


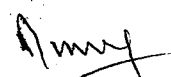
**IN THE HIGH COURT OF JUDICATURE AT MADRAS
(SPECIAL ORIGINAL JURISDICTION)**

W.P No. 6236/2019

179/2019, 491/2019, 505/2019, 501/2019, 496/2019, 786/2019, 798/2019,
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A. SEHAR PONRAJ
Registrar of Companies
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Muthukamatchi Manohar & other writ petitioners

.....Petitioner

Vs

1. Union,of India,
Represented by its Secretary


A. SEHAR PONRAJ
Registrar of Companies
Tamilnadu, Andaman &
Nicobar Islands, Chennai

Ministry of Corporate Affairs,
ShastriBhawan, Rajendra Prasad Road,
New Delhi - 110001

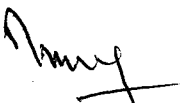
2. Registrar of Companies
Tamilnadu, Chennai
Block No.6, B Wing 2nd Floor
ShastriBhawan 26,
Haddows Road,
Chennai – 600 006.

.....Respondents

COMMON COUNTER AFFIDAVIT FILED ON BEHALF OF FIRST AND THE SECOND RESPONDENT

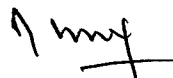
I, A.SeharPonraj S/o K.Arthur Edwin, aged 58 years, working as Registrar of Companies, Tamil Nadu, Andaman and Nicobar Islands having office at 2nd Floor, ShastriBhavan, No.26, Haddows Road, Chennai – 600006 do hereby solemnly affirm and sincerely state as follows:

1. I am the second respondent herein and I am duly authorized to file affidavit on behalf of the first respondent as well. I am well acquainted with the facts and circumstances of the instant case and competent to affirm this affidavit.
2. It is humbly submitted that the present petitions are liable to be dismissed in limine as the same is devoid of merits and the averments raised by the petitioners in the present petitions are all denied by this respondent as they are untenable either in law or on facts.
3. It is most respectfully submitted that the petitioners herein have not approached this Hon'ble Court with clean hands.
4. It is humbly submitted that the petitioners have failed to file the Annual Returns and Annual Finance Statements for a continuous period of three financial years from 2014-15 to 2016-17.
5. The petitioners have not put forth any justifiable reasons for such failure in filing the Annual Returns for the said continuous period which were ought to have been filed by the petitioners, being Directors of the Company as per the Companies Act, 2013.
6. The averments raised by the petitioners in the petition that due to inadvertence and oversight ,annual accounts and annual returns could not be filed with this


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respondent and that the petitioners herein were shocked and surprised to find their names in the list of disqualified directors under section 164(2) (a) of the Companies Act, 2013 (hereinafter referred to as the Act) dated 17.12.2018 which was uploaded on 18.12.2018 by the respondent are all untenable.

7. It is humbly submitted that according to section 92(4), every company should file a copy of the Annual Returns with the second respondent herein, within sixty days from the date of conducting Annual General meeting or from the date on which the Annual General Meeting ought to have been conducted. The time limit for filing the Balance Sheet is 30 days from Annual General Meeting.
8. It is humbly submitted that the Ministry of Corporate Affairs had also extended the date of filing of AOC-4 forms up to 28-11-2017 without levying additional fee vide a General Circular No. 14/ 2017 dated 27.10.2017. It is submitted that in the present case, in spite of providing various opportunities for the petitioners herein had failed to file the Statutory Returns before this Respondent.
9. It is humbly submitted that the list of disqualified directors was uploaded on the MCA Portal only on 18.12.2018 through order dated 17.12.2018 which is after one year from the General Circular regarding extension of time to file AOC-4 form.
10. It is pertinent to note that the petitioners have not availed any of the above beneficial opportunities to avoid his disqualification but have come down before this Hon'ble Court after list of the petitioners' name was uploaded as disqualified director on the MCA portal.
11. It is humbly submitted that the filing period expires on 30.10.2017 which is within 30 days from the date of Annual general meeting ought to have been conducted. The Ministry issued a circular before the expiry period i.e. on 27.10.2017 which is a circular and not statutory provision. Such an extension was provided only for the benefits of the petitioners' companies to file the Returns. But when the petitioner deliberately did not avail such benefit, the disqualification starts from the statutory date on which the period for filing the Annual Returns expires.
12. The petitioners, being directors of the company, are under an obligation to comply with the necessary statutory provisions laid down in the Companies Act. The main intention of the Companies Act is to protect the interest of the investors,


