


IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Special Original Jurisdiction)

W.P.No.6597 of 2019

4618/2019, 3519/2019, 3047/2019, 526/2019, 530/2019, 2801/2019, 2882/2019,
541/2019, 2038/2019, 2033/2019, 27918/2018, 1638/2019, 1638/2019, 2129/2019,
3618/2019, 3611/2019, 1526/2019, 131/2019, 33536/2018, 92/2019, 2573/2019,
3132/2019, 3136/2019, 2639/2019, 2640/2019, 2041/2019, 20354/2018, 3697/2019,
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25170/2018, 25171/2018, 24905/2018, 23679/2018, 23680/2018, 24665/2018,
24067/2018, 24029/2018, 25192/2018, 25193/2018, 8982/2019, 8468/2019, 8814/2019,
9050/2019, 8828/2019, 9062/2019, 7471/2019, 7725/2019, 8978/2019, 8049/2019,
8002/2019, 8751/2019


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

Mr. Gurusamy Nadar Parthasarathy other Writ petitioners in

.....Petitioner

VERSUS

1. Union of India
Represented by its
Ministry of Corporate Affairs,
ShastriBhawan, Dr.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 ON BEHALF OF RESPONDENT NO. 1 & 2

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

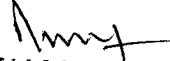
1. I submit that I am the 2nd respondent in the present Writ Petition and also other batch writ petitions, as such I am well acquainted with the facts and circumstances of the cases filed by the petitioners and competent to affirm this affidavit. I am duly authorized to file this affidavit on behalf of the 1st Respondent as well.

2. I submit that each and every averment made and contentions raised in the writ petitions are denied unless the same are specifically admitted hereunder.

3. I submit that the facts relevant for the present petition are as follows:

(a) That on 01.04.2014, Section 164 of the Companies Act, 2013 came into force on 01.04.2014 repealing the corresponding Section 274 (1) (g) of the Companies Act, 1956.

(b) That on 12.08.2014, the Respondent No.1 after receiving various representations from stakeholders for grant of transitional period / one time opportunity to enable them file various pending documents and avoid penal action under stricter provisions of the Companies Act, 2013 issued General Circular No.34/14 i.e. Company Law Settlement Scheme – 2014 (hereinafter 'CLSS, 2014'). The scheme could be availed from 15.08.2014 to 15.10.2014.It was clarified under clause 7 of the CLSS, 2014 that at the


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conclusion of the scheme, the Registrar would initiate necessary action under the Companies Act, 2013/1956 against companies who had not availed the same. True Copy of the CLSS, 2014 is annexed herewith and marked as **ANNEXURE-A1**.

(c) That on 15.10.2014, the Respondent No.1 passed General Circular No.41/14, dated 15.10.2014, thereby extending the CLSS, 2014 scheme till 15.11.2014. True Copy of the Circular No.41/14, dated 15.10.2014 is annexed herewith and marked as **ANNEXURE-A2**.

(d) That on various dates, the Respondent No. 2 under section 248 (1), (4) of the Companies Act read with Rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, issued Form No. STK – 5 Public Notice proposal to remove / strike off names of the Companies (22954 Companies). By the said Notice objections to the proposed removal were solicited invited within 30 days from the date of publication of the Notice.

(e) That on 08.11.2017, Notification was issued by the Central Government striking off 20747 companies, including the Company for which the Petitioner was a Director.

(f) That on 08.09.2017 & 01.11.2017, the Respondent No. 2, herein released a list of disqualified Directors, wherein the name of the Petitioner also figured in the list of directors disqualified under Section 164(2) (a) of the Companies Act, 2013. The said list was uploaded in the website of the Respondent No. 1 herein.

(g) That on 03/08/2018 the Honorable High Court of Madras while hearing a batch of Writ Petitions challenging the action of the Respondents, in releasing the list of disqualified directors was pleased to allow the Writ Petitions.

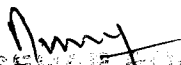
(h) The Respondents have filed a Writ Appeal Petition 63/2019 before the Honorable High Court of Madras challenging the Orders of the Learned Single Judge passed on 03/08/2018 and the same is pending before the Hon'ble High Court of Madras. The present batch of Writ Petitions are filed with the same question of law and similar facts.

