



DISQUALIFICATION OF DIRECTORS: AN ENIGMA

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Abstract

This article deals with four main issues from the retrospective application of Section 164 by the Registrar of the Company to the polarity between the sections of the Companies Act dealing with the disqualification of director and the provisions pertaining to Annual General Meetings. The main essence of this article glimpses through the sequence of events in consonance with the disqualification of directors under section 164(2) that came into force from 01.04.2014. Section 164 of the Act, correspondent to Section 274(1)(g) of the Companies Act, 1956. The section deals with the disqualification of directors pursuant to not filing of annual returns for a consecutive of three financial years. Now, it can be stated that this provision provides for a stern system to deal with defaulting and shell companies. In September 2017 when MCA issued three lists disqualifying directors under the criteria given under section 164 (2), buttressed by Section 167(1)(a). However, this provision led to a sequence of events which created more confusion for the directors as to their duties and offices. As a result, a long list of petitions was filed under the Writ jurisdictions of the High Courts. The position of these cases still

seems to be a state of discrepancy. This leaves out a lot of wrinkles in the Companies Act, 2013 to be ironed out by the Apex Court with respect to disqualification of Directors.

Keywords: disqualification of directors, retrospective application, company law, natural justice, registrar of company, audi alteram partem.

• Introduction

*To begin with, let's give a brief view of the conundrum. The end of August 2013 led to the long-awaited enactment of the Companies Act, 2013 (“**The Act**”)¹ by the Parliament, which received Presidential Assent on 29th August 2013. Although some of the key issues consisted of spending on CSR Policies and class action suits, not much emphasis was placed upon the analysis of Section 164 of the Act, which left a vacuum. This article presents an analysis of the ROC'S role and the list published in 2017 disqualifying the directors under the new Companies Act, 2013 and an emphasis on the requirement for an intelligible interpretation of Section 164(2). This has been discussed with relevance to four main issues that has led to this kaleidoscope of the events along with a detailed understanding of the divorced views of different courts. The aspect of this paper is to analyse all the significant judgments given so far and to clear out as much air as possible with respect to the 2017 notification of the MCA.*

There are four main points that have been addressed in this article, which draw reference from a series of Judgements having multifaceted views on the pursuant

¹ The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India). Available at,

<https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>



disqualification of directors, they are as follows:

- I. **The retrospective application of Section 164(2) has stirred a hornet's nest of fear among directors.**
- II. **The Dichotomy between Section 164(2) and Sections 92, 96 and 137 of the Companies Act, 2013.**
- III. **Whether Doctrine of Proportionality & Principles of Natural Justice has been violated or not?**
- IV. **The MCA's mandate to deactivate the Director Identification Number vis- à -vis the power prescribed under the new act.**

• **Application s. 164(2) - retrospective or otherwise.**

The reasoning behind enacting Section 164(2)² (the Section) and Section 167(1)(a)³ of the Act was to eliminate the virus of a number of inoperative companies and shell companies.⁴ The first and foremost issue, that needs to be addressed when disembarking the question on prospective or retrospective application of the said section, is that, it will be essential to delve deeper into the understanding of the default years that are being considered under the current provisions. The Act in section 2(41), defines 'financial year' with relation to Companies and Corporate entities as a period commencing from the 1st April of the year and ending on the 31st of March of the following year.⁵ The said section of the Act, which came into force from 01.04.2014, deals with the filling of financial statements of annual returns following which if there's a default for a period of three consecutive years the

following repercussions are prescribed under this section.

Now addressing the situation at hand and taking into account the date of enforcement of Section 164, the first financial year would be 2014-2015, the second would be 2015-2016 and third would be 2016-2017. However, as previously mentioned, the MCA had published three lists disqualifying directors of various companies for the FYs. 2012-2014, 2013-2015, 2014-2016, wherein the default years has resulted into a retrospective application.