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shareholders and interest of such other public. It is submitted that section 166 of the Act which mentions about the duties of the Director is unequivocally clear that the Directors shall act in the best interests of the Company and its shareholders. It is clear beyond any reasonable doubt that the Directors have failed to file the Annual Returns and Annual Financial Statements for a continuous period of three financial years, a fact the Petitioners themselves agreed with, in their sworn affidavit. It shows that the Directors have failed in their statutory duties which are explicitly given in section 166 of the Companies Act 2013 knowing very well that such omission is prejudicial to the interests of the Company.

13. It is a well settled legal proposition that there shall be a balance between rights and duties. In the instant petitions, the Petitioners while averring that they are deprived of their "right for an opportunity of being heard", they conveniently overlooked the fact that they have grossly failed in their statutory duties towards the Company and its Shareholders for not just one year or two years but for a continuous period of three financial years. It is pertinent to note that the Petitioners have committed a breach of duty which is prejudicial to the interests of the Company that it can potentially result in loss of Corporate Identity of the Company. In these circumstances, the Petitioners cannot seek relief for not giving the "right of opportunity of being heard".

14. It is humbly submitted that the Petitioner has not challenged the Constitutional validity of section 164(2)(a) of the Companies Act 2013. It is further submitted that section 164(2)(a) does not envisage any notice to be given to the directors and hence it is apparent that the action of the Respondent in releasing the list of Disqualified Directors is very well in compliance with section 164(2)(a) and section 167(1)(a) of the Act. It is further submitted that the disqualification incurred by the Petitioner is by operation of law for not filing of Annual Returns and Annual Financial Statements for a continuous period of three financial years.

15. It is humbly submitted that the Petitioner has averred that the Respondent has not issued any notice to the Petitioners before releasing the list of disqualified directors and thereby not providing an opportunity of being heard, which in the humble opinion of the Respondent is not tenable. It is well settled that "principles of natural justice" shall be adhered with for any executive actions that results in the violation of the fundamental rights of a person. In the instant petitions, the Petitioners have failed to show how their fundamental rights are affected by the action of the Respondent. It is submitted that the disqualification provision given in section 164(2)(a) read with 167(1)(a) does not bar the Petitioners from doing any



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Registrar of Companies
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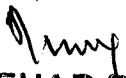
business, trade or occupation, only that the Petitioners have been rendered incapable of becoming directors in any companies for a limited period of five years. Hence it is submitted that the disqualification incurred by the operation of section 164(2)(a) and 167(1)(a) does neither affect any fundamental rights nor any common law rights of the Petitioners and therefore does not require any notice to be given to the Petitioners.

16. It is humbly submitted that the position of "Directorship" is created by the Companies Act and hence the right of any person to be a director is a Statutory Right and not a Fundamental Right. Any statutory right comes with its own statutory duties and restrictions.

17. It is humbly submitted that the prayer of the petitioners in seeking relief under the guise of not affording "opportunity of being heard" is frivolous in nature. In light of section 164(2)(a), it can be seen that the Petitioner has failed in his duties in filing annual return and annual financial statements and continue to do so for at least 1095 days for the financial year 2014-15 and for at least 730 days for the financial year 2015-16, knowing fully well that this default is prejudicial to the interests of the company and can lead to an adversarial legal process under section 92(4) and 137(1) of the Act. The Petitioner has averred that the failure to file annual returns and financial statements for three financial years has arisen out of inadvertence and oversight, which in the humble opinion of the Respondent is non-tenable. A continuing default for more than thousand days cannot be attributed to inadvertence or oversight by any figment of imagination. It is a sheer breach of duty by the Petitioners arising out of blatant and willful disregard of law and hence the Petitioners does not deserve any mercy in the eyes of law.

18. It is humbly submitted that the principles of natural justice is not absolutely essential in all conditions. The application of principles of natural justice has to consider the nature of offence and thought has to be given on whether affording principles of natural justice will make any difference. In the judgment delivered in **Board of Directors, H.P.T.C. & Anrvs K.C. Rahi** the Hon'ble Supreme Court, through a division judge bench held as follows:

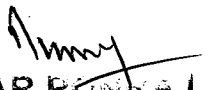
"The principle of natural justice cannot be put in a straightjacket formula. Its application depends on facts and circumstances of the case. To sustain a complaint of non-compliance of the principle of natural justice, one must establish that he has been prejudiced thereby for non-compliance of principle of natural justice..."