4. I respectfully submit that the answering Respondent has acted as per the provisions of Sections 164(2) read with Section 167 of the Companies Act, 2013. The said sections are reproduced below:

164. Disqualifications for appointment of director.—

... (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 financial years; or


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(b) has failed to repay the deposits accepted by it or pay interest thereon 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, 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.

167. Vacation of office of director. — (1) the office of a director shall become vacant in case—

(a) he incurs any of the disqualifications specified in section 164;


5. I submit that the petitioners in all writ petitions stood disqualified as per the operation of law and upon fulfillment of the essential criteria as mentioned in the aforementioned Sections 164(2)(a) read with Section 167(1)(a) of the Companies Act, 2013. It is further submitted that the provisions of Section 164(2)(a) of the Companies Act, 2013 cannot be read in isolation and are to be read with the provisions of Section 167(1)(a) of the Companies Act, 2013.

6. I submit that the Petitioners have not approached this Hon'ble Court with clean hands. It is the duty of the directors of the Company to make the statutory compliance within the time prescribed under the law. The writ petitioners are hiding behind their own defaults in statutory duties for a continuous period of three financial years. Therefore all the Writ petitions thus deserves to be dismissed on this ground alone.

7. It is humbly submitted that the Petition is filed based on the following grounds (a) section 164(2)(a) is operated prospectively and (b) opportunity of being heard is not accorded. The aforesaid averments are baseless and legally no tenable. The fact mentioned in the petitions are misleading.

Grounds of Retrospectivity

8. It is submitted that the Petitioners have cited section 274(1)(g) of the Companies Act 1956 which was given retrospective effect by explicitly mentioning the date from which the defaults would be considered for disqualification. It is humbly submitted that the Petitioners have overlooked the fact that the Respondents have released the impugned list of disqualified directors on 08/09/2017 which shows that the section 164(2)(a) read with section 167(1)(a) was invoked on a date much later than 01/04/2014 which is the date of coming into force of section 164(2)(a). In other words, enforcing a statute almost three years after the date of coming into force of that legislation cannot be termed as "retrospective operation" by any measure.

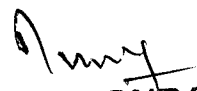

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9. It is further submitted that in section 164(2)(a), while stipulating the conditions which attract disqualification of Directors, the words "has not filed financial statements or annual returns for any continuous period of three financial years" are used. It is respectfully submitted that the Petitioners while challenging the operation of 164(2)(a) have failed to recognize the significance of the word "any" in section 164(2)(a), which explicitly provides that default in respect of any 3 continuous financial years as on 01.04.2014 can also be reckoned for the purpose of disqualification under section 164(2).

10. It is submitted that the principles that have to be applied for interpretation of statutory provisions of this nature are well-established. The first of these is that, statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication. It is submitted that the Petitioners have failed to appreciate that a statutory provision can be given retrospective operation by "necessary implication" too. In this instant case the section 164(2)(a) is invoked prospectively, but the statute can reach to a default anterior to the date of its commencement, which is very much rendered valid by "necessary implication". Hence it is submitted that the retro-active operation of section 164(2)(a) on 08/09/2017 is legally valid as ascertained by a multitude of judgments.

11. The Petitioners have averred that the Respondents have invoked section 164(2)(a) read with 167(1)(a) in a retrospective manner and that the first Financial Year for arriving the period of disqualification is 2014-2015, which in the humble opinion of the Respondent is not tenable. The Petitioners also aver that the disqualification provisions under section 164(2)(a) read with 167(1)(a) can be invoked only after 30/10/2017 as the third financial year is 2016-2017, which in the opinion of the Respondent is frivolous and deserves to be dismissed. It is well settled in **K.V. Joseph vs. State of Gujarat 17.03.1997 - GUJHC: MANU/GJ/0227/1997** that *Law once enacted is required to be enforced*.

