

A COMPARATIVE STUDY OF DISQUALIFICATIONS OF DIRECTORS IN COMPANIES ACTS'

1. INTRODUCTION:

Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Procedural law establishes a mechanism for determining those rights and liabilities and machinery for enforcing them.

On study of various judgments, one could settle that it is a cardinal rule in law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

Section 164 of the Companies Act, 2013 states various disqualifications for appointment of Director in a company. Further, this act emphasizes the intention of the law makers that is to bring such strict provisions under the Act to tighten the noose of the defaulters for non-filing of the financial reports annually is an act of keeping the stakeholders in grave obscurity.

2. OBJECTIVES:

- To make a comparative study of the Indian Companies Laws on disqualification of the directors
- To analyse the international perspectives regarding the disqualification of directors in various countries
- To study inter-regional facts on disqualification of directors in India
- To analyse few Indian cases related to the disqualification of directors

3. METHODOLOGY:

This study is an analytical type of research. Most of the data are secondary in nature which are gathered from various sources like annual reports, research publications, and reports of various countries on company's law and views of MCA etc.

4. THE INDIAN COMPANY'S ACT AND DISQUALIFICATION OF DIRECTORS: A COMPARISON

There are two situations when the disqualification arises:

1. Non filing of financial statements and annual return for any continuous period of 3 years;
2. Failure to repay interest on deposit/ debentures or repayment of deposit/debentures and such failure continues for a period of 1 year or more.

If any of the two situations arises, all the directors of such company get tainted with such disqualification. Consequence of the disqualification, as per Section 164 (2), is that such director neither can be re-appointed in that company nor appointed as a director in any other company. This will be the case till 5 years from when the company fails to do so. So, in a way Section 164 (2) not only cites the situation in which the disqualification gets attracted but also specifies the tenure of disqualification. What is the consequence if Section 164 (2) is not complied?

The subject matter of disqualification of directors is covered under section 274 in the Companies Act, 1956 where as it is covered under section 164 in Companies Act, 2013. Below table-1 shows comparison between two Companies Acts.

Table-1: Comparison between Indian Company Act

The Companies Act, 1956 Under section 274	The Companies Act, 2013 Under section, 164
1 A person shall not be capable of being appointed director of a company, if-	
(d) he has been convicted by a court of any offence involving moral turpitude 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;	Along with (d) it has 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) he has not paid any call in respect of 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;	Covered in (1) f
(g) such person is already a director of a public company which:- (A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on	Covered under (2) with a slight change as: (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

<p>and after the first day of April, 1999; or (B) has failed to repay its deposit or interest thereon on due date or redeem its debentures on due dates or pay dividend and such failure continues for one year or more;</p> <p>Provided that such a person shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns under sub-clause (a) or has failed to repay its deposit or interest or redeem its debentures on due date or pay dividend referred to in clause (B)</p>	<p>financial years; or (b) has failed to repay the deposits accepted by it or pay interest there on 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,</p> <p>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.</p>
<p>Not covered</p>	<p>1 (e) an order disqualifying him for appointment as a director has been passed by a Court or Tribunal and the order is in force;</p>
<p>Not covered</p>	<p>1 (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</p>
<p>Not covered</p>	<p>1(h) he has not complied with sub-section (3) of section 152.</p>
<p>(2) The central Government may, by notification in the Office Gazette, remove-</p> <p>(a) the disqualification incurred by any person in virtue of clause (d) of sub-section (1), either generally or in relation to any company or companies specified in the notification; or</p> <p>(b) The disqualification incurred by any position in virtue of clause (e) of sub-section (1).</p>	<p>Not specified</p>
<p>(3) A private company which is not a subsidiary of a public company may, by its articles, provide that a person shall be disqualified for appointment as a director on any grounds in addition to those specified in sub-section (1).</p>	<p>Has widened the scope by enhancing including all sub-section and clauses of the section 164 :</p> <p>(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):</p> <p>Provided that the disqualification referred to the clauses (d), (e) and (g) of sub-sections (1) shall not take effect-</p> <p>(i) for thirty days from the date of conviction or order of disqualification;</p> <p>(ii) where an appeal or petition is preferred within thirty days as aforesaid against the</p>

	<p>conviction resulting in sentence or order, until expiry of seven days from the date on which such appeals or petition is disposed of; or</p> <p>(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.</p>
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Note: Compiled from various sources

5. INTERNATIONAL REVIEWS ON DISQUALIFICATIONS OF DIRECTORS:

The law on disqualification of directors has been prescribed internationally in their respective company laws. Following Table-2 provides a clear cut picture of some countries.

Table-2: International review on the disqualifications of directors

Name of the Country	The Law
Alberta Companies Act	<p>The courts can resort to another method of director disqualification, as they not only have the power to disqualify directors who misbehave during a company's insolvency, but also to disqualify directors at any time during the company's life. The courts have had some ability to disqualify directors for years, but in 1981-82 the Cork Report recommended strengthening the courts' discretionary disqualification powers and instituting mandatory disqualification for directors in certain circumstances. In 1986, the disqualification provisions in various statutes were consolidated in the CDDA and further reforms to the Insolvency Act 2000 introduced the "disqualification undertaking" to supplement a "disqualification order." Now, the most commonly reported conduct under the CDDA includes allowing the company to continue to trade when it was unable to pay its debts, failing to keep proper accounting records, failing to prepare and file accounts or make returns to Companies House, and failing to submit returns or pay the Crown any tax due.</p> <p>Note: Cork Report, supra note 17 at paras. 1766, 1816-37. In fact, the court has had the power to disqualify certain individuals from managing a company since 1928: see Companies Act, 1928 (U.K.), 18 & 19 Geo. V, c. 45, s. 75, subsequently consolidated as s. 275 of the Companies Act, 1929 (U.K.), 19 & 20 Geo. V, c. 23; see generally U.K., H.C. "Company Law Amendment Committee 1925-26: Report Presented to Parliament by Command of His Majesty," Cmd 2657 in Sessional Papers, vol. 4 (1925-26) 477 (Chairman: Wilfred Greene, K.C.). The provision came about as a result of the recommendation of the Company Law Amendment Committee under the chairmanship of Mr. Greene, K.C., but as time went by, the court's power became more extensive. When the provisions were re-enacted in the Companies Act, 1948 (U.K.), 11 & 123 Geo. VI, c. 38, undischarged bankrupts were</p>

