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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 2nd September, 2020

\+ **W.P.(C) 5490/2020 & CM APPLs. 19779-80/2020**

SANDEEP AGARWAL & ANR. ..... Petitioners

Through: Mr. Nikhil Verma, Advocate.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Gigi C. George, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.

2. The present petition has been filed by the Petitioners - Mr. Sandeep Agarwal and Ms. Kokila Agarwal, both of whom are directors in two companies namely Koksun Papers Private Limited (*hereinafter, "Koksun Papers"*) and Kushal Power Projects Private Limited (*hereinafter, "Kushal Power"*). The name of Kushal Power was struck off from the Register of the Companies on 30th June, 2017, due to non-filing of financial statements and annual returns. The Petitioners, being directors of Kushal Power were also disqualified with effect from 1st November, 2016 for a period of five years till 31st October, 2021 under Section 164(2)(a) of the Companies Act, 2013 (*hereinafter, "Act"*).

3. Pursuant to their disqualification, their Director Identification Numbers (*"DIN"*) and Digital Signature Certificates (*"DSC"*) have also been cancelled. In view thereof, they are unable to carry on the business and file returns etc. in the active company Koksun Papers. By the present petition, the disqualification is challenged and quashing is sought of the

impugned list of disqualified directors.

4. Mr. Nikhil Verma, ld. counsel appearing for the Petitioners relies upon Sections 164(2) and 167(1)(a) of the Act to submit that the said sections were materially amended by the Companies Amendment Act, 2018, and introduction of the disqualification in proviso under Section 167(1)(a), comes into effect only on 7th May, 2018. Thus, in respect of the companies, in which the Petitioners were already directors, a conjoint reading of Section 164(2) and 167(1)(a) would show that the disqualification would not apply in a retrospective manner. Ld. counsel relies upon the judgment of this Court in ***Mukut Pathak & Ors. v. Union of India & Ors., 265 (2019) DLT 506***.

5. The further submission of Mr. Verma is that Koksun Papers is entitled to take benefit of the Companies Fresh Start Scheme (CFSS) 2020 (*hereinafter, "Scheme"*) dated 30th March, 2020 introduced by the Ministry of Corporate Affairs, whereby active companies are permitted to make good any defaults in filing of documents and seek immunity from disqualification. However, the directors, who have to sign the papers for Koksun Papers, have been disqualified and their DINs and DSCs have been deactivated. As a result, Koksun Papers is not able to avail the benefit of the said Scheme. Ld. counsel thus prays that in view of the judgment in ***Mukut Pathak (supra)*** as also subsequent orders where the said judgment has been followed, the disqualification of the Petitioners be set aside.

6. On behalf of Ministry of Corporate Affairs, Mr. George, ld. counsel submits that the judgment in ***Mukut Pathak (supra)*** has been challenged by way of an appeal by the Ministry and the said LPA is pending, though no stay has been granted. Ld. counsel also relies upon the recent order passed by the ld. Division Bench in two writ petitions i.e. ***Anamika Devi v. Union***

of India. & Anr.,[W.P.(C) 4356/2020, decided on 20th July, 2020] and ***Gaurav Kumar v. Union of India & Anr., [W.P.(C) 4357/2020, decided on 20th July, 2020]*** to argue that the disqualification list having been notified in 2017, the challenge to the same is extremely belated, hence the writ petition deserves to be dismissed.

7. The Court has heard the ld. counsel for the parties and perused the record. The judgment in ***Mukut Pathak (supra)***, insofar as the merits of the case is concerned, is squarely applicable in the present case. The said judgment clearly holds that the proviso to Section 167(1)(a) of the Act cannot be read to operate retrospectively. It was further held that the said proviso, being a punitive measure with respect to the rights and obligations of directors, cannot be applied retrospectively unless the statutory amendment expressly provides so. The operative portion in ***Mukut Pathak (supra)*** is set out herein below:

> "*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.*
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> *xxxx*
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> *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."