12. The contentions of the Petitioners upon the date of invoking disqualification provisions directly contravenes the above principle. The very premise that even after coming into force, a certain legislation has to be kept in cold storage without operation for more than three years is untenable and unreasonable and hence the averments of the Petitioners deserve to be dismissed on this ground alone. The same view has been taken by Hon'ble High Court of Calcutta in **Nabendu Dutta vs Arindam Mukherjee, [2004] 55 SCL 146 (CAL.)**, in which the Court held that "*It is an absurd thought that after an Act having been notified cannot be given effect immediately.*[Para 54]"


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13. I submit that the Petitioners ought to have challenged the date of commencement of section 164(2)(a), which they have failed to do so. It is submitted that challenging the operation of a notified statute, without challenging either the constitutional validity of the section or the date of notification of the statute is bad in law as it violates the cardinal principle of law that "Every law once enacted needs to be enforced."

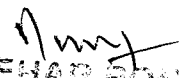
14. It is further submitted that the essential ingredients for applying section 164(2)(a) are as follows:

- a. A company which has defaulted in filing its Annual Returns or Financial Statements.
- b. As on the date of applying this section, such default has been committed for any period of three continuous financial years in the past.
- c. Any person who is or has been a Director of such defaulting company.

15. In the instant Petitions, as on the date of operation of section 164(2)(a), all these essential conditions exist and hence the averment of the Petitioners about the act of the Respondents in releasing the list of disqualified directors as illegal and arbitrary is denied and baseless.

16. It is further submitted that the position of "Directorship" is created under Companies Act and hence the right of any person to be a director is a Statutory Right and not a Fundamental Right. Every statutory right comes with its own statutory duties and statutory restrictions. For instance, section 165 of the Companies Act 2013 restricts any Director to hold directorship in more than twenty companies, which is a mere statutory restriction and cannot be construed as a provision that breaches the right to hold countless directorships. There are multitude of similar statutory restrictions available in the Companies Act and section 164(2)(a) is one such statutory restriction. It is humbly submitted that the disqualification incurred under section 164(2)(a) read with section 167(1)(a) does not result in any loss of Fundamental Rights or Statutory Rights and it is a mere conditional restriction for a limited period of five years.

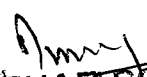
17. It is further submitted that the disqualification under section 164(2)(a) read with 167(1)(a) which is a "limited period conditional restriction" once incurred will not invalidate the past actions performed by the Director and will not remove his right to be a Director after the restriction period of five years. It is pertinent to note that the DIN number allotted to the Director is not abrogated even after incurring disqualification under section 164(2)(a) and the Director can start using the same DIN after the restriction period of five


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years. This shows that the disqualification provision will neither remove nor abrogate any fundamental or statutory right and it merely restricts the Directorship for a limited period and hence the averment of the Petitioners that the operation of section 164(2)(a) affects their fundamental right is baseless and misleading.

18. It is further submitted that the Petitioners have averred that any statute that affects the existing rights has to be given prospective operation. It is submitted that though the operation of section 164(2)(a) upon the Petitioners happened much later than the date of commencement of the section and hence prospective, the Petitioners have wrongfully raised the question of retrospectivity without considering the fact that neither any fundamental rights nor any statutory rights of the Petitioners are affected and the disqualification incurred by the Petitioners is nothing more than a "*limited period statutory restriction*". I further submit that the constitutional validity of the erstwhile amended section 274(1)(g) of the Companies Act, 1956 (corresponding section 164(2) of the Act, 2013) was upheld in the matter of *Snowcem India Ltd vs Union of India*, [2005] 60 SCL 50 (Bom), wherein it was held by Division Bench of Hon'ble Bombay High Court that Section 274(1)(g) is not violative of the directors' fundamental rights guaranteed under Article 14 & Article 19(1)(g) of the Constitution of India. Further, this test of constitutional validity was reiterated in the matter *Saurashtra Cement Ltd & Ors. vs Union of India*, [2007] 75 SCL 375 (Guj). It was observed by the Hon'ble Court that the provisions of Section 274 (1)(g), as amended by Companies (Amendment) Act, 2000, is constitutionally valid more particularly when Section 274 (1) (g) has been enacted primarily in the interest of larger public .