	<p>prohibited from being directors without leave of the court, and courts could prevent those who had been convicted of fraudulent trading from being involved in managing companies. In 1976, the maximum possible period for disqualification was increased to 15 years and an individual could be disqualified for having behaved improperly during a company's insolvency. These provisions were re-enacted in the Companies Act 1985, (U.K.), 1985, c. 6 and in the Insolvency Act 1986, supra note 7. For an overview of the history of the disqualification provisions, see Fiona Tolmie, Corporate and Personal Insolvency Law, 2d ed. (London: Cavendish Publishing, 2003) at 246; see Davies, supra note 21 at para. 10-2; see Ziegel, "Creditors as Corporate Stakeholders," supra note 13 at 523.</p>
<p>The Companies Act, (Bangladesh) 1994</p>	<p>The Section 94 of the act highlights the disqualification of directors as:</p> <p>(1) A person shall not be capable of being appointed as director of a company, if-</p> <ul style="list-style-type: none"> (a) He has been found to be of unsound mind by a component court and the findings is in force; or (b) He is an undischarged insolvent; or (c) He is applied to adjudicated as an insolvent and his application is pending; or (d) He has not paid any call in respect of 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; or (e) He is a minor <p>(2) A company may in its articles provide additional grounds for disqualifications of a director.</p>
<p>Malaysia Companies Act 1965 (REVISED - 1973) and Reprint on 2000.</p>	<p>Section 130A: Disqualification of Directors of insolvent companies</p> <p>(1) Where on an application under this section it appears to the Court—</p> <p>that a person—</p> <ul style="list-style-type: none"> (i) is or has been a director of a company which has at any time gone into liquidation (whether while he was a director or subsequently) and was insolvent at that time; and (ii) is or has been a director of such other company which has gone into liquidation within five years of the date on which the first-mentioned company went into liquidation; and <p>(b) that his conduct as director of any of those companies makes him unfit to be concerned in the management of a company,</p> <p>the Court may make an order that that person shall not, without the leave of the Court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for such period beginning on the date of the order and not exceeding five years as may be specified in the order.</p> <p>Note- The law does not clearly specifies any thing on the issue</p>
<p>Republic of South Africa, The Companies Act, 2008</p>	<p>Section 69 of the Act says as:</p> <p>(7) A person is ineligible to be a director of a company if the person—</p> <ul style="list-style-type: none"> (a) is a juristic person;

	<p>(b) is an unemancipated minor, or is under a similar legal disability; or (c) does not satisfy any qualification set out in the company's Memorandum of Incorporation.</p> <p>(8) A person is disqualified to be a director of a company if— (a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or (b) subject to subsections (9) to (12), the person—(i) is an unrehabilitated insolvent; (ii) is prohibited in terms of any public regulation to be a director of the company; (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or (iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence— (aa) involving fraud, misrepresentation or dishonesty; (bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or (cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).</p> <p>(9) A disqualification in terms of subsection (8)(b)(iii) or (iv) ends at the later of— (a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or (b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).</p> <p>(10) At any time before the expiry of a person's disqualification in terms of subsection (8)(b)(iii) or (iv)— (a) the Commission may apply to a court for an extension contemplated in subsection (9)(b); and (b) the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.</p> <p>(11) A court may exempt a person from the application of any provision of subsection (8) (b). (12) Despite being disqualified in terms of subsection (8) (b)(iii) or (iv), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by— (a) that disqualified person; and (b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company.</p>
<p>Singapore Companies Act, 1986</p>	<p>COMPANY DIRECTORS DISQUALIFICATION ACT 1986</p> <p>The CDDA1986 seeks to remedy this practice by preventing certain individuals from acting as company director, but the ambit of the Act's control is much wider than this one instance.</p> <p>Categories of conduct</p> <p>The CDDA1986 identifies three distinct categories of conduct which may, and in some circumstances must, lead the court to disqualify</p>

	<p>certain persons from being involved in the management of companies. These are:</p> <p>a. General misconduct in connection with companies A Misconduct is defined as under various grounds.</p> <p>b. Disqualification for unfitness</p> <ul style="list-style-type: none"> • This covers: <ul style="list-style-type: none"> - Disqualification of directors of companies which have become insolvent, who are found by the court to be unfit to be directors (S6 of the CDDA1986). Under S6, the minimum period of disqualification is two years, up to a maximum of 15 years - Disqualification after investigation of a company under Pt XIV of the CA1985 (S8 of the CDDA1986). <p>A disqualification order may be made as the result of an investigation of a company under the Companies legislation. Under S8 of the CDDA1986, the Secretary of State may apply to the court for a disqualification order to be made against a person who has been a director or shadow director of any company, if it appears from a report made by an inspector under S437 of the CA or Ss94 or 177 of the Financial Services Act 1986 that 'it is expedient in the public interest' that such a disqualification order should be made. Once again, the maximum period of disqualification is 15 years.</p> <p>c. Other cases for disqualification</p> <ul style="list-style-type: none"> • This relates to: <ul style="list-style-type: none"> - participation in fraudulent or wrongful trading under S213 of the Insolvency Act 1986 (S10 of the CDDA1986) - undischarged bankrupts acting as directors (S11 of the CDDA1986) - failure to pay under a county court administration order (S12 of the CDDA1986).
Australia Corporations Act 2001	<p>The Act provides for the removal of directors by shareholders provided certain conditions are met (s 203D (public company), s 203C (proprietary company)). The Act also provides that automatic disqualification from a position of director occurs when a director:</p> <ul style="list-style-type: none"> • is convicted on indictment of certain serious offences (for example an offence relating to the business or financial standing of the company) (s 206B(1)); • is an undischarged bankrupt or has failed to comply with any prescribed insolvency procedures (s 206B(3),(4)); • is convicted of certain offences against the Act and is punishable for a period of imprisonment for a period of greater than 12 months (s 206B(1)(b)(i)); • is convicted by an offence that involved dishonesty and is punishable by imprisonment for at least three months (s 206B(1)(b)(ii)). <p>There is an automatic disqualification for a director who is convicted on indictment under s 206B(1) of Act (see s 206B(2)) with the possibility</p>

	<p>of extending the disqualification by up to 15 years on the application of ASIC (s 206BA).</p> <p>Both ASIC and the courts can also disqualify a person from acting as a director (ss 206C–206G). Please note that there are other ways in which a director of a company incorporated under the Act may be disqualified or removed. For example, the Australian Charities and Not-for-profits Commission Act 2012 provides for its own regime to disqualify or remove. A person who is disqualified from managing a corporation commits an offence if that person:</p> <ul style="list-style-type: none"> • makes, or participates in the making, decisions that affect the whole, or a substantial part, of the business of the corporation; or • exercises the capacity to significantly affect the corporation's financial standing; or • communicates instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation: - knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or - intending that the directors will act in accordance with those instructions or wishes.
<p>UK Companies Act, 2006</p>	<p>The principal statutory restrictions on acting as director derive from the Company Directors Disqualification Act 1986 (CDDA).</p> <p>Section 11 of that Act provides that persons who are undischarged bankrupts or subject to a bankruptcy restrictions order may not act as directors of limited companies. It is an offence for persons to act in contravention of these provisions. The CDDA lays down a number of other grounds on which directors may be disqualified by law from acting as directors. A director may be disqualified from holding office as director, or from being otherwise involved in the management of limited companies, under the provisions of the Company Directors Disqualification Act 1986 (CDDA). Where a person has been disqualified under the CDDA, he or she may not – without special leave of the court – act as a director of any limited company or be concerned or take part in the management of a company. Disqualification orders may be imposed on companies as well as individuals, so those companies that act as ‘corporate directors’ of other companies may be barred in the same way as individuals.</p> <p>Under reforms brought in by the Enterprise Act 2002, the Secretary of State may, in lieu of instituting or continuing with an application for a disqualification order, accept an undertaking from the person concerned that he will not, for a period specified in the undertaking, be a director of a company or act in any of the other ways already discussed. Undertakings may be given only where the grounds on which an order may be sought are those specified in sections 6–8 of</p>

	<p>the Act, i.e., ‘unfitness’ based on the person’s conduct as a director of a company which has gone into insolvency or which has been the subject of an investigation of its affairs.</p> <p>The courts have discretion under the CDDA to determine what constitutes ‘unfitness’. They have used a number of criteria to assess this. In <i>Re Bath Glass Ltd</i> [1988] 4 BCC 130, it was held that, to declare a director unfit, the court must be satisfied that the defendant has been guilty of a serious failure or failures, whether deliberate or through incompetence, to perform his or her duties. Furthermore, a director would be unfit if his actions were very far from those of a ‘reasonably competent director’. Other specific criteria which at various times have been deemed significant for this purpose include (i) the amount of the company’s debts, and in particular the amounts owing to the Crown, (ii) the number of companies with which a director has been involved which have gone into liquidation, (iii) breaches of commercial morality, iv) gross incompetence and (v) recklessness.</p> <p>The court held that, if a director is to be found to be ‘unfit’ in such a situation, then there must be some additional ingredient, which in this case would have been that at the time the director received advance payment from a customer, the director knew – or should have known – that there was no reasonable prospect that the company would avoid insolvency. Given the efforts that the directors in this case were found to be making to find the necessary ‘corporate solution’ to save the business, this additional ingredient was not considered to be present.</p>
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Source: Compiled from Various reports.

