

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 4th April 2022**

Pronounced on: 15th July 2022

+ **W.P. (Crl.) 559/2020**

NITIN REKHAN

... Petitioner

Through: Mr. Manish Kaushik
and Mr. Mishal Johari, Advocates.

versus

UNION OF INDIA & ORS.

... Respondents

Through: Ms. Bharathi Raju,
Senior Panel Counsel for
Respondents No. 1 & 2(UOI).

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant Criminal Writ Petition has been filed under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code") *inter alia* praying for passing appropriate orders and directions to the Respondent No. 2 to perform their duty in accordance with law and to prosecute Respondents No. 3 to 7 under Sections 73 and 76A of the Companies Act, 2013 and to take appropriate action on the complaint filed by the petitioner.

FACTUAL MATRIX

2. The matter has arisen out of the facts as detailed hereunder:
 - a. The Petitioner is a businessman by profession whereas the Respondent No.3 is a private limited company engaged in the business of Real Estate.
 - b. The Petitioner had paid Rs. 40,00,000/- (hereinafter referred to as the “amount in question”) to the Directors of Respondent No. 3 Company for issuance of shares in the said company on 27th December 2010 by depositing the share application money in A/C No. 5582000100022401 maintained with Karnataka Bank Limited, Karol Bagh.
 - c. The Respondent No.3 Company failed to allot the shares as promised to the Petitioner and returned the money on 9th February 2018 through RTGS. It is alleged that however, the said Company failed to repay the interest accrued on the amount in question as per Companies (Acceptance of Deposits) Rules, 2014 and Rule 17 of the Companies (Acceptance of Deposits) Rules, 2014.
 - d. The Petitioner approached the Registrar of Companies (Respondent No.2) by filing an online complaint on 11th December 2018 for non-compliance of the Companies (Acceptance of Deposit) Rules, 2014 by Respondent No.3 Company and for the recovery of the Interest

Amount. The Deputy Registrar of Companies, Delhi issued a Show Cause Notice dated 14th May 2019 to the Respondent No.3 Company.

- e. Despite the issuance of Show Cause Notice, it is alleged that no action was taken by the Respondent Company on the complaint filed by the Petitioner. The status of the same is currently reflected as “under examination” on the website of the Ministry of Corporate Affairs.
- f. The Petitioner has also preferred a private complaint under Section 200 of the Code before the Special Judge, Dwarka Courts, Delhi against Respondent No.3 and others including the Respondents No.1 and 2 for not having taken any action against Respondents No. 3 to 7 as per the law under Section 73 and 76A of the Companies Act, 2013.
- g. By way of the instant writ petition, the Petitioner has prayed for passing appropriate orders and direction to the respondent No. 2 to do their duty in accordance with law and to prosecute Respondents No.3 to 7 under Section 73 and 76A of the Companies Act, 2013 and to take appropriate action on the complaint filed by the petitioner.

SUBMISSIONS

3. Learned counsel appearing on behalf of the Petitioner submitted that the Petitioner had paid amount in question to the Directors of Respondent No.3 Company for issuance of shares in the said company on 27th December 2010 by depositing the share application money in A/C No. 5582000100022401 maintained with Karnataka Bank Limited, Karol Bagh. It is submitted that the petitioner has filed a copy of the Bank Statement of February 2018 and that the Petitioner was further issued an Income Tax Notice dated 24th September 2018 thereby confirming the deposit of the said amount as share application money. It is further submitted that despite this, the shares were never allotted.

4. It is further submitted that the Respondent No.7 M/s PVRN & Co., the auditors of Respondent No. 3 Company acting in connivance with the Respondent No. 3 Company and other key managerial persons have been involved in a well-calculated fraud carrying activities in violation of the provisions of the Companies Act, 2013. It is stated that as an illustration and specimen of the fraudulent practices of the Respondent No. 3 Company, the Petitioner has annexed the Balance Sheet of the year 2016-17 of the Respondent No. 3 Company to show the acceptance of unsecured deposit of Rs. 60,00,000/- from one Jakesh Kumar Sagar.

