

BEFORE THE ADJUDICATING OFFICER
REGISTRAR OF COMPANIES KERALA AND LAKSHADWEEP

ADJUDICATION ORDER NO. ROC/ADJ/S-10A/ 017/ /2019 Dated. 18.12.2019

ADJUDICATION UNDER SECTION 10A OF THE COMPANIES ACT, 2013 READ WITH THE COMPANIES (ADJUDICATION OF PENALTIES) RULES, 2014.

In the matter of: M/s HARITHA NIDHI LIMITED

And

In the matter of: An application dated 24-Jul-19 filed by the Company to this office on 25-Jul-19.

1. Brief details of the Company: -

The company was incorporated on 02-Nov-18 bearing Corporate Identity Number (CIN) U65999KL2018PLC055395 and the subscriber/s to the memorandum of association has agreed to take the total 52500 /- number of shares each of Rs. 10 /- for a total value of Rs. 525000 in the share capital, termed to be the paid-up capital of the Company contributed by the subscribers to the Memorandum of Association.

2. BACKGROUND OF THE CASE: -

Under the provisions of Section 10A, a company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital, shall not commence any business or exercise any borrowing powers unless **a declaration is filed** by a director within a period of **one hundred and eighty days** of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the **date of making of such declaration**. **R.23A of the Companies (Incorporation) Rules, 2014** carries that the declaration under section 10A by a director shall be in E-Form namely INC-20A and shall be filed with registry of Registrar of Companies, Kerala, as provided in the Companies (Registration Offices and Fees) Rules, 2014 and the contents of the said form shall be verified by a company Secretary or a chartered Accountant or a cost Accountant in practice. Admittedly the company has not filed the e-form INC-20A till date which is a statutory requirement.

Admittedly the company has not complied with the aforesaid provisions and made an application dated **24-Jul-19** has been filed on 25-Jul-19 to office of ROC stating therein that the company has violated the provisions of Section 10A of the Companies Act, 2013 read with **THE COMPANIES (ADJUDICATION OF PENALTIES) RULES, 2014 (as amended vide G.S.R. 131 (E) dated 19th February 2019**, by not filing the declaration of commencement of business in the prescribed e-form namely INC-20A within 180 days from the date of its incorporation. It is implored in the application that there was no intension to delay the remittance of amount of paid up capital to the company account and there was no will full default in filing of Form INC-20 A. Delay was due to inadvertence and liable to be condoned or further requested to extend the prescribed period of filing and condoned the delay in filing enabling the company to proceed with the compliance required as per statute.

3. APPOINTMENT OF ADJUDICATING OFFICER

Vide Notification bearing No. S.O. 831. (E) dated 24th March 2015 the Govt. of India Ministry of Corporate Affairs has appointed the Registrar of Companies Ernakulam as Adjudicating Officer under the Companies Act, 2013 (18 of 2013) read with the Companies (Adjudication of Penalties) Rules, 2014 with respect to all companies having its registered office with in the State of Kerala and Union territory of Lakshadweep Islands. I am vested with jurisdiction and empowered to adjudicate the matter in hand within the prescribed legal frame.

4. HEARING

I have carefully perused the averments made in application by the Company and the documents available on record/MCA portal. After considering the facts mentioned in the application and other evidences /materials available on record I hereby, proceed to decide the case on merit.

5. ISSUES FOR CONSIDERATION: -

The issues that arise for consideration in the present case are:

- 1) Whether the Company has violated the provisions of section 10A (1) (a)?
- 2) Who are liable for penalty for the violation of section 10A (1) (a)?
- 3) Whether the default is of continuing nature and when it ceased to continue?
- 4) What would be the quantum of monetary penalty that can be imposed?
- 5) Whether the company can make an application to Adjudicating authority for adjudication of penalty under section 10A and further the same is tenable?

7. RELEVANT PROVISIONS OF THE ACT AND RULES

Before advertng to the issues in hand, it will be fitting to denote the germane provisions of the Companies Act, 2013 read with applicable Rules.

Section 10A of the Companies Act, 2013 – (Effective from 2nd November, 2018 inserted vide Companies (Amendment) Second Ordinance, 2019)

Section-2 (59) and 2(60) of the Companies Act, 2013 (Definitions clause).

R.23A of THE COMPANIES (INCORPORATION) RULES, 2014 (as amended vide G.S.R. 411 (E) dated 07th June 2019).

R.12 of THE COMPANIES (REGISTRATION OFFICES AND FEES) RULES, 2014 (as last amended vide G.S.R. 340(E) dated 30th April 2019).

R.3 of THE COMPANIES (ADJUDICATION OF PENALTIES) RULES, 2014(as amended vide G.S.R. 131 (E) dated 19th February 2019).