6. INTER-REGIONAL FCATS ON DISQUALIFICATIONS OF DIRECTORS: A GRAPHICAL ANALYSIS

The government is right to crack down on directors of shell companies with no apparent operational business. Illegality must be penalised. Reportedly, directors of the two lakh-odd shell companies- that have been struck off by the Registrar of Companies-will also be barred from taking similar board positions elsewhere or getting reappointed. This is in line with regulation. However, there could be a spate of disputes if many disqualified directors also run legitimate businesses. That is avoidable. The government has now hinted at making a rule to address the appeals of disqualified directors. This is pragmatic.

The Ministry of Corporate Affairs (MoCA) has begun making public lists of disqualified directors across the nation as well as those associated with. The disqualified in the lists are those who are, or were a director, in a company that has not filed financial statements or annual returns for any continuous period of three financial years. Such

directors will not be eligible for reappointment as a director in that company or for appointment in other companies for five years from the date of non-compliance.

The table no-3 derived below followed by the diagram-1 depicts the detailed numbers of disqualified directors in some important regions of India as a moment of the government exercises. From the table it can be seen that, the maximum number of directorships disqualified is from Delhi (74921), which includes the names of some foreign nationals as well. This was followed by Mumbai (66,851), Hyderabad (41,156), Bangalore (20,924), Ernakulam (around 14000), Cuttack (13,383), Ahmedabad (10,513), Gwalior (9,628), Pune (4,449), Puducherry (1,605), Himachal Pradesh (1,363), Coimbatore (1,299), Shilong (1,290) and Chhattisgarh (889).

Region	Numbers of Disqualified Directors
Delhi	74,921
Mumbai	66,815
Hyderabad	41,156
Bangalore	20,924
Ernakulam	14,000
Cuttack	13,383
Ahmedabad	10,513
Gwalior	9,628
Pune	4,449
Puducherry	1,605
Himachal Pradesh	1,363
Coimbatore	1,299
Shilong	1,290
Chhattisgarh	889

Source: Compiled data (approximate)

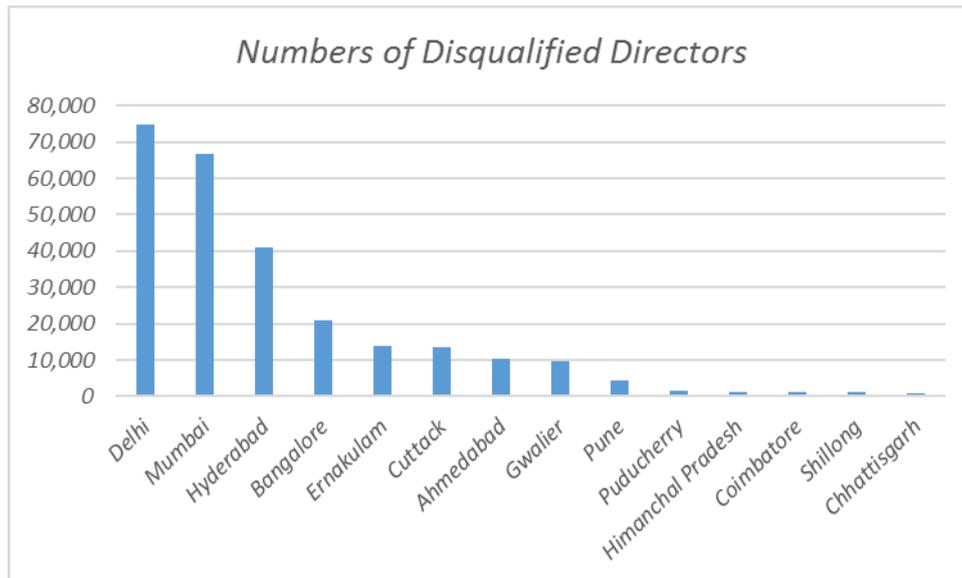


Diagram-1: Region wise disqualification of directors
Source: The Hindu, 2017

7. SOME RELATED CASES (Precise Report):

CASE-01

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD SPECIAL CIVIL APPLICATION NO. 19210 of 2017 IN SRINIVAS SRIDHAR D-905, ASHOK TOWERS, DR SS ROAD, & 1....Petitioner(s) Versus

UNION OF INDIA & 1....Respondent(s)

CORAM: HONOURABLE MR.JUSTICE RAJESH H.SHUKLA Date: 13/10/2017

ORAL ORDER

1. Present petition is filed by the petitioner-Director of the company under Articles 14, 19(1)(g), 21, 265 and 300(A) of the Constitution of India as well as under the provisions of the Companies Act, 2013 read with Companies (Appointment and Qualification of Directors) Rules, 2014 read with Disqualified Directors (of Struck Off Companies) under Section 164(2)(a) of the Companies Act, 2013.
2. Heard learned Senior counsel Shri Mihir Thakore appearing with learned advocate Shri P P Majmudar for the petitioners.
3. Learned Senior counsel Shri Thakore has referred to the background of the facts and also referred to the provisions of Section 164(2)(a) of the Companies Act, 2013 with Section 267 of the Act and submitted that as provided in Section 164(2)(a) of the Companies Act, the issue as to whether the person would have been disqualified for non-complying with the requirement could be considered from

the date i.e. 01.04.2014. He submitted that in that event he still has a chance to submit and comply with the requirement and therefore, necessary protection may be granted as otherwise it would permit the uploading data with the Registrar of the Companies. He has also referred to the judgment of the Hon'ble Delhi High Court in Writ Petition (Civil) No.8896/2017 and submitted that the similar order may be passed granting the protection. He has also fairly stated that there is another judgment of the Hon'ble Madras High Court and stated that the necessary protection may be granted.

4. In view of the submissions raising the contentions about the interpretation of Section 164(2)(a) as well as Section 167 of the Companies Act, it requires consideration for the purpose of considering the date on which the person can be said to have failed to comply with the requirements. 5. Hence, Notice to the respondents returnable on 30.11.2017. Ad-interim relief in terms of paragraph 18(C) till then qua the petitioner. Direct service qua respondent No.2 is permitted. Respondent No.1 is permitted to be served over and above normal mode by speed post at the cost of the petitioner.