To understand the issue at hand it is important to note when laws can have a retrospective or prospective approach and what is the ideology behind it all. Now the general rule is that unless mentioned otherwise, all laws are to have a prospective effect. The ideology behind this is that the laws are made to govern the current activities and hence unless specified there is a prospective application of the law. Now a law has a retrospective effect only when it is done with a view to clarifying a specific provision or omission in the previous legislation. Since nothing was mentioned when this section came into force one can say that Section 164(2) of the Act will have a prospectively application.⁶

lex prospicit non respicit: is a principle of law which states that, "The law looks forward, not backward." The interpreting of a statute must be guided by this rule, unless a contrary intention appears, the intention of the legislation must be considered. It is indeed

² The Companies Act, 2013, § 164(2).

³ The Companies Act, 2013, § 167(1)(a).

⁴ Mukut Pathak & Ors v. Union of India, 265 (2019) DLT 506, at 66.

⁵ The Companies Act, 2013, § 2(41).

⁶ SS Rana & Co, Disqualification of Directors: Penalty u/Section 164(2) of Companies Act not to apply Retrospectively. Available at, <https://www.lexology.com/library/detail.aspx?g=7d5700cc-a99d-458f-9e7e-034b6d622508>.



obvious that the retrospective application is against the principle of 'fairness. The essence of a prospective legislation is to preserve this general principle that legislation when introduced for the first time ought not to change the character of past matters, but to deal with future acts.⁷

"It is well settled that no statute shall be construed to apply retrospectively, unless such a construction appears clear from the language of the enactment or otherwise necessary by implication. It is also equally trite that a statute is not retrospective merely because it affects existing rights or because a part of the requisites for its action is drawn from a time antecedent to its passing."⁸

From the general law as stated in Halsbury Laws of England and as mentioned above we can see that all declaratory statutes as is, in this case, have a prospective effect and are considered to be in force or applied when they came into force and as is mentioned in the Scindia Steam Navigation Case⁹. Take for example; If at the beginning of the year Law A is applicable and during pendency of that year, an amendment is brought about with respect to the said Law A, then the amended law won't be applicable to that year as if it was in force when the year began but will apply to such events taking place pursuant to its enforcement. In basics, this judgment too followed the basic principle of *lex prospicit*

non respicit. Hence, the argument that the defaults for the year 2014-2016 should be taken into account have no stand and the same has been agreed by the judgments given by the High Courts of Karnataka, Gujrat, and Madras in Yashodhara Shroff¹⁰, Gaurang Balvantlal Shah¹¹, and Bhagavan Das Dhananjaya Das¹² respectively.

For reference the relevant parts from the case of C.I.T. Bombay v. Scindia Steam Navigation Co. Ltd¹³, have been produced here

"the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year."

The Delhi High Court¹⁴ in the case of Mukut Pathak¹⁵ has considered another prospect when dealing the retrospectivity of Section 164 (2)(a) and has held that the application of the said section by the Registrar was in congruity with principles of interpretation as the companies had to file the annual returns pursuant to holding of the annual general meeting in accordance with section 96 of the Act.

⁷ Niharica Khanna, Retrospective Operation of Law, Vol 2/ Issue 1/ May 2016. Available at, <http://www.jlapp.in/volume-2-issue-6/>

⁸ Phillips v Eyre, LR 6 QB 1.

⁹ C.I.T Bombay v. Scindia Steam Navigation Co. Ltd., AIR 1961 SC 1633.

¹⁰ Yashodhara Shroff and Ors v. Union of India and Ors., [2019] 155 SCL 299 (Kar).

¹¹ Gaurang Balvantlal Shah v. Union of India, 2019 GLH (1) 444.

¹² Bhagavan Das Dhananjaya Das v. Union of India and Ors., (2018) 6 MLJ 704.

¹³ C.I.T Bombay, *supra* note 3.

¹⁴ Khaitan & Co, Delhi High Court Judgment n Director Disqualification. Available at, <https://s3.amazonaws.com/documents.lexology.com/83e1d6b1-d67a-444b-bb2e-d05f9f171f9f.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1619346534&Signature=Mum4%2FgJFu6bA1bhrc4Jp54ntDXw%3D>

¹⁵ *Supra* note 1.