8. FINDINGS

On perusal of the material available on record and bearing in mind the facts and circumstances of the case, I record my findings as hereunder:

Issue 1: Whether the Company has violated the provisions of section 10A?

Section 10A (1)(a) plainly carries that the company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless **a declaration is filed** by a director within a period of **one hundred and eighty days** of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the **date of making**

of such declaration. R.23A of the Companies (Incorporation) Rules, 2014 carries that the declaration under section 10A by a director shall be in E-Form No. - LNC-20A and shall be filed as provided in the Companies (Registration Offices and Fees) Rules, 2014 and the contents of the said form shall be verified by a company Secretary or a chartered Accountant or a cost Accountant in practice. Admittedly the company has not filed the e-form INC-20A till date which is a statutory requirement.

On perusal of the record room of e-registry of MCA it came to our notice that the Company has filed such statutory declaration in prescribed e-form Namely INC-20A bearing SRN H85866572 on 30-Aug-19 with the delay of 85 days and further on perusal of the said e-form it is also noted that one of the Director namely Mr./Mrs./Miss BHAGYARAJ P B was authorized by the Board of Directors of the Company vide resolution number 1 dated 24-Apr-19 to sign this form and declare that all the requirements of Companies Act, 2013 and the rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with. The compliance of Companies Act is a statutory obligation on the Company and every officer of the Company, and the penal liability arises as soon as provisions under the Act are violated. Therefore, the intention of the parties committing such violation becomes wholly irrelevant". The law is well settled that that the ignorance of law has no excuse. It is also relevant to mention here that the penalty under a statute is for breach of civil obligation and is mandatory and the mensrea is not an essential element for imposing the penalty. Therefore, the grounds for non-filing of INC-22A as described in application dated is neither tenable nor the Adjudicating authority is vested with power to condone the delay in filing or to extend the statutory period of filing. Therefore, the Company and its officers who was authorised to ensure the compliance of the provisions of Section 10A have violated the provisions of Section 10A attracting penalty.

Issue 2: Who are liable for penalty for the violation of section 10A?

Section 10A (2) carries that If any default is made in complying with the requirements of this section, the **company** and **every officer who is in default** shall be liable to a penalty. The word "**Officer**" has been defined under Section 2(59) and includes any directors also. The company have three directors therefore a question arises for attention that whether all the three directors of the applicant along with the company are liable for penalty? "**officer who is in default "as defined under section 2(60)** means any person who, under the immediate **authority of the Board** or any key managerial personnel, **is charged with any responsibility** including maintenance, **filing** or distribution of accounts or **records**, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default.

On careful perusal of the rule 3 of the Companies (Adjudication of Penalties) Rules, 2014 it may be also be observed that with in the whole text of the rule the word "officer in default" is finding place and not the word "every officer in default" as appearing in section 10A(2). The very purpose of rule is to ensure the smooth administration of the act by the administrative ministry. on perusal of the said e-form it is also noticed that one of the Director namely Mr./Mrs./Miss BHAGYARAJ P B having DIN 8272508 was authorized by the Board of Directors of the Company vide resolution number 1 dated 24-Apr-19 to sign this form and declare that all the requirements of Companies Act, 2013 and the rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with. Therefore, after considering the aforesaid entire facts / circumstance of the case I hold that the Company and the Director duly authorised by the Board resolution who is officer in default in terms of section 2(59), 2(60) are liable for penalty for the said violations of provisions of section 10A read with R.3 of **Companies (Adjudication of Penalties) Rules, 2014**,

Issue 3 – Whether the default is of continuing nature and when it ceased to continue?

Under the provisions of section10-A, a company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 dated 02.11 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless a **declaration (i.e. e-form INC-20A) is filed** by a director within a period of **one hundred and eighty days** of the date of

incorporation of the company. If any default is made in complying with the requirements of this section, the **company** shall be liable to a penalty of **fifty thousand** rupees and **every officer who is in default** shall be liable to a penalty of **one thousand rupees for each day** during which such **default continues** but not exceeding an amount of one lakh rupees. Upon textual reading of the penal provisions of the section it is clearly understood that the default is of continuing nature and ceased to continue only upon filing of such statutory declaration

As on the date of application dated 24-Jul-19 the company was debarred from filing such declaration without the payment of penalty as may be determined and levied by the adjudicating authority. Only upon of payment of penalty and filing of INC-28 attaching therewith the adjudication order, the company was allowed to file INC-20A. in such compelling situation the company has applied for adjudication of penalty or condoning the delay in filing or for extension of statutory period of filing vide application dated 24-Jul-19 filed to this office on 25-Jul-19. Later on, MCA has removed the precondition of adjudication and or payment of penalty and allowed the filing of such declaration, empowering the adjudicating authority to take contingency of such delay in filing, if any, and to adjudicate the matter. The question arises whether the default continues up to date of adjudication order or up to the date of application or up to the date of actual filing of INC-20A?