CASE-02

VIKRAM AHUJA VS. GREENSTONE INVESTMENTS PVT LIMITED AND ORS., BEFORE NCLT, MUMBAI BENCH, DECIDED ON 22.11.2016:

In a case law, one of the point for discussion and decision before the Hon'ble bench was "*whether the disqualification set forth in Section 164(2)(a) r/w 167(1) (a) of the Act 2013 has retrospective effect or not*";

- a. The Hon'ble Tribunal, after considering various case laws considered that: "*this provision has to be read as **applicable to the situations where nonfiling has started, at the most in the past and continuing while this enactment has come to into existence and also to future non-filing.....***"
- b. Also, in a decided case law it has been provided that, *the statute providing posterior disqualification on past conduct does not become a retrospective one because a part of a requisition for its action is drawn from a time antecedent to its passing;*
- c. Therefore, the provisions of Section 164 (2)(a) shall be applicable where the non-filing has started in the past and continuing while this enactment has come to

existence and also to the future non-filing. Mere applicability of such provision on continuous default till date shall not give rise to the question of retrospective or prospective effect.

CASE-03

Calcutta High Court

Pragati 47 Development Ltd vs Partha Ghosh & Ors on 17 December, 2015

OD-12 to 15

IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION, ACO No. 213 of 2015, APO No. 468 of 2015

PRAGATI 47 DEVELOPMENT LTD. Vs. PARTHA GHOSH & ORS.

AND

ACO No. 214 of 2015

APO No. 469 of 2015

PRAGATI 47 DEVELOPMENT LTD. Vs. RAJ SHEKHAR AGARWAL & ORS.

AND

ACO No. 227 of 2015

APOT No. 573 of 2015

RAJ SHEKHAR AGARWAL & ANR . Vs. PRAGATI 47 DEVELOPMENT LTD. & ORS.

AND

ACO No. 228 of 2015

APOT No. 575 of 2015

RAJ SHEKHAR AGARWAL & ANR . Vs. PRAGATI 47 DEVELOPMENT LTD. & ORS.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

Date: 17th December, 2015.

The Court: An interesting question of law has arisen pertaining to Section 164 of the Companies Act, 2013.

The view rendered by the Company Law Board at the final hearing of an interlocutory application in proceedings under Sections 397 and 398 of the Companies Act, 1956 is that since the relevant provision was notified on April 1, 2014, the period of disqualification as envisaged under Section 164(2) of the Act of 2013 would count, at the earliest, from April 1, 2014 and the default for any previous period cannot be reckoned for the purpose of the disqualification.

Such question requires attention and the requisite time may not be available before the vacation. The appeals will be heard. It will be open to the parties to use affidavits to

disclose whatever documents that may have been before the Company Law Board. Such affidavits be filed by January 4, 2016.

The appeals will appear for hearing on January 14, 2016.

The appellants insist that upon the directors of the rival group in the company being disqualified for failing to file the financial statements for three 3 consecutive financial years, the appellants' group has been in control of the management of the company. Such position is disputed by the respondents.

Since there is uncertainty as to the management of the company, it is necessary that no major decisions pertaining to the company, particularly its share-holding in other companies, are taken. *Pragati 47 Development Ltd vs Partha Ghosh & Ors* on 17 December, 2015 and no meeting of its board of directors is convened or held till the matters are taken up next.

The appellants refer to police complaints lodged by the respondents' group repeatedly to harass the appellants. The latest in such regard is Ballygunge Police Station Case No.156 dated December 4, 2015. The respondents are directed to ensure that the police authorities do not take any coercive or other measures against the alleged accused indicated in the complaint till the matters are taken up next. Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

CASE-04

Nabendu Dutta and ors. Vs. Arindam Mukherjee and ors. LegalCrystal Citation :

legalcrystal.com/884665

Court : Kolkata

Decided On : May-20-2003

Reported in : [2004]121CompCas150(Cal),[2004]55SCL146(Cal)

Judge : Kalyan Jyoti Sengupta, J.

Acts : Companies Act, 1956 - Sections 274, 274(1) and 294; [Reserve Bank of India Act, 1934](#) - Section 45QA; [Companies \(Amendment\) Act, 2000](#)

Appeal No. : G.A. Nos. 2107 and 3889 of 2002 and C.S. No. 236 of 2002

Appellant : Nabendu Dutta and ors.

Respondent : Arindam Mukherjee and ors.

Advocate for Pet/Ap. : Sudipta Sarkar, Sr. Adv., ;P.C. Sen, ;P.K. Roy, ;Hirak Mitra and ;Joyanta Mitra, Advs.

Judgement :

Kalyan Jyoti Sengupta, J.

1. In this motion, the petitioner succeeded in obtaining an ad interim order of status quo, passed by this court in a declaratory action for holding that defendants Nos. 1 and 2 have become disqualified to be directors in defendant No. 3-company in view of the provision of Section 274, Sub-section (1)(g) of the Companies Act, 1956.
2. Defendants Nos. 1 and 2 applied for vacating of the aforesaid order of status quo. However, this application has not been disposed of separately and the same has been treated to be an affidavit-in-opposition to the petition of this motion for convenience sake.
3. Short narration of the facts in this case would be relevant in order to find out, prima facie, as to whether the plaintiffs/petitioners are entitled to continuation of the interim order till the disposal of the suit or not. The plaintiffs/ petitioners are holders of equity shares in defendant No. 3, Yule Financing and Leasing (hereinafter referred to as 'Yule'), being defendant No. 7 which was floated in the year 1981 by Andruie Yule and Company (the fourth defendant). Defendants Nos. 1 and 2 had been the directors of Yule who had accepted deposits from the public under various schemes but failed to repay on their respective dates on maturity.
4. They were appointed directors on June 28, 1999, and June 26, 1998, respectively, and had been till October 15, 2001, and September 26, 2001, respectively, when, the aforesaid two persons are said to have resigned from the office of the director of defendant No. 7. Now these two persons are sought to be appointed directors in defendant No. 3. It appears that during their tenure of directorship defendant No. 7 is alleged to have defaulted in repaying the amount of deposit together with interest to the public upon maturity. So, defendant No. 7 approached the Company Law Board for suitable order for reschedulement of repayment under the Companies Act, 1956.
5. By an order in August, 2000, pursuant to the scheme submitted by defendant No. 7 reschedulement of repayment of the deposits to the respective depositors was allowed. During the tenure of the directorship of defendants Nos. 1 and 2 Section

274 of Sub-section (1) of the Corporate Laws was amended on December 13, 2000, by incorporating in Sub-section (1), Clause (g) (A and B). Therefore, the aforesaid section as amended are set out hereunder: '274. Disqualification of directors.--(1) A person shall not be capable of being appointed a director of a company, if such person is already a director of a public company, which-- (A) has not filed the annual accounts and annual returns for any continuous three financial years the commencing on and after the first day of April, 1999, or- (B) has failed to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more :Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns, under Sub-clause (A) or has failed to repay its deposit or interest or redeem its debentures on due date or pay dividend referred to in Clause (B).' Learned counsel for both the parties have argued and agreed that any Act cannot have any retrospective operation and the law is very well settled that unless expressly it is intended by the Legislature, retrospective operation cannot be thought of and it is always prospective.