19. It is submitted that section 274(1)(g) of Companies Act 1956 is a similar provision to section 164(2)(a) of Companies Act 2013. It is submitted that the Division Bench of Hon'ble Bombay High Court in ***Snowcem India Ltd vs Union of India*, [2005] 60 SCL 50 (Bom)**, has held that the disqualification provisions in section 274(1)(g) of Companies Act 1956 does not violate the Fundamental Rights of the Directors. It is further submitted that the Petitioners have filed this Writ Petition based on the false premises that the operation of section 164(2)(a) read with 167(1)(a) has affected the Petitioner's fundamental rights, whereas neither any fundamental rights nor any statutory rights of the Petitioners are affected due the limited period statutory restriction imposed by section 164(2)(a). It is further submitted that the Petitioners have failed to perform their statutory duty of ensuring that Annual Returns and Financial Statements of the Company is filed within the prescribed time, repeatedly for three years thereby attracting the impugned limited period restriction. Hence it is submitted that the question of retrospectivity arises


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only when fundamental rights are affected, which is not in this instant case and hence the Petition may be dismissed as it is filed without any legal backing.

20. It is further submitted that section 164(2)(a) read with 167(1)(a) has not been given retrospective operation, that is to say, it has not been made to commence from a date prior to the date of its passing but the effect is anterior to the date of the notification. It is humbly submitted that despite the relevant provision came into force on 01/04/2014, the Respondents have given ample opportunities to those defaulting Directors in the form of Company Law Settlement Scheme 2014, which the Petitioners have failed to avail. It is further stated that the Petitioners had enough time to set their house in order as the said disqualification provision was invoked on September 2017, which is three and half years after the provision came into force which implies that the Petitioners have failed to perform their statutory duty for more than thousand days.

21. I submit that the Writ Petitions are misconceived and no fundamental right of the petitioners have been affected as they have miserably failed in fulfilling their statutory duties continuously for a period of three years. The disqualification suffered by them is the consequence of their own defaults and by operation of law. The role of the answering Respondent may be best summarized as that of preventing a holder of an expired boarding pass from boarding a flight at the airport. It is otherwise the duty of the disqualified directors to inform the companies concerned that they have been disqualified as per the operation of provisions of Section 164(2) of the Companies Act, 2013.

22. I submit that the action undertaken by the answering Respondent is identification of the disqualification of directors and is in accordance with the operation of law as envisaged under Section 164(2)(a) read with Section 167(1)(a). It is most respectfully submitted that the Hon'ble High Court does not have the jurisdiction to cure the disqualification which has incurred on account of operation of law. I submit that the Writ Petitioners are now estopped from taking shelter under Section 403 of the Companies Act.

23. I submit that there is a failure on the part of the Petitioners to comply with Rule 14 of the Companies (Appointment of Directors) Rules 2014 which required them to file Form DIR-8 with the Company concerned and in turn the Company concerned should have filed DIR-9 with the Registrar of Companies. It is humbly submitted that as per the Companies (Appointment of Directors) Rules, 2014, made effective from 1st April 2014, as per Rule 14(2) whenever a company fails to file the financial statements or annual returns as specified in Section 164(2) the Company shall immediately file Form DIR-9, to


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Registrar of Companies furnishing therein the names and addresses of all the directors of the company the relevant financial years. As per Rule 14(3) of the Companies (Appointment of Directors) Rules 2014 when a Company fails to file Form DIR-9 within a period of 30 days of the failure, it would attract disqualification under section 164(2) and officers specified in Section 2(60) of the Act shall be officers in default. It is submitted that on verification of the documents of the Respondent companies, it is seen that the companies have not filed Form DIR-9 with the Registrar of Companies and hence, as per Rule 14(3) disqualification under section 164(2) is attracted.

24. I further submit that as far as filing of financial statements or annual returns are concerned, under the provisions of the Companies Act, 2013, all companies, whether public or private, including not-for-profit companies, are legally bound to file the same with the Registrar of Companies before the due date as stipulated in relevant provisions. Under the Companies Act, 1956, non-filing of Balance Sheet or Annual Return for any financial year by a company, whether public or private, including not-for-profit companies, was also an offence punishable under Section 220(3)/162 of the said Act. Further, under Companies Act, 2013, non-filing of Financial Statement/Annual Return for any financial year, by a company, whether private/public, is an offence punishable under section 137(3)/92(5) of the Act. It is submitted that it may be seen that no new statutory obligation is created under Section 164(2), as the liability to file statutory returns already existed under the erstwhile Companies Act, 1956 as well. The petitioners herein, being directors of the company, already have knowledge of the default committed by the company.