5. The learned counsel for Petitioner submitted that the petitioner is aggrieved due to inaction on behalf of the Respondent No. 2 in dealing with the complaint of the Petitioner seeking enquiry into the financial irregularities, serious economic offences and illegal conduct of

Respondent No. 3 Company in accepting the deposits in contravention of provisions of Companies Act, 2013 and for repayment of the interest as per the provisions of law.

6. The learned counsel for the Petitioner has contended that Respondent No. 2 has failed to register the case against the Respondent No. 3 and to carry out their statutory duty, which is in blatant violation of provisions of the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014. It is submitted that the delay in enquiry and investigation on part of the Respondent No. 2 is acting as a shield for the Respondent No. 3 Company.

7. Learned counsel for the Petitioner further submitted that the Section 2(31) of the Companies Act, 2013 defines the term “deposit” as including any receipt of money by way of deposit or loan or in any other form by a company. Further, it is submitted that Rule 2(1)(c) of Companies (Acceptance of Deposit) Rules, 2014, defines the term “deposit” and excludes various amounts received by a Company from the ambit of Deposit which shall not be considered as deposits.

8. It is also submitted that as per the provisions of Rule 2(1)(c)(vii) of Companies (Acceptance of Deposit) Rules, 2014, it is clear that the money paid towards the share application for allotment shall be treated as deposits if the said money is not refunded within 60 days from acceptance. Accordingly, it is submitted that the money paid by the petitioner to the Respondent No.3 was hence qualified to be treated as deposits since no shares were allotted to him.

9. The learned counsel for Petitioner has further submitted that as per Section 74(1) of the Companies Act, 2013, the companies accepting deposits prior to the commencement of the Companies Act, 2013 are obliged to file statement with the Registrar of Companies, if the amount of such deposit or any interest due thereon, remained unpaid on the commencement of the Act. The Respondent No. 3 Company has failed to comply with the said provision and hence is liable for punishment in violation of provisions of the Companies Act, 2013.

10. Furthermore, it is submitted that the Respondent No. 3 Company contravened Section 73 of the Companies Act, 2013 wherein the private companies are prohibited from accepting deposits from the public. However, Respondent No. 2 has failed to consider the same.

11. It is submitted that the Respondent No.3 Company has been accepting deposits from Public/Individuals beyond its objective specified in Memorandum of Association and without taking requisite permission and certification from the RBI and concerned government departments. It is submitted that the Respondent No.3 Company has contravened the requirements mandated under Section 73(2) of the Companies Act, 2013 as it accepted deposits from the Petitioner, who is not a member of the Respondent No. 3 Company without passing of resolution on general meeting and as per rules prescribed in consultation with RBI subject to conditions in Section 73(2) of the Companies Act.

12. It is further submitted that Section 76A of the Companies Act, 2013 further makes every officer of the company, who is in default of

contravening the provisions as mentioned in Section 73 of the Companies Act, 2013, punishable with imprisonment which may extend to seven years and with fine which shall not be less than twenty-five lakh rupees, but which may extend to two crore rupees.

13. The learned counsel for petitioner has contended that the M/s PVRN & Co., Respondent No. 7, the auditor of Respondent No.3, in collusion and connivance with each other have participated in the wrongdoing and committed the misdeeds of accepting deposits from public despite the same being outrightly barred by law and Respondent No.7 has further failed to report the factum of acceptance of deposits by the Respondent No.3 Company from the public. It is also submitted that the Respondent No. 7, M/s PVRN & Co. has failed to carry out the duty of auditing in accordance with the accounting standards.

14. Furthermore, it is submitted that the Respondent No. 3 Company has failed to return the statutory interest payable to the petitioner as per the Rule 17 of the Companies (Acceptance of Deposits) Rules, 2014 which imposes a penal interest of 18% per annum on the deposits accepted by a private company from the public. It is submitted that the current status of the complaint filed by petitioner is still being shown as “Under Examination”, despite the passage of a considerable amount of time, due to inaction on the said complaint by Respondent No. 2.

15. It is submitted that the Respondent No. 2 has not considered the activities of the Respondent No. 3 which are in clear contravention of Section 73 of the Companies Act, 2013 which has created an explicit bar

on acceptance of deposits by Public to a Private Company punishable under Section 76A of the Companies Act, 2013.