8. The judgment in ***Mukut Pathak (supra)*** has been squarely followed

in ***Kailash Singhal & Anr. v. Union of India & Anr., [W.P.(C) 5261/2020, decided on 14th August, 2020]*** and ***Rajendra Kumar Agrawal v. Union of India & Anr., [W.P.(C). 4988/2020, decided on 24th August, 2020].***

9. Coming to the effect of the order of the ld. Division Bench in ***Anamika Devi (supra)*** and ***Gaurav Kumar (supra),*** relied upon by Mr. George – the ld. Division Bench in the said two writ petitions had observed as under:

> *"1. Both the petitions have been filed by the petitioners praying inter alia that the respondent No.I/Union of India and the respondent No.2/Registrar of Companies be directed not to treat them as "disqualified Directors" under the provisions of Section 164 of Companies Act. Further, the petitioners seek issuance of a writ of mandamus, quashing publication of their names in the List of disqualified Directors, uploaded and published on the website of the respondents in September, 2017. The petitioners also seek directions to the respondents to unfreeze their Director Identification Number (DIN) and Digital signatures certificates thereby enabling them to file the documents and returns on behalf of the companies on which they were serving as Directors.*
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> *2. At the outset, we have requested learned counsel for the petitioners to address us on the maintainability of the present petitions in view of the inordinate delay on the part of the petitioners in approaching the court for relief and that too when admittedly, the List of disqualified Directors had been uploaded and published on the website of the respondent No. I as long back as in September 2017.*
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> *3. The only explanation sought to be offered by Mr. Verma, learned counsel appearing for the*

petitioners is that they were unaware of the publication of the aforesaid List till recently. He however concedes that there is no explanation offered in the petition for the delay.

4. The aforesaid submission is not acceptable. Ignorance cannot bestow any benefit on a litigant and nor can it be a ground to condone a delay of almost three years in approaching the court for relief. We may note that the petitioners had been disqualified for a period of five years commencing from 0 1.11.2016 and continuing to remain in force till 31.10.2021. By now, a little over one year of the period of disqualification is left to expire. But no steps have been taken by the petitioners to seek legal recourse in all this duration.

5. Powers of judicial review vested in the court are discretionary in nature and in particular facts and circumstances, the court can decline to exercise the said power more so, when a party approaches the court for relief with a delay of almost three years, without an explanation worth the name for the said delay.

6. For the aforesaid reasons, we decline to entertain the present petitions on the ground of delay, which are accordingly dismissed along with the pending applications."

10. A perusal of the above order of the ld. Division Bench shows that the ld. Division Bench held that the filing of the writ petition was very belated, but at the same time the Court holds that powers of judicial review are discretionary and the question of delay is to be examined in the particular facts and circumstances of each case.

11. In the present case, the facts and circumstances show that the Companies Fresh Start Scheme (CFSS) is a new scheme, which has been notified on 30th March, 2020. This Scheme was not invoked before the Ld.

Division Bench. The scheme is obviously launched by the Government in order to give a reprieve to such companies who have defaulted in filing documents and they have been allowed to file their requisite documents and to regularize their operations, so as to not face disqualification. The Scheme also envisages non-imposition of penalty or any other charges for belated filing of the documents. The relevant provisions of the said Scheme are set out below:

> "*4. In order to give such an opportunity to the defaulting companies and to enable them to file the belated documents in the MCA-21 registry, the Central Government in exercise of powers conferred under section 460 read with section 403 of the Companies Act, 2013 has decided to introduce a Scheme namely "Companies Fresh Start Scheme, 2020 (CFSS-2020) condoning the delay in filing the above mentioned documents with the Registrar, insofar as it relates to charging of additional fees, and granting immunity from launching of prosecution or proceedings for imposing penalty on account of delay associated with certain filings. Only normal fees for filing of documents in the MCA-21 registry will be payable in such case during the currency of CFSS-2020 as per the provisions of section 403 read with Companies (Registration Offices and Fee) Rules, 2014 and section 460 of the Act.*
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> *xxx*
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> *6. The details of the Scheme are as under:-*
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> *(i) The scheme shall come into force on the 01.04.2020 and shall remain in force till 30.09.2020*
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> *xxx*
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> *(iv) Manner of payment of normal fees for filing of belated documents and seeking immunity under the Scheme – Every defaulting company shall be*

required to pay normal fees as prescribed under the Companies (Registration Offices and Fee) Rules, 2014 on the date of filing of each belated document and no additional fee shall be payable. Immunity from the launch of prosecution or proceedings for imposing penalty shall be provided only to the extent such prosecution or the proceedings for imposing penalty under the Act pertain to any delay associated with the filings of belated documents…….