The Hon'ble Bombay High Court in the case of Kaynet Finance Limited Vs. Verona Capital Limited¹⁶ has addressed a very important aspect regarding Section 167(1)(a) that acts as a pillar to Section 164(2).¹⁷ The vicarious responsibility of the directors which resulted in disqualifications on account of defaults by company has been stipulated in the provision of Section 164(2). Section 167(1)(a) deals with vacancy of the offices of directors if they have been disqualified under Section 164. Now, the issue that arose was, whether Section 167(1)(a) applies to Section 164 in its entirety or to the part of that Section. For the purpose of disqualification of the directors under Section 164,¹⁸ the said section can be divided into two parts. The sub-section (1) relates to disqualification of a person for appointment as a director on certain categories given under clause (a)-(h) of the sub-section, while the sub-section (2) provides for disqualification of the directors on account of companies that have defaulted to file annual returns for a period of three consecutive years. The controversy involved in the present issue is the interpretation of these two Sections. The elucidation of Section 167(1)(a) read with the entire Section 164(2) will create a void, consequently such a person is not qualified to be re-appointed as a director of a defaulting company.¹⁹

“If it is interpreted that the directors of a company which has not filed its financial statements for the stipulated period are not only disqualified for reappointment but their offices will stand vacant, it will create a vacuum. The offices of directors of such a company would forthwith fall vacant and the cause of such company cannot be proceeded with by the directors.”²⁰

The court further elaborated that section 164(1) does not deal with disqualification after appointment, but contemplates the disqualification for initial appointment, there's a pre-supposition that there is a sitting director. Therefore, addressing the interplay between section 167(1)(a) and 164(2), the disqualification will not immediately leave a vacancy when the disqualification is under sub-section 2 of Section 164. The Hon'ble Delhi High Court²¹ agreeing to the Kaynet Limited case also held that Section 167(1)(a) applies to sub-section 1 and not sub-section 2 of Section 164.

This position was addressed in the Companies Act (Amendment), 2018 amending Section 167(1)(a). The Amendment cleared out the air around this issue and added a further position stating that Section 167(1)(a) applies to section 164(2).²² The amendment proviso provided that, the director disqualified under section 164(2)(a) will instantly vacate the

¹⁶ Kaynet Finance Ltd v. Verona Capital Ltd., AIR 2019 Bom 298.

¹⁷ Aditya Singh Chauhan, Disqualification of Directors: Construing Retrospectivity. *Available at*, <https://indiacorplaw.in/2020/03/disqualification-of-directors-construing-retrospectivity.html>

¹⁸ Rupin Chopra and Reetika Wadhwa, India: Disqualification of Directors: Penalty u/Section 164(2) of Companies Act Not to Apply Retrospectively 14 January 2020. *Available at*, [https://www.mondaq.com/india/directors-and-](https://www.mondaq.com/india/directors-and-officers/883186/disqualification-of-directors-penalty-usection-1642-of-companies-act-not-to-apply-retrospectively#:~:text=Section%20164(2)(a)%20of%20the%20Act%20deals%20with,a%20period%20of%20five%20years.)

[officers/883186/disqualification-of-directors-penalty-usection-1642-of-companies-act-not-to-apply-retrospectively#:~:text=Section%20164\(2\)\(a\)%20of%20the%20Act%20deals%20with,a%20period%20of%20five%20years.](https://www.mondaq.com/india/directors-and-officers/883186/disqualification-of-directors-penalty-usection-1642-of-companies-act-not-to-apply-retrospectively#:~:text=Section%20164(2)(a)%20of%20the%20Act%20deals%20with,a%20period%20of%20five%20years.)

¹⁹ Kaynet, AIR 2019 Bom 298, at 21.

²⁰ *id.*

²¹ Mukut Pathak & Ors v. Union of India, 265 (2019) DLT 506.

²² *Id.*, at note 2.



director position in all the non-defaulting companies where that person holds that respectable position, but when it comes to the defaulting company the disqualified director will get an extended period to complete the pending responsibilities and vacate the office of that defaulting company.