In my judgement the company should not be blamed and suffer for any delay in adjudication at the end of adjudicator which is beyond its control. Further on the date of application by the company the filing of such declaration was not permissible and only upon of payment of penalty and filing of INC-28 attaching therewith the adjudication order, the company was allowed to file INC-20A. In such compelling situation the company has applied for adjudication of penalty or condoning the delay in filing vide its application which is liable to be respected. I hold that continuing nature of offence ceased to continue on the date of application. Therefore, considering the date of filing of Application there is delay of 85 days and only the officer in default designated vide board resolution dated 24-Apr-19 and Company shall be legally responsible for penalty.

Issue 4- What would be the quantum of monetary penalty that can be imposed?

While determining the quantum of penalty under sections 10A, it is important to consider the Rule – 3 (13) of the **Companies (Adjudication of Penalties) Rules, 2014**, which reads as under: -

Rule - 3(13): - **In case a fixed sum of penalty is provided** for default of a provision of the Act, the adjudicating officer shall impose that fixed sum, in case of any default therein.

Section 10A (2):-

If any default is made in complying with the requirements of this section, the **company** shall be liable to a penalty of **fifty thousand** rupees and **every officer who is in default** shall be liable to a penalty of **one thousand rupees for each day** during which such **default continues** but not exceeding an amount of one lakh rupees.

Considering the both provisions that is R.3 (13) and Section 10A (2), I hold that the quantum of penalty shall be same as enumerated therein the Act read with rule.

Issue 5- Whether the company can make an application to Adjudicating authority for adjudication of penalty under section 10A and the same is tenable?

Upon textual reading of the Rule 3A of the Companies (Adjudication of Penalties) Rules, 2014, it can be understood that the rules provide a very exhaustive procedure for adjudication proceeding like a complete code of procedure also guiding the adjudicating authority to determine the quantum of penalty. First and foremost, requirement of the procedural rule is that a show cause notice to the Company and defaulting Officer/s must be issued by the adjudicating officer giving the full details of violation, its consequence, fixing the date of hearing/personal appearance e.t.c.,. No doubt the adjudicating officer is required to issue such show cause notice once he noticed any violation of the act but since, on the date of application by the company, the filing of such declaration was not permissible by the digital registry of MCA and only upon payment of penalty

and filing of INC-28 attaching therewith the adjudication order the company was permitted to file INC-20A. In such compelling situation the company has applied for adjudication of penalty or condoning the delay in filing vide its application. In such compelling circumstances, beyond the any stretch of imagination the company cannot be precluded to apply before the authority for adjudication. The non-filing of INC-20A by the company/directors is sprouting an absolute incapability upon the Company to commence any business or filling any statutory returns/records. To remove the incapability and to commence business, company has every right to apply before the authority for adjudication of penalty. For any delay in adjudication or for any procedural lapses in online filing the company cannot be blamed and the application made by company is tenable. The issue is decided in positive.

9. **ORDER**

In exercise of the powers conferred on me vide Notification bearing No. S.O. 831. (E) dated 24th March 2015 the Govt. of India Ministry of Corporate Affairs read with Rule 3 of the Adjudication Rules, I hereby impose a penalty of Rs. 50,000/- (Rupees fifty thousand) upon the Company and Rs. 85000/- upon the Officer in default who is one of the directors namely Mr./Mrs./Miss BHAGYARAJ P B @ Rs.1000.00 per day for a total defaulting days of 85 days for the violation of the provision of section 10A.

I am of the view that the said penalty commensurate with the defaults committed by the Company in terms of penalty structure provided in Act read with relevant Rules. The adjudicatory authority has no discretion to levy penalty less than what is legally and statutorily leviable.

10. The Company and the Officer in default shall remit / pay the said amount of penalty for a total of Rs. 135000 /- within **30** days from the date of receipt of this order, by way of e-payment facility available on MCA portal while uploading the e-form namely Form No. INC-28 prescribed for filing of the adjudication orders/ Court orders.
11. It may be remarkable to note that if penalty is not paid and or INC-28 is not filed within the stipulated period by the order or orders passed by the appellate authority as the case may be, no extension shall be granted in this regard and necessary penal action shall be initiated without any further notice in the matter.



(G. C. YADAV)
(Adjudicating Officer)
Registrar of Companies
Kerala and Lakshadweep

To,

1. M/s HARITHA NIDHI LIMITED
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