Grounds on Principles of Natural Justice

25. 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 so 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 does not deserve any relief under the guise that "opportunity of being heard" is not given.

26. 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


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164(2)(a), it can be seen that the Petitioners have failed their 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 Petitioners have 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 do not deserve any mercy in the eyes of law.

27. 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 reported in **Board of Directors, H.P.T.C & Anr vs 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...”

28. 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 Petitioners are 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. It is the legislative intent to not to accord any “opportunity of being heard” to a set of defaults which are repetitive and willful arising out of blatant disregard of law.

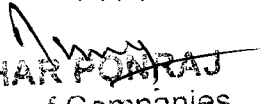
29. It is submitted that an opportunity to show cause is not necessary where facts are undisputed. The Honorable Supreme Court of India has held in **Dharmarathmakara Rai Bhadur Arcot Ramaswmay Mudaliar Educational Institution v. Education Appellate**


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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, ie. 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.

30. 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 Petitioners extends for an unreasonable period of time, shows the utter disregard of the Petitioners towards the law and hence sending notice to the Petitioners will lead to a mere empty formality.

31. It is submitted that, the petitioners themselves are aware of the facts that they have not filed the statutory returns within the statutory period and also the legal effect of the same and the same is not within the exclusive knowledge of the answering respondent herein. It is pertinent to note here that it has been held in **Bharat Bhushan Vs. H.B. Porfolio Leasing Ltd., [1992] 74 Comp Cas 20 (Delhi)**, that a broad proposition of law cannot be laid down that before a director incurs the disability as required by Section 283, he must be given a show cause notice or reasonable opportunity of being heard. Further, disqualification from directorship is well within the knowledge of the company and its Board of Directors and ignorance of law of the land cannot be taken as a plea by the writ petitioners. Besides the above, it is submitted that the answering Respondent has no active role in this regard and disqualification as per the provisions of Section 164(2)(a)


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and consequent vacation of office as per Section 167(1)(a) occurs as a result of operation of law. Thus, issuance of show cause notice is not mandatory.

32. I submit that the provisions of Section 164(2) of the Act have to be read in conjunction with Section 167(1)(a), which makes it specifically clear that the office of director who incurs disqualification under Section 164, shall stand vacated immediately and further, accordingly they shall not be eligible to be re-appointed in that company and to be appointed in other companies for a period of 5 years from the date on which 3rd consecutive default as envisaged in Section 164(2) are committed by the companies. As such, it is submitted that the disqualification, occurring due to operation of the provisions of Section 164(2) cannot be read in isolation, as contended by the petitioners, especially when there exists a specific provision in Companies Act, 2013 viz., Section 167(1) which provides for the immediate vacation of office of director who is suffering from disqualification under Section 164.


33. I further submit that continuing in office after being disqualified as per the operation of the provisions of Section 164, is an offence under section 167(2) of the Companies Act, 2013. Since the period of disqualification contemplated under Section 164(2) is 5 years from the 3rd consecutive default, respective Director Identification Numbers (DIN) of such directors have been de-activated to prevent such directors from being appointed/re-appointed as directors. It is in the above background that names have been displayed on the Ministry's website for public information.

34. I submit that since the statutory disqualification under the Companies Act, 2013 cannot be cured, the Writ Petitions are liable to be dismissed in limine.

In view of the submissions made above, it is most respectfully prayed that:

This Hon'ble High Court may be pleased to dismiss the writ petitions against the Respondents with costs to the Respondents and pass such other order or orders as deemed fit and proper in the circumstances of the matter.

Solemnly affirmed at Chennai on
this the day of, April, 2019 and
signed his name in my presence
after reading the contents herein


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BEFORE ME

ADVOCATE-CHENNAI