• **The Dilemma between Section 164 and Sections 92, 96 and 137 of the Companies Act, 2013.**

Another important aspect apart from the retrospective application of Section 164(2) when dealing with disqualification under the lists issued by the Registrar of Companies (ROC), is the intersection of time limit for the annual general meeting and other obligations of the company under Sections 92(4), .96 and .137(1) of the Act. There is a twofold approach when addressing the legal position in the issue. The first being that of Section 164(2) of the Act 2013, which allows disqualification of directors if annual returns have not been filed for three consecutive years (as previously dealt with) and the second being Sections 96, 92(4) and 137(1) of the Act that lays down the limitations for Annual General Meeting (AGM), and filing of subsequent annual returns, paired with the filing of the balance sheet.²³

The prescribed time limit to file the annual returns under Section 92(4) of the Act is sixty days from the date of annual general meeting

or the last date on which the annual general meeting ought to have been held and filing of balance sheet under Section 137(1) of the Act the time limit is thirty days from the annual general meeting. Section 164 coming in force from the 01.04.2014 (i.e. the next financial year), thus for a company the third financial year ending according the above date will be 31.03.2017 and the last date for convening the annual general meeting thus would be 30.9.2017, the last date for filing the annual returns would have been 29.11.2017 and the balance sheet to be filed only before or on 30.10.2017.²⁴

This is the view which most of the court took into consideration. Now, the dichotomy at hand where the Hon'ble Gujarat High Court in Gaurang Balvantlal Shah, the Hon'ble Madras High Court in Bhagavan Das Dhananjaya Das, the Hon'ble Karnataka High Court in Yashodhara Shroff and the Hon'ble Lucknow High Court in Jai Shankar Agrahari²⁵ adopted the above approach wherein the effect of the new Act concerning the filing of the Annual Returns and consequent vacation of the office of directorship under this section can only be triggered on or after the 31st October of the respective year.²⁶ While disagreeing and deviating the Hon'ble Delhi High Court in the case of Mukut Pathak has upheld the disqualification of the directors by applying section 164(2)(a) to 2013-14 financial year on the grounds that there are six months for further filing of the annual under Section 96

²³ Dr. K. R. Chandratre , Compendium of Key Issues Under Corporate Law.

²⁴ Bhagavan Das Dhananjaya Das v. Union of India and Ors., (2018) 6 MLJ 704, at 6. *Available at*, <https://taxguru.in/wp-content/uploads/2018/08/Bhagavan-Das-Dhananjaya-Das-Vs-Union-of-India-Madras-High-Court.pdf>,

²⁵ Jai Shankar Agrahari v. Union of India, (2018) 6 MLJ 704, at 6.

²⁶ K. Vaitheeswaran and Yeswanthram CJ, Disqualification of Directors & Principles of Natural Justice. *Available at*, <http://www.lawstreetindia.com/experts/column?sid=478#:~:text=The%20disqualification%20of%20directors%20as,under%20the%20Companies%20Act%2C%202013.&text=However%2C%20this%20provision%20had%20applied,directorships%20in%20Public%20Limited%20Companies.>



of the Act and thus not being *ex post facto*. It is concerning when penal provisions are levied on companies, if the section of the previous act (the Companies Act, 1956) had excluded private companies for a financial account of the previous year, even though the filing period is in the next financial year.

• **Doctrine of proportionality & principles of natural justice whether violated or not?**

A major contention raised by the directors who had filed the petition in this case was that the least of all an opportunity of being heard had to be provided to them before disqualifying them and demitting them from their office. The petitioners in these cases took a stance that the principle of *audi altrem partem* has been breached. To have a further understanding as to when can it be said that the principles of natural justice are breached? Or Do these principles have to be applied in every case? Or what are the restrictions in applying them? Let's have a brief look at the arguments presented by both sides.

In *Maneka Gandhi v Union of India*²⁷ a rather interesting observation was made in cases where principles of natural justice were applied²⁸

“ Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for

*promptitude or the urgency of the situation so demands”*²⁹

And for this very reason we will now see how most of the Hon'ble High courts have in this particular case of disqualification of directors has held that the Principles of natural justice are not to be applied.

It so happened that when these directors were disqualified under Section 164(2) these directors also had to vacate their office as per Section-167(1) not only in the companies which had default but also in companies which did not incur this default but had common directors.

An important point for their argument was that there should've been a show cause notice issued to them before disqualifying them.