16. *Per Contra*, Ms. Bharathi Raju, learned CGSC for Respondents No. 1 & 2 has submitted that the amount in question, that was given as share application money by the Petitioner on 27th December 2010, was returned without any interest by the Respondent No. 3 Company on 9th February 2018 to the Petitioner. Therefore, the amount in question is not at all due with the company and the dispute between the Petitioner and the Respondent No. 3 Company is only limited to the extent of adjudicating whether there is any entitlement of interest on the amount in question available to the Petitioner.

17. The learned counsel for Respondents No. 1 & 2 has contended that Petitioner had given the amount in question for allocation of shares in the year 2010 which falls under the operation of Companies Act, 1956 read with Companies (Acceptance of Deposits) Rules, 1975 and not under the the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014.

18. It is further submitted that as per Rule 2(b)(vii) of the Companies (Acceptance of Deposits) Rules, 1975, irrespective of the period for which shares are not allotted, any amount by way of subscriptions to any shares, pending the allotment of the said shares, shall remain excluded from the purview of “deposit”.

19. It is further submitted that according to the General Circular no. 05/2015 issued by the Ministry of Corporate Affairs dated 30th March

2015 and the clarification by RBI, the amount received by a private company prior to 1st April 2014 shall be governed by the Companies Act, 1956 read with Companies (Acceptance of Deposits) Rules, 1975 and shall not be treated as deposit under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 subject to the condition that relevant private company shall disclose, in the notes to its financial statement for the financial year commencing on or after 1st April, 2014 the figure of such amounts and the accounting head in which such amounts have been shown in the financial statement.

20. It is, therefore, submitted that as per Rule 2(b)(vii) of Companies (Acceptance of Deposits) Rules, 1975 read with General Circular No. 15/2015, the share application money given by the Petitioner for allotment of shares is not a deposit after the commencement of Companies Act, 2013 with effect from 1st April 2014.

21. Furthermore, it is submitted that with regard to the investor complaint filed by the Petitioner, two letters dated 11th December 2018 and 31st October 2019 had been sent to the company, however, no response has been received. It is averred that the letters were sent as a matter of practice even though the office cannot enforce the matter sought by the complainant as the same is outside the jurisdiction of Respondents No. 1 & 2 as the said transaction of amount in question does not fall under the definition of deposit under Companies Act, 1956 read with Rule 2(b)(vii) of Companies (Acceptance of Deposits) Rules, 1975.

22. In light of the aforesaid, it is submitted that the instant petition is devoid of merits and this Court may be pleased to dismiss the same.

23. Heard learned counsels appearing on behalf of parties at length and perused the record.

QUESTION FOR ADJUDICATION

24. A mere perusal of the petition makes it evident that the crux of the entire matter lies in adjudicating whether the penal interest as being claimed by the petitioner is applicable on the amount in question paid to the Respondent No. 3 Company. This can be decided by answering the following questions:

- a. Whether the Companies Act 2013 and the Companies (Acceptance of Deposit) Rules, 2014 is applicable on the amount in question?
- b. Whether the amount in question can be treated as “deposit”?

25. Both these questions are interlinked and shall be answered sumptuously and comprehensively in the following paragraphs.

ANALYSIS

26. For a better appreciation of the case at hand, it is pertinent to peruse and analyse the provisions of law invoked in the instant petition before delving deeper into the facts of the case; and even before their

analysis it is crucial to test the applicability of these provisions to the case at hand.

27. It is pertinent to note that the provisions of Companies Act 2013 did not come into force on a single date, rather they have come into operation in phases. In the first phase, the Ministry of Corporate Affairs vide its notification dated 12th September 2013 notified 12th September 2013 as the date on which certain provisions of the Companies Act, 2013 would come into force. It was followed up by a notification dated 27th February 2014, notifying Section 135 of the Companies Act, 2013 and Schedule VII, to be effective from 1st April 2014. Subsequently, in the third phase, by notification dated 26th March 2014, the Ministry notified 1st April 2014 as the date on which certain provisions and all remaining schedules of the Companies Act, 2013 would come into force.