6. In this amending Act, there is no such expressed intention. Both the parties have cited the various authorities in support of their respective submissions. Mr. P. C. Sen, learned senior counsel in support of the petition, submits that it is true the aforesaid principle of interpretation of statutes is applicable generally but there may be certain cases where the language of the section itself may work in retrospection. He submits that ordinary grammatical meaning of the wordings shall be given. When the ordinary grammatical meaning is clear and unambiguous, no further aid and assistance from the object and reason of the Act should be taken. In this case, the aforesaid provision will be applicable if a person who is already a director on the date of commencement of the Act, is associated with any defaulting company, he would be inviting this disqualification. In support of his aforesaid submission he has relied on a number of decisions of the Supreme Court reported in Union of India v. Mudan Gopal Kabra : [1954]25ITR58(SC) , Rafiquennessa (Mst.) v. Lal Bahadur Chetri, : [1964]6SCR876, Bashiruddin Ashraf v. Bihar Subai Sunni Majlis-Awaqf, : [1965]2SCR205 and T.K. Lakshmana Iyer v. State of Madras,

: [1968]3SCR542 and an English decision in A Solicitor's Clerk, In re [1957] 3 All ER 617.

7. Even if the order of the Company Law Board is taken into consideration, still then, there is default in paying the amount of the deposit, so far as it relates to the deposit holders of Rs. 5,000, there has been a default for one year.
8. Mr. P. K. Roy, learned senior counsel whose clients have sought to come into this proceeding for being added as a party, supports the argument of Mr. Sen and he submits the aforesaid amendment is intended to protect the deposit holders and the public at large. So, this has to be construed strictly and the language employed in the said section is intended to mean the person who is already a director meaning thereby in essence, because of the language used therein, it has retrospective operation.
9. Mr. Hirak Mitra, learned senior counsel, while opposing this application, contends that the language of the section is very clear. There is no provision either expressed or by necessary implication that the said section is intended to give a retrospective operation. A portion of the said amended section has been expressly given retrospective operation from April 1, 1999, whereas the other portion has not been mentioned specifically. So, it is clear that it will have prospective operation. Therefore, upon a careful reading of the said section it will appear that defaulting period of one year or more and holding office of director will be counted on and from December 13, 2000. In terms of the above section one year is the minimum time. Before expiry of one year defendants Nos. 1 and 2 have resigned admittedly. Therefore, they do not come within the mischief of the aforesaid section.
10. Mr. Joyanta Mitra, learned senior counsel also opposes this application and has advanced the same argument and in support of their arguments they relied on the following decisions of the Supreme Court and other courts : Jagir Kaur (Mst.) v. Jaswant Singh, : [1964]2SCR73 , Kanai Lal v. Paramnidhi Sadhukhan, : [1958]1SCR360 , State of Maharashtra v. Nanded-Parbhani Z. L. B. M.

11. V. Operator Sangh : [2000]1SCR357 , Harbhajan Singh v. Press Council of India : [2002]2SCR369 , Pakala Narayana Swami v. Emperor, AIR 1939 PC 47, Rananjaya Singh v. Baijnath Singh, : [1955]1SCR671 , Nelson Motis v. Union of India : (1992)IILLJ744SC , Mahadeolal Kanodia v. Administrator General of West Bengal: [1960]3SCR578 , Ganesh Wire Industries v. C. E. S. C. Ltd. [2002] 3 CLT 16 ; AIR 2003 Cal 138, Films Rover International Ltd. v. Cannon Film Sales Ltd. [1986] 3 All ER 772 (Ch D), Luke v. IRC [1963] AC 557 (HL) and [1884] 13 QBD 337.
12. Mr. Joyanta Mitra adds that the aforesaid section operates for disqualification and has got civil consequences. So, the construction of the section should be very restrictive and the clear and literal meaning should be given. Mr. Sudipta Sarkar, learned senior counsel submits that in view of the order passed by the Company Law Board no question of disqualification within the section is applied as the due date for payment of the deposits has been rescheduled and, therefore, the minimum period of one year is not fulfilled. As such the suit as well as the application are frivolous one and interim order should be vacated. Of course, Mr. Hirak Mitra at the very outset contended that the plaintiff/ petitioner have no locus standi to maintain the suit, as the shareholders are not concerned with the management of the company they are interested only in the dividend of shares.
13. Before I advert to the main issues I think I should decide the question of locus standi first. I am unable to accept the argument of Mr. Hirak Mitra that the plaintiff/petitioner being the shareholder and the clients of Mr. P. K. Roy, who are also the shareholder, have no locus standi. The shareholders are vitally interested in the proper and lawful management of company, inasmuch as they are represented by the directors, and obviously they must see that company is managed and controlled by the competent and untainted person to protect their interest if a company mans the office of director with disqualified persons, it certainly brings disrepute to the company itself and it may have adverse effect in the business of the company.
14. The aforesaid amended portion of Section 274, is in my view, punitive measure for the benefit and protection of the deposit holders against failure, either wilful or otherwise in repayment of deposit on due date. In my view, not only the

shareholder of a particular company in which tainted directors are sought to be appointed from a defaulting company, any person in the member of the public who is interested to transact with that limited company can also come in and question the appointment of the tainted directors. This section intends to identify those directors under whose management the default has occurred. So, I hold that the plaintiff/petitioner and the clients of Mr. Roy have locus standi.

15. Going by the prayers of the petition, I am of the view that the prayers (a), (b) and (c) cannot be granted and this can only be granted by passing a decree. The prayer (d) is not clear. However, since the order of status quo has been passed initially, it has to be considered in totality of the facts and circumstances of this case and without resorting to technicality, whether this can be maintained till the disposal of the suit or not.
16. The moot question in this case is, on the facts and circumstances of this case, whether this section has retrospective operation or prospective operation. Even if it is made prospective operation, then, because of the language employed therein the effect thereof can be given for the failure of the company that has already taken place on the date of commencement of the Act or not. I think the argument of Mr. Sarkar has to be considered first, as to whether the aforesaid section can be applied in view of the order passed by the Company Law Board, rescheduling the date of repayment.
17. On the factual score it appears that had there been no order of the Company Law Board then due date of maturity of all the deposits would have been for the various slabs of the deposits from December 31, 1998, till June 30, 2000. However, these dates of repayment have been rescheduled by the order of the Company Law Board and it appears that this has been done for all slabs of deposits.
18. I cannot accept the argument of Mr. Sen that by this order the due date does not stand changed and/or modified for the purpose of the aforesaid Section 274, Subsection (1), Clause (g)(B). When the date of repayment is rescheduled, due date automatically stands extended and/or varied. The beneficial part of legislation should be given to all persons without any discrimination. When the company is

getting benefit of the aforesaid order and it is saved from the evil consequences for failure to make payment on maturity, why the director(s) concerned should not get such benefit of extension as the failure of the company in making payment within due date is correlated to the legal disqualification of the directors.

19. Therefore, I am of the view that due date for computing one year or more to repay is to be reckoned from the rescheduled dates as fixed by the Company Law Board in 49. Therefore, it is clear that default of the company has been continuing. Defendant No. 1 has been a director from June 28, 1999, till October 15, 2001, when he is said to have resigned from the office of directorship of defendant No. 7. Though I do not find any document in the affidavit-in-opposition of any of the defendants that defendant No. 1 has resigned. No copy of the resignation letter has been disclosed nor annexed nor any resolution of the board of the company has been annexed showing acceptance of resignation. It is the special knowledge of defendants Nos. 1 and 2 and for that matter defendant No. 7 to produce this document by way of evidence to establish the resignation was tendered and it has been accepted under the provision of the Companies Act, 1956, or it has been legalized under the provision of the Companies Act, 1956, by the Registrar of Companies. It is a legal requirement to be complied before resignation is held operative, lawful and valid. It is true that the petitioner in its petition has admitted the fact of resignation. In my view, admission of the petitioner in this case does not matter as against the provision of law. I hold that respondents Nos. 1 and 2 in the absence of those documents are said to have been technically continuing director for the purpose of applying the aforesaid provision.
20. In my view, the aforesaid findings at this interlocutory stage are prima facie, and to hold that defendant No. 1 is disqualified to be appointed as a director in defendant No. 3. In the case of defendant No. 2 he was appointed as the director on June 26, 1998, and remained till September 26, 2001, in defendant No. 7 when the default of the company continued for one year or more. In his case also likewise defendant No. 1, I do not find any document that he has tendered a resignation nor any document to show such resignation had been accepted not to speak of furnishing any copy of statement in Form 32. So, he is deemed to have been continuing as director.

