pending applications are also disposed of.

117. The parties are left to bear their own costs.

VIBHU BAKHRU, J

NOVEMBER 04, 2019
pkv/**RK**