The Courts of this land have time and again at various occasions reiterated the basics to be followed while deciding if these principles are applicable. In the notable cases of *Maneka Gandhi*, *J.N. Sinha*, and *Dharampal*, these courts have in clear words stated that though the main idea of these principles is that a person whose rights will be adversely affected, should be given an opportunity to present his case. However it is now accepted after due consideration that these principles only supplement the law. It means that these principles are not the law itself but only help in applying the law in a fair and equitable manner.

The next obvious question which comes to one's mind is that can these principles be applied in cases of statutory actions. For this let's have a look at the case of *J.N. Sinha* the

²⁷ *Maneka Gandhi v. Union of India*, 1978 AIR 597.

²⁸ *Maneka Gandhi v. Union of India* [1978 SC], Delhi Law Academy. Available at,

<https://www.delhilawacademy.com/maneka-gandhi-v-union-of-india-1978-sc/>

²⁹ *Mukut Pathak & Ors v. Union of India*, 265 (2019) DLT 506, at 63.



courts wherein considered the question of whether in case of statutory actions these principles can be attracted? It was stated in this case that whether by implication of provision, if one has to determine whether the principles are applicable to the basic scheme of the provision along with the language, that has conferred the power . Moreover the purpose for which the power has been conferred also needs to be examined.³⁰

This doesn't mean that the natural justice is rather inflexible; what it means is that its application should be restricted in cases where the chance of providing a person the opportunity to case would mean that the particular section becomes inefficient. In the case of Mukut Pathak the Hon'ble Delhi High Court while considering the question was of the view that since the section in question is such that it lays down criteria for being appointed as a director of a company in a negative sense and hence, if such person fails to qualify these criteria they cannot be appointed as directors. Hence, the administrative decision of the MCA as such cannot be said to be a qualitative decision and is merely a statutory process. In order for a better understanding reference has been drawn to the para's from Delhi High Court's judgment in Mukut Pathak

"This provision does not entail any decision-making process on the part of the Authorities administering the Act. No Authority is required to exercise any discretion or take any judicial or quasi-judicial decision regarding disqualification of a director. The Authority is also not required to pass any order

*disqualifying an individual. Clearly, in these circumstances, the rule of audi alteram partem would be inapplicable. As noticed above, such rules are meant to supplement the law to ensure procedural fairness."*³¹

As discussed above and in the case of Sinha in a view to determine if there has to be application of these principles one will have to look into the intent of the power and the purpose it serves here the intent of the MCA can be located as that there seems to be incorporation of a lot of shell companies and the information of such is available with the ROC and a lot of these companies withhold information wilfully as they pertain to these shell companies and these companies are made to perform a limited purpose. Hence, such a change was much needed and bought about in the Act. And giving them an opportunity of being heard would result in inefficiency of the section 164(2)(a) of the act.³²

The courts of this land also had the opportunity to consider the question of applicability of these principles to administrative decisions in the case of Dharampal Satyapal Ltd.³³, Dr A.K. Sikri, J had observed that such principles, *"are a kind of code of fair administrative procedure in the decision making process". It is difficult to understand as to how such principles would assist in the administrative procedure where an authority is not required to take any qualitative decision. The question whether a person fulfils the stipulated qualifications leaves little room for debate. As observed above, the administrative*

³⁰ Union of India v. Col. J.N. Sinha, (1970) 2 SCC 458.

³¹ Mukut Pathak & Ors v. Union of India, 265 (2019) DLT 506, at 65

³² Mukut, 265 (2019) DLT 506, at 66, 69

³³ Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and Others, (2015) 8 SCC 519



authorities are not required to take any qualitative decision in this regard. In the aforesaid view, this Court is unable to accept that exclusion of the audi alteram partem rule results in any procedural unfairness”³⁴

This clearly leaves no room for further doubt that why majority of the High Courts³⁵ in the case for disqualification of director were of the view that the principle of *audi altrem partem* should’ve been followed is rather ineffective in this case. Not only this, if one might come to think the MCA did come out with the Condonation of Delay Scheme on 29th December 2017 and gave a chance to all the companies in default of provision 164(2)(a) to rectify the default and be reinstated as directors.