21. Accordingly, I am of the view that order of status quo passed by this court shall continue till the disposal of the suit and I do not find any reason either on fact or in law to vacate the same. The application for vacating interim order is thus dismissed. Cost of this application will be cost in the cause.
22. However, I expedite the hearing of the suit. Let the written statement be filed by the defendants/respondents within a period of fortnight from date. Service of writ of summons is not required to be served as it would be an academic formality. Since copies of the plaints have already been received by the parties as it appears from the interlocutory proceedings if not received then copies thereof shall be served upon the learned advocates on records of the respective defendants/respondents. There will be cross order for discovery, within a fortnight thereof. Inspection forthwith. Parties would be at liberty to pray for early hearing of the suit before appropriate Bench.

CASE-05

Hindustan Club Ltd. Vs. Pawan Kumar Jain

LegalCrystal Citation : legalcrystal.com/872661

Court : Kolkata

Decided On : Aug-02-2005

Reported in : [2005]64SCL65(Cal)

Judge : Pinaki Chandra Ghose and ;Narayan Chandra Sil, JJ.

Acts : Companies Act, 1956 - Sections 211, 216, 217, 227(3), 274, 274(1) and 642; ;Companies (Amendment) Act, 2000; ;Election Rules - Rule 5; ;Companies Rules, 2003 - Rules 4 and 9; ;Constitution of India - Article 173

Appeal No. : G.A. No. 2218 of 2005 in A.P.O.T. No. 418 of 2005 with C.S. No. 326 of 2004

Appellant : Hindustan Club Ltd.

Respondent : Pawan Kumar Jain

Advocate for Def.: S.B. Mookherjee, ;Pratap Chatterjee, ;Sanjiv Banerjee and ;Moti Sagar Tiwari, Advs.

Advocate for Pet/Ap. : Sidharth Shankar Ray, ;P.C. Sen and ;Siddhartha Mitra, Advs.

Disposition : Appeal dismissed

Judgement : Pinaki Chandra Ghose, J.

1. This application arising out of an order dated 29-4-2005 (See Pawan Jain v. Hindustan Club Ltd. [2005] 5 Comp. LJ 1/62 SCL 210 (Cal.)) whereby His Lordship was pleased to direct the appellant to hold annual general meeting (hereinafter referred to as AGM) under the supervision of a special officer and further to hold

AGM of the Club in accordance with the rules of Hindustan Club (hereinafter referred to as the said Club).

2. Facts of the case briefly are as follows: 2.1 On 9-11-2004 a notice was issued by the said Club for convening the AGM to be held on 18-12-2004 to transact the following business: (i) To receive, consider and adopt the audited balance sheet as on 31-3-2004; (ii) To appoint auditors for the year 2004-05 and fix their remuneration; (iii) Election and balloting; (iv) To announce the results of the election of the office bearers and committee members.
3. The said notice was issued by Hon'ble Secretary on behalf of and under the authority of the Executive Committee of the said Club. On that very day, by a circular proposals/nominations were invited for election of the office bearers and Executive Committee members for the year 2004-05. Election officers were appointed under Article 28(a) of the election rules of the said club and the Executive Committee appointed Gobinda Prasad Agarwal and Ashoke Kumar Singhania as Hon'ble Election Officers for conducting election. Nominations were required to reach at the office of the said club by 7 p.m. on 26-11-2004 and the last date of withdrawal was also fixed.
4. On very that date, printed copy of annual accounts of the said club along with the auditor's report was circulated among the members of the said club. Clause 4(e) stated that none of the committee members is disqualified as on 31-3-2004 from being appointed as committee members in terms of Clause (g) of Sub-section (1) of Section 274 of the Companies Act, 1956 (hereinafter referred to as the said Act).
5. After scrutiny, 36 nominations/proposals including those of the plaintiffs for election as committee members for the year 2004-05 were found valid and such names were posted on the notice board of the said club and the same was corrected on 29-11-2004 and one of the members withdrew his nomination for such election.
6. On 7-12-2004, an undated erratum was put upon the notice board of the said club stating that there has been an omission in Clause 4(e) of the auditor's report and

nominations of 12 members including the plaintiffs were invalid. On 13-12-2004, all the plaintiffs/respondents herein filed Form DD-A under Section 274(1)(g) of the said Act and obtained receipts therefor. The said fact has been admitted by the appellant before the court. On 13-12-2004 election officers reported to the President/Hon'ble Secretary of the club and the candidates of the said club that all the nominations received by the club upto 26-11-2004 were not accompanied by the mandatory declaration under Section 274(1)(g) of the said Act. Therefore, all the nominations were invalid.

7. In these circumstances, a suit was filed challenging such rejections of nominations and by an interim order dated 17-12-2004 the said decision was stayed rejecting the nomination papers of the candidates for election of office bearers. However, the Hon'ble Court did not restrain the holding of the meeting or from transacting the other business at the said meeting.

8. On 18-12-2004, AGM was held and adjourned sine die without transacting any business. The matter was heard out after filing of the affidavits before the Hon'ble first court. Mr. Siddhartha Shankar Ray, learned Senior Advocate, appearing on behalf of the appellant/petitioner drew our attention to Clause 5(a), (b) and (c) of the election rules of the said club.(which deals with the scrutiny of proposals by the election officers) which is set out hereunder: Scrutiny of proposal.–(a) The election officers shall scrutinise the nominations received and a list of valid nominations will be displayed on the notice board of the club at least before 2 weeks of the date of the annual general meeting. (b) If the number of the candidates for the office bearers and the members of the committee is equal to the office bearers and members to be elected, the ballot papers will not be issued and those candidates would be considered having duly elected. (c) If the number of candidates for the post of any office bearer or members of the committee exceed the number to be elected, then only the election shall be held by ballot, only for such posts for which the numbers so exceed.' and submitted that under Rule 5(a) of the election rules, the election officer shall scrutinise the nominations received and a list of valid nominations will be displayed on the notice board of the club at least two weeks before the date of the annual general meeting.

9. He further contended that on 7-12-2004, some members of the said club drew attention of the president that mandatory provisions of Section 274(1)(g) of the said Act have not been complied with by ten candidates who had offered themselves for election as office bearers and executive committee members for the year 2004-05 and it was pointed out that the election officers had wrongly included their names in the list of valid nominations put up on the notice board on 26-11-2004. In view of the obvious printing error in the auditor's reports circulated by the club, an erratum to the annual report 2003-04 was put up on the notice board of the club stating that due to inadvertence, the auditor's report to the members as printed and circulated contained an omission inasmuch as it did not set out the name of the 12 committee members from whom no declaration has been received under Section 274(1)(g) of the said Act. The said erratum was put up on the notice board of the said club duly signed by the Hon'ble Secretary on 15-12-2004, election officers received a legal opinion from counsel stating that all nominations received by the election officers upto 26-11-2004 which were not accompanied by the mandatory declaration as required under Section 274(1)(g) of the said Act should be declared as invalid.