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In the instant petitions, the Petitioners have failed in their duty for more than thousand days for the first financial year and further at least seven hundred days subsequently for the next financial year. Hence it is submitted that the Petitioner is not disqualified due to a single lapse, but due to persistent repeated and unrelenting default for a continuous period of three years and therefore not giving an "opportunity of being heard" won't result in any prejudice against the Petitioners.

19. It is submitted that an opportunity to show cause is not necessary where facts are undisputed. The Honorable Supreme Court of India has held in **Dharmarathmakara Rai Bhadur Arcot Ramaswamy Mudaliar Educational Institution v. Education Appellate Tribunal** that "*opportunity to show cause was not necessary where facts are undisputed and the affected person could not fourth any valid defence.*" In the instant petitions, the facts are undisputed as far as the defaults are concerned, i.e. Non-filing of annual returns and financial statements for a continuous period of three financial years. Further the Petitioners have given "inadvertence and oversight" as their defense for their serial defaults, which in any measure cannot be termed as a valid defense as the default has been continuing for years. Hence it is submitted that the defaults being apparent and undisputed, combined with the lame excuse of "inadvertence" by the Petitioners renders that the Petitioners does not deserve any relief under the pretense that "opportunity of being heard" is not given.


20. It is further submitted that similarly in **KSRTC v. S.G. Kotturappa**, the Court opined that where the respondent had committed repeated acts of misconduct and had also accepted minor punishment, he is not entitled to benefit of principles of natural justice as it would be mere formality. Supreme Court remarked; "**the question as to what extent principles of natural justice are required to be complied within a particular case would depend on fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any straitjacket formula. The principles of natural justice are furthermore, not required to be complied with, if it will lead to a mere empty formality.**" In the instant Petitions, the default committed by the Petitioners are repetitive and continuing for more than thousand days. The very fact that the Petitioners have failed in their statutory duties repeatedly for three consecutive years and each such omission by the Petitioner extends for an unreasonable period of time, shows the utter disregard of the Petitioner towards the law and hence sending notice to the Petitioner will lead to a mere empty formality. It is pertinent to mention here that In most of the cases, the second


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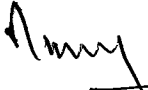
Respondent has sent notice to the Company for not filing Annual Returns and Financial Statements under section 248(1), which is supposed to be acted upon by the Directors as the Company is an artificial legal person and cannot act upon notices. It shows that the Directors, despite receiving notices under section 248(1) has not acted upon the same.

21. It is also submitted that Delhi High court in **Mukut Pathak & ORS Vs Union of India** has rejected the contention that "the impugned list of disqualified directors is void just because it is published without following the principles of natural justice". The Honorable court while delivering the judgment has considered the previous judgment of Gujarat High Court in **Gaurang Balvantlal Shah v. Union of India (supra)** that "*As such, there is no procedure required to be followed by the respondent authorities for declaring any person or Director ineligible or disqualified under the said provision. A person would be ineligible to be appointed as Director, if he falls in any of the Clauses mentioned in Sub-section (1) and the person is or has been a Director in a company, and the company makes defaults as contemplated in Clause (a) of (b) of Sub-section (2) thereof, he would be ineligible to be reappointed in the said defaulting company and appointed in any other company. The ineligibility is incurred by the person/director by operation of law and not by any order passed by the respondent authorities, and therefore, adherence of principles of natural justice by the respondents is not warranted in the said provision, as sought to be submitted by learned Advocates for the petitioners.*"

22. It is submitted that the petitioners have averred that their DIN ought to have been activated for the defaulting companies for which they have incurred disqualification in line with first proviso to section 167(1)(a). I submit that this averment is invalid because the said proviso to Sec 167(1)(a) of Companies act 2013 which says that, "*Provided that where he incurs disqualification under sub-section(2) of section 164, the office of director shall become vacant in all the companies , other than the company which is in default under that sub section*" has been enforced only with effect from 07-05-2018 by the Companies (Amendment) Act,2017 whereas directors stand disqualified with effect from 01-11-2017 by operation of section 164(2)(a) read with 167(1)(a) of the Companies Act 2013. It is to be noted that this provision is a prospective provision and cannot be applied retrospectively. It is hence submitted that the petitioner's argument for activating the DIN is not legally tenable.