28. Section 2(31) of the Companies Act, 2013 that defines “deposit”, came into force from 1st April 2014 and as such, it cannot be applied retrospectively for the share-purchase agreement between the Company and Petitioner that was entered into between the parties back in the year 2010, way back in time before the commencement of the 2013 Act and its provisions.

29. Furthermore, the Companies (Acceptance of Deposits) Rules, 2014 as notified by MCA vide notification No. G.S.R 256(E) dated 31st March 2014 came into force on 1st April 2014. Therefore, the said Rules of 2014 can also not be applied on the amount in question.

30. It is evident that amount in question was given by the Petitioner in the year 2010 and was returned to him by the Respondent Company in the year 2018. Hence, the same shall be governed by the provisions of the Companies Act, 1956 read with Companies (Acceptance of Deposits) Rules, 1975 and the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 does not apply.

31. Rule 2(b)(vii) of the Companies (Acceptance of Deposits) Rules, 1975 reads as under:

“(b) “deposit” means any deposit of money with, and includes any amount borrowed by, a company, but does not include-

(vii) any amount received by way of subscriptions to any shares, stock, bonds or debentures such bonds or debentures as are covered by sub-clause (x) pending the allotment of the said shares, stock, bonds or debentures and any amount received by way of calls in advance on shares, in accordance with the Articles of Association of the Company so long as such amount is not repayable to the members under the Articles of Association of the Company ;”

32. It is clear that as per Rule 2(b)(vii), irrespective of the period for which shares are not allotted, any amount by way of subscriptions to any shares, pending the allotment of the said shares, shall remain excluded from the purview of “deposit”.

33. As per the contents of the General Circular No. 05/2015, dated 30th March, 2015 issued by the Ministry of Corporate Affairs, it has been clarified as under:

“2. The matter has been examined in consultation with RBI and it is clarified that such amounts received by private companies prior to 1st April, 2014 shall not be treated as ‘deposits’ under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 subject to the condition that relevant private company shall disclose, in the notes to its financial statement for the financial year commencing on or after 1st April, 2014 at the figure of such amounts and the accounting head in which such amounts have been shown in the financial statement.”

34. As per this circular, the amount received by the private companies prior to 1st April 2014 shall not be treated as “deposits” under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 provided that the same was disclosed in financial statement for the financial year commencing on or after 1st April 2014.

35. Therefore, as per Rule 2(b)(vii) of Companies (Acceptance of Deposits) Rules, 1975 read with General Circular No. 15/2015, the share application money given by the Petitioner for allotment of shares cannot be treated as “deposits”. Therefore, as such, the question of applicability of penal interest does not arise.

36. Having considered the entirety of facts and circumstances of this case, as well as the provisions of law as applicable, this Court has come to the conclusion that the amount in question cannot be treated as “deposit” and as such does not attract the penal interest that would have otherwise applied, for the following reasons:

- a. *firstly*, the money was given by the Petitioner in the year 2010, and was returned by the Respondent Company to

the Petitioner in the year 2018, and hence the same shall be governed by the provisions of The Companies Act, 1956 read with Companies (Acceptance of Deposits) Rules, 1975;

- b. *secondly*, as per the General Circular No. 05/2015 dated 20th March 2015 released by the Ministry of Corporate Affairs in consultation with RBI, the amount received by the private companies prior to 1st April 2014 shall not be treated as deposits under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 provided that the same was disclosed by in financial statement for the financial year commencing on or after 1st April, 2014; and
- c. *thirdly*, as rightly contended by the learned counsel for the Respondents No. 1 & 2, the inaction of the Office on the said letters dated 11th December 2018 and 31st October 2019 was by virtue of the fact that the prayers contained therein were outside the purview of jurisdiction of Respondents No. 1 & 2.

37. Therefore, for the reasons as aforesaid, this Court is of the opinion that no case for exercise of writ jurisdiction is made out. In any case, the contractual relations or other obligations arising therefrom between the Petitioner and the Respondent No. 3 are outside the scope of the instant writ petition. It is open for the