10. Mr. Ray, learned Senior Advocate, also contended that a declaration as provided for under Section 274(1)(g) of the said Act read with the rules framed thereunder is required to be filed along with the filing of the nomination papers by the candidates which is the cut-off date and not immediately after the candidate is elected, as has been held by the Hon'ble first court. He further submitted that His Lordship has held that declaration in Form DD-A could be filed by a successful candidate after he was elected and it was not necessary for the candidate to file such declaration in Form DD-A, at the time of filing his nomination papers and that a scrutiny of the nominations by the election officers could be done, in the absence of such declaration form being filed by the candidates. The list of valid nominations could be displayed on the notice board by the election officers irrespective of whether such nominations were accompanied by the declaration forms as prescribed under the rules framed under Section 274(1)(g) of the said Act. He further drew our attention to Rule 4 and Rule 9 which are set out hereunder: '4. Duty of statutory auditor to report disqualification.--(a) It shall be the duty of statutory auditor of the appointing company as well as disqualifying company, as required under Section

227(3)(f) to report to the members of the company whether any director is disqualified from being appointed as director under Clause (g) of Subsection (1) of Section 274 and to furnish a certificate each year as to whether on the basis of his examination of the books and records of the company, any director of the company is disqualified for appointment as a director or not.

11. Duty of every director.—Every director in a public company registered under the Companies Act, 1956 shall file Form 'DD-4', prescribed under these rules, before he is appointed or re-appointed.'
12. According to him, if such procedure is accepted, in that case, while the members are casting their votes on the date of the annual general meeting would not know which particular candidate is eligible to be elected or has incurred a disqualification under the rules. According to him, it would lead to an anomalous situation where a candidate after being elected could subsequently be disqualified, if he is unable to furnish the declaration in Form DD-A as required under the rules. However, an elected candidate is found to be subsequently disqualified by reason of operation of Section 274(1)(g) of the said Act, then re-poll would have to be held to determine which candidate is to be elected in place and instead of the disqualified candidate. Filing of Form DD-A along with the nomination papers would ensure certainty and finality in the election results.
13. He further submitted that none of the plaintiffs though directors of other public limited companies and having aware of the provisions of the said Act, had filed their declaration under the said rules on 26-11-2004 which was the last date for nominations. It is a fact that their nominations were erroneously put up on the notice board as valid nominations. According to him, an erroneous decision of the election officers cannot give a right to a candidate, who is not eligible, to insist that elections be held in accordance with the nomination list put up by the election officers on 26-11-2004.
14. He also relied upon a case of Vidya Charan Shukla v. Purshottam Lal Kaushik : [1981]2SCR637 where the Hon'ble Court decided whether or not the candidate was disqualified at the date of scrutiny of the nomination papers. He further relied

upon another decision in *Amrit Lal v. Amba Lal Patel* : [1969]1SCR277 and submitted that election was challenged on the ground that he was on the date of scrutiny of nominations, less than 25 years of age—which was the minimum prescribed age under Article 173(b) of the Constitution of India and as such, is disqualified. He further relied upon a decision in *Deoraj v. State of Maharashtra*: AIR2004SC1975 and submitted that where an interim relief would tantamount to the granting of final relief itself, the petitioner would have to make out a very strong prima facie case. He further contended that such cases would be a rare and an exceptional case. He also submitted that the Hon'ble first court by granting such order in favour of the respondents finally disposed of the suit in question.

15. He further contended that even if the order so passed by the Hon'ble first court is given effect to, the next AGM of the said club is held latest by 30-9-2005 for ensuing year 2005-06 and, therefore, he submitted that the special officer should be directed to hold elections for the year 2005-06 by inviting fresh nominations of the members.
16. He took a point that this Hon'ble Court has no jurisdiction to entertain the suit since the registered office of the defendant club is situated at 4/1, Sarat Bose Road, Kolkata, which is outside the jurisdiction of this Court and the meeting was also to be held at the said registered office. Accordingly, he submitted that this Court has no jurisdiction to entertain the suit since the court held that erratum was issued by the auditors of the company at their office at 6, Old Post Office Street, Kolkata, within the jurisdiction of this Court.
17. Mr. S.B. Mookherjee, learned Senior Advocate, appearing on behalf of the respondent/plaintiff submitted that it is admitted that on 29-11-2004 after scrutiny of 36 nominations the election officers hung up the names of the candidates whose names were found to be valid after scrutiny and hung up those names in the notice board on 29-11-2004. There was no infirmity or invalidity so far as the names of the plaintiffs/respondents are concerned. He further submitted that erratum which was issued by the auditor was not even considered at any meeting of the committee members nor was it placed at any meeting of the committee

member which would be evident from a letter written by the 13 out of the 21 members regarding the said fact.

18. On 13-12-2004, all the plaintiffs/respondents filed the Form DD-A under Section 274(1)(g) of the said Act and obtained receipts for the same. This fact is not disputed [filing of such declaration forms was mentioned in paragraph 16(iii) of the petition and admitted in paragraph 15 of the affidavit-in-opposition]. He further submitted that under Section 211 of the said Act, every balance sheet of a company shall give a true and fair picture of the state of the company's affairs as at the end of the financial year and shall be in the prescribed form. Under Section 216 of the said Act, the profit and loss account shall be annexed to the balance sheet and the auditor's report including the auditor's separate special or supplementary report, if any, shall be attached thereto. Under Section 217 of the said Act, there shall be auditor's report by the board of directors. Such balance sheet and auditor's report in printed forms dated 9-11-2004 were circulated to the shareholders along with the notice convening the said AGM. The executive committee appointed the election officers on 9-11-2004. He further submitted that the auditor's report has been manipulated which will be obvious from the following facts: (i) The report is dated 9-11-2004. (ii) The auditor is certifying that none of the Committee members is disqualified as on 31-3-2004 under Section 274(1)(g). (iii) So far as the erratum is concerned, the nominations were invited to be filed by the circular letter issued by the committee on 9-11-2004 by 26-11-2004. (iv) Therefore, on 9-11-2004, which is the date of the auditor's report, the nominations had not been filed. The ground for rejection is that the nominations were not accompanied by declaration under Section 274(1)(g). (v) Therefore, how could the auditor on 9-11-2004 say that these members were disqualified when the nomination papers had not even been filed? (vi) In other words, the first portion of the auditor's report does not tally with the latter portion because the disqualification which requires a certificate from the auditor, as of the last date of the financial year, that is to say, on 31-3-2004. Moreover, even on 29-11-2004, the nominations for the year 2004-05 were found to be valid. The purported rejection was only on 15-12-2004.
19. He further submitted that Section 274(1)(g) of the said Act was introduced by the Companies (Amendment) Act, 2000. Rules have been framed under Section 642 of

the Companies Act by the Central Government to carry out the purpose of Clause (g) of Sub-section (1) of Section 274 of the said Act. Rule 9 is as follows: '9. Duty of every director.—Every director in a public company registered under the Companies Act, 1956, shall file Form DD-A, prescribed under these Rules, before he is appointed or reappointed.'