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(ix) Scheme not to apply in certain cases – This scheme shall not apply :-

a. to companies against which action for final notice for striking off the name u/s 248 of the Act (previously section 560 of Companies Act, 1956) has already been initiated by the Designated authority;

b. where any application has already been filed by the companies for action of striking off the name of the company from the register of companies;

c. to companies which have amalgamated under a scheme of arrangement or compromise under the Act;

d. to vanishing companies;

e. Where any increase in authorized capital is involved (Form SH-7) and also charge related documents (CHG-1, CHG-4, CHG-8 and CHG-9);"

12. The salient features of the Scheme are:

i) It has been launched to facilitate a fresh start, on a clean slate, for companies registered in India;

ii) Alleviative measures under the Scheme are for the benefit of all companies. It gives an opportunity to file belated documents in the

MCA-21 Registry in respect of annual filings, without being subject to higher additional fee on account of delay;

iii) It grants immunity from launch of prosecution or of proceedings for imposition of penalty on account of delay associated with certain filings. For the said filings, only normal fee would be payable;

iv) Any defaulting company can file the belated documents, which were due for filing on any given date, as per the Scheme. Normal fee would be payable for such filing by the defaulting company under the Companies (Registration Offices and Fee) Rules, 2014 and no additional fee shall be payable;

v) To the extent that any prosecution has been launched or penalty has been imposed for the delay associated with the filings of belated documents, it provides that the same shall not be launched and immunity has been provided;

vi) Applications can be made for seeking immunity in respect of belated documents. Once the documents are taken on file or approved by the designated authority, such applications would have to be filed within six months from the date of closure of the Scheme;

vii) To avail benefit of the Scheme, the defaulting company would have to withdraw any appeal that it may have filed against prosecution launched or orders passed by a court or adjudicating authority under the Act;

viii) If a final notice of striking off of a company has already been initiated or in certain other situations as enumerated in Clause 6(ix), the Scheme would not apply;

ix) If immunity is granted, the Scheme provides that prosecution shall be withdrawn before the concerned Court and the proceedings for penalties shall also be closed.

x) The Scheme also extends to inactive companies who can file the requisite documents and get themselves declared as dormant companies under Section 455 or apply for striking off the name of the company.

13. This Scheme provides an opportunity for active companies who may have defaulted in filing of documents, to put their affairs in order. It thus provides Directors of such companies a fresh cause of action to also challenge their disqualification *qua* the active companies. In the present case, the Petitioners are Directors of two companies – one whose name has been struck off and one, which is still active. In such a situation, the disqualification and cancellation of DINs would be a severe impediment for them in availing remedies under the Scheme, in respect of the active company. The purpose and intent of the Scheme is to allow a fresh start for companies which have defaulted. In order for the Scheme to be effective, Directors of these companies ought to be given an opportunity to avail of the Scheme. The launch of the Scheme itself constitutes a fresh and a continuing cause of action. Under such circumstances, the question of delay or limitation would not arise. The ld. Division Bench did not have an occasion in the case of ***Anamika Devi (supra)*** and ***Gaurav Kumar (supra)*** to consider this Scheme.

14. In view of the fact that in the present case, the Petitioners are directors of an active company Koksun Papers in respect of which certain documents are to be filed and the said company is entitled to avail of the Scheme, the

suspension of the DINs would not only affect the Petitioners *qua* the company, whose name has been struck off, but also *qua* the company which is active. Thus, the facts and circumstances of this case are different from the facts in the case before the ld. Division Bench.

15. Considering the COVID-19 pandemic, the MCA has launched the Fresh Start Scheme-2020, which ought to be given full effect. It is not uncommon to see directors of one company being directors in another company. Under such circumstances, to disqualify directors permanently and not allowing them to avail of their DINs and DSCs could render the Scheme itself nugatory.

16. In order to enable the Directors of Koksun Papers i.e. the Petitioners herein, to continue the business of the active company Koksun Papers, in the fitness of things and also in view of the judgment in ***Mukut Pathak (supra)***, the disqualification of the Petitioners as Directors is set aside. The DINs and DSCs of the Petitioners are directed to be reactivated, within a period of three working days.

17. The writ petition is allowed in the above terms. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 2, 2020/*dk/A*