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23. It is further submitted that the Petitioner directors have incurred disqualification with effect from 01-11-2017 for a period of five years by the operation of section 164(2)(a) read with 167(1)(a) of the Companies Act 2013. I further submit that the Petitioners have not challenged the constitutional validity of the above mentioned sections. It is submitted that these instant petitions are filed only for challenging the subsequent blocking of their DINs and not challenging disqualification incurred. This can be ascertained from the fact that almost all the Writ Petitions are filed after 17-12-2018.
24. It is submitted that the DINs of the disqualified directors are blocked in order to avoid misuse of the DINs. It is submitted that any disqualified director can possibly create new companies, close the existing companies, issue new shares etc., which are all prohibited under section 167(2) of Companies Act 2013.
25. It is also submitted that by not blocking the DINs, opportunities are being created to disobey or violate section 167(2) and other provisions of the Companies Act 2013, which will result in criminal prosecutions of massive scale considering the number of directors disqualified. It is further submitted that being disqualified, the DINs of the Directors do not have any material usage. It is to be considered that any form filed by using the DIN of any disqualified director is a serious offence under Companies Act 2013. It is humbly submitted that no purpose deemed useful can ever be served by the DIN of a disqualified director. Rather, multiple violations and consequential criminal prosecutions dragging for a considerable amount of time burdening the exchequer in handling the criminal proceedings can incur by not blocking the DIN.
26. It is submitted that the intention of the respondent is to minimize the considerable amount of time, energy, taxpayer money and more importantly potential burden expected to be heaped upon the already overburdened criminal justice machinery, by allowing the disqualified directors to illegally use their DINs in violation of section 167(2) of the Companies Act 2013. It is submitted that the blocking of DINs have not resulted in any prejudice against the Petitioner Directors. It is submitted that the Petitioner Directors have failed to establish what kind of existing benefits / rights were prejudiced with, as a result of blocking their DINs, which anyways have been rendered ineffective by the operation of section 164(2)(a) read with 167(1)(a) upon its holders.
27. It is humbly submitted that from the above, it is clear that the petitioners herein are no way prejudiced as they were well aware with the legal procedures and duties


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to be complied with by him. On the contrary, the Companies with which the Petitioners held directorship were severely prejudiced by the default of the Petitioners to an extent that most of them were struck off under section 248 of the Act and such end of corporate life of the Companies were solely attributed to the dereliction of duty by the Petitioners towards the Companies and the Shareholders. It is well settled that the "opportunity of being heard" cannot be given mechanically to every instances. In this instant Petitions, the default is repetitive, unrelenting, and wilful and hence does not deserve the application of principles of natural justice. It is further submitted that the legislature has not envisaged any notice to be served to the defaulting Directors while applying section 164(2)(a) and hence the action of the Respondents in releasing the list of disqualified directors is not illegal and arbitrary as claimed by the Petitioners. It is the legislative intent to not to accord any "opportunity of being heard" to a set of defaults which is repetitive and wilful arising out of blatant disregard of law.

28. The respondent denies the contentions regarding retrospective enforcement of section 164(2)(a) which has no application to the present case as the non-compliance was taken for the financial years 2014-15 to 2016-17 which is very well after the provisions under section 164(2) (a) came into effect. Furthermore, the liability starts from the last statutory date for filing the Balance Sheet which ends on 30.10.2017 i.e. from 01.11.2017 and not from the period on which time for extension for such failure expires.


29. This respondent specifically denies the other contentions raised in the petition as the disqualification is only for five years i.e. from 01.11.2017 to 31.10.2022.

Thus from the above facts and circumstances of the case, it is clear that the petitioners herein have made dereliction of statutory duties and cannot circumvent the liability imposed by Law with invalid and insufficient reasons put forth by petitioners.

For all the reasons stated above it is prayed that the Hon'ble Court may be pleased to dismiss all the writ petitions filed with costs to the Respondents and thus render justice.

Solemnly affirmed at Chennai on
This the day of, November, 2019
Signed his name in my presence
After reading the contents herein

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BEFORE ME

A. SEHAR PONRAJ
Registrar of Companies
Tamilnadu, Andaman &
Nicobar Islands, Chennai
ADVOCATE-CHENNAI