20. The election rules of the club were framed long ago and, therefore, do not provide for filing of any declaration regarding compliance with Section 274(1)(g) of the said Act, nor do the rules fix any time for filing of such declaration forms. The election rules of the club cannot either curtail or enlarge the period fixed by the Act or statutory rules framed thereunder which have statutory force. Rule 9 requires the forms to be filed before a candidate is appointed or reappointed and therefore, it cannot be contended that such declaration form is required to be filed along with the nominations. Nominations were purported to be rejected on 15-12-2004 on the alleged ground that the declarations were not filed along with the nominations. Mr. Mookherjee further contended that this is not the requirement of the Act and the rules, nor even it is the requirement under the election rules of the club. Therefore, such steps could not have been taken by them. He further contended that rejection of the nominations filed by the plaintiff/respondent herein are illegal and void which was stayed by an interim order dated 17th December, 2004.
21. He further submitted that the respondents are making a fundamental mistake in contending that non-filing of the declaration tantamount to disqualification under Section 274(1)(g) of the said Act, namely, a person shall not be capable of being appointed as director of a company if such person is already a director of a public company, which has not filed the annual accounts for a continuous period of three financial years or has failed to repay its deposit or interest thereon on due date or to redeem its debentures on due date or pay dividend and such failure continues for one year or more and such disqualifications for a period of five years from the date of the default.
22. He also submitted that even if the declaration form is not filed before the appointment or reappointment unless the director concerned comes within the mischief of the provisions of Section 274(1)(g) of the said Act, he cannot be said to

be disqualified for appointment. Therefore, the rejection of the nominations on the ground that the same were not accompanied by the declaration forms is contrary to law and wholly untenable.

23. He further submitted that some of the plaintiffs/respondents who are directors of any public companies do not come within the mischief of Section 274(1)(g) and as such, not disqualified from being appointed as committee members. It is not the case of the appellant that any of the plaintiffs suffered from any disqualification as enumerated in Section 274(1)(g) of the said Act. In these circumstances, he submitted that the purported rejection of the nominations are invalid and of no effect.
24. He further contended that the Hon'ble first court proceeded on that basis and in fact, His Lordship directed the Club to proceed with the holding of the AGM and election on the basis of the nominations already filed. His Lordship has also appointed a special officer for supervision but the club did not proceed to hold the adjourned AGM and, hence, he further contended that there was no merit and the appeal and application should be dismissed.
25. We have heard the learned Counsel for the parties at length. By the Companies (Amendment) Act, 2000 a modification was introduced in the Companies Act, 1956. The purpose of the amendment is to disqualify certain persons from directorship in public companies. A person who has been working as a director in a public company and which has made the following types of default incurs the disqualification. Now, let us see what are such types of default, which has been introduced by the said amendment. It appears that those are: (a) failure in filing annual returns and annual accounts for any continuous period of three financial years; and (b) failure in paying matured deposits or interest on deposits or failure to pay back debenture holders on due date of redemption or the declared dividend, and the default has continued for one year or more.
26. It further appears that under Rule 9 it is the duty of every director in a public company registered under the Act, shall file Form DD-A prescribed under these rules before he is appointed or reappointed. In the instant case, it is admitted that

on 13-12-2004 all the plaintiffs/respondents filed Form DD-A under Section 274(1)(g) of the said Act and obtained receipts for the same, which is not denied by the appellant. Therefore, it cannot be said, in our opinion, that there is any violation of any rule by the plaintiff in seeking election by filing their nominations for the post of office bearers or the committee members for the year 2004-05.

27. In these circumstances, we have to accept and uphold the contention of Mr. Mookherjee and we do not find any substance in support of the appeal. Accordingly, we do not find any reason to interfere with the order so passed by the Hon'ble first court. We also do not find that there is any violation of the said Rule 9 by the respondents/plaintiffs. Accordingly, we direct the Club to hold such adjourned annual general meeting and further to hold election as directed by the Hon'ble first court under the supervision of the said special officer within a period of three weeks from the date.
28. By consent of the parties, this application is being treated as an appeal and we hereby dismiss of the appeal on the above terms.

CASE-06

It was discussed in the Supreme Court Judgment in case of **Maharaja Chintamani Saran Nath ... vs State Of Bihar And Ors on October 7, 1999** that the true principle is that Lex prospicit non respicit (law looks forward not back). As Willes, J. said, retrospective legislation is `contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. Similarly, the Supreme Court of India in **Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others**, [1994] 4 SCC 602 has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows:

- i. A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its

application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

- ii. Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
- iii. Every litigant has a vested right in substantive law but no such right exists in procedural law.
- iv. A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
- v. A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

Thus, the disqualifications under Section 164 (2) cannot become applicable as on April 1, 2014 for any annual filings not done in any of the previous financial years by a private company.

8. CONCLUSION

While Sections 164 came into force on April 1, 2014, the disqualifications under Section 164 (2) cannot become applicable as on April 1, 2014 for any annual filings not done in any of the previous financial years. Section 164 (2) curtails the right of directors of such companies to continue as directors, casts a new burden, imposes a new liability on such directors for having defaulted in filing financial statements for any 3 continuous financial years. In view of Section 164 (2), the disqualification will get attracted in case of non-filings made for years commencing from FY 2013-14 onwards. However, it will be inappropriate to regard that this will lead to immediate vacation of office under Section 167 (1).

Disqualifications as provided under section 164(2) of the Act are applicable to all companies irrespective of their category and status. The private companies may add such other disqualification in its Articles in addition to the statutory disqualifications provided under the Act. Further, as far as the applicability of Section 164(2) to the private companies are concerned here it would be relevant to refer the circular dated 5th June 2015 wherein the Ministry of Corporate Affairs have clarified the sections which are exempted in case of Private Companies.

While discussing the international perspective, except Australia and UK, no other countries have a clear cut acts on the disqualifications of directors. Even it is also observed that some countries are not yet changed their old long companies act since more than a decades.

Directors of companies must have impeccable integrity. They must act as watchdogs for companies to uphold corporate governance and protect interests of all shareholders. In tandem, the government must also introduce a unique legal identifier for every corporate entity and make it mandatory for each one to disclose its beneficial owner. The reform will kill shell companies that anonymise undesirable transactions.

SCOPE FOR FURTHER RESEARCH:

The issue on disqualifications of directors is a burning issue since last few years. The concept become more crucial more particularly after the demonetization initiated by the Government of India during the November last year. Looking at the sensitiveness of the matter, it is required to explore this area into quite a massive way. Few such steps are suggested below:

- An empirical analysis can be done by exploring various aspects related to the directors who are already declared disqualified by the Ministry of Corporate Affairs, (MoCA) Government of India.
- To apply the tool of board evaluation to explore any such relationship if exist between disqualified directors and that of the nature of the company and management of the company.
- An inter sectorial analysis can be done to find out the sector wise classifications of the numbers of directors and the real difficulty that arrived to quantify the Act prescribed by the Law. This can fulfil multiple objects related to the sector wise performance of the directors along with the sector wise real difficulty in fulfilling the desired act.
- The study can also pave a way in analysing the profiles of the directors along with the companies to asses various demographic details which might reflect some light for the law makers in this area.

- To explore certain other areas which may be hidden and not yet explored by the experts who are already experienced in this area. The research can also be applied to other companies who are in the radar of the MoCA.

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