But the Hon'ble Gujrat High Court is in respectful disagreement of this view. It has primarily relied on the view of certain landmarks given by the Apex Court which state that Principles of natural justice are to be applied not only to quasi -judicial decisions but also to administrative decisions. As has been amply made clear by Maneka Gandhi’s Case the Courts are of the view that even administrative actions come under the preview of the principles. And thus, this High court in the case of Bhagavan Das Dhananjaya Das was of the view that an opportunity to be heard should’ve been presented to the directors before they were also disqualified from companies that had scrupulously followed the provisions of the amended companies law.³⁶

Be that as it may one can only come to think that whether in this case the principles are to be applied or not to be? And in furtherance of it I’d like to place reliance on a recent judgment of the apex court where Hon’ble J. Nariman, J. Joseph, J. Sinha³⁷ came to the view that whenever the applicability of this rule is questioned one must keep in mind that these principles are flexible tools in hands of judiciary and are to be used only to remedy injustice and further more a mere infraction of this rule cannot mean to say that the step taken is invalid what is rather important is that there should be prejudice caused to the party/person. Not only this it also holds that where such decisions are a mandatory provision of law and are in individual as well as public interest there these principles should not be applied.³⁸ And as mentioned above that this move of the MCA to reduce shell companies one can only say that this was a move in public interest at large.

- **If MCA had the power to act deactivate the DIN for defaults committed under Section 164(2)(a) of the Act.**

The various courts of this land like the Allahabad High Court, Delhi High Court, Gujrat High Court when considering the question on whether the ROC had the power to de-activate the DIN of the directors under the provisions of the Act came to the conclusion that they are not allowed to do so and the DIN’s of the Directors should be reinstated by the respondents. The reason behind this is there are circumstances set

³⁴ Mukut, *supra* note 19.

³⁵ Mukut Pathak & Ors v. Union of India, 265 (2019) DLT 506, at 70,71; Yashodhara Shroff and Ors v. Union of India and Ors., [2019] 155 SCL 299 (Kar); Gaurang Balvantlal Shah v. Union of India, 2019 GLH (1) 444.

³⁶ Bhagavan Das Dhananjaya Das v. Union of India and Ors., (2018) 6 MLJ 704, at 27-29.

³⁷ Satish Kumar Gupta v. Union of India and Anr., (WP 1224 of 2018).

³⁸ Satish Kumar Gupta v. Union of India and Anr., at 39 (WP 1224 of 2018).



out under Rule 11 Appointment and Qualification of Director Rules, 2014 under which DIN's of directors can be cancelled and none of these circumstances state that the DIN could be cancelled on non-observance of Section 164(2)(a) of the Act. Hence, this action of the respondents the MCA / ROC is held to be arbitrary.³⁹

directors in non-defaulting companies might look on the face of it contrary to natural justice, the court held otherwise. It is finally upto the Hon'ble Supreme Court⁴⁰ to adjudicate these issues and decide what the right entails.

• **Conclusion**

Various High Courts have given their opinion on the interpretation of Section 164(2)(a) of the Companies has led to disparities in the application of this Section. After clearly analysing the different views laid out by the courts and scrutinizing them, it is evident that the retrospective application the Section 164(2)(a) has led to issues that may have resulted in a vacuum. Although the applicability of Section 167(1)(a) was cleared out in 2018, its application to Section 164(2)(a) before should have not been applied as the disqualification was due to defaults in filing the annual returns of the company and not before the appointment considering directors as individuals. The provisions for conducting AGM and the required filing being the annual statement and returns was one of the most important reason for diversion between the High Courts of different states. However, the scales tilt towards the prospective application of the section. The decision on constitutionality of Section 164 under Article 14 and 19 of the Constitution of India was only dealt with by the Hon'ble Allahabad High Court in Jai Shankar Agrahari, held the section to not be unconstitutional. Thought not giving show cause notice regarding disqualification of

³⁹ Jai Shankar Agrahari v. Union of India, at 79-80 (2020 SCC OnLine All 24).

⁴⁰ The Registrar of Companies Maharashtra Mumbai & Anr V. Shailendrajit Charanjit Rai & Anr., S.L.P 18693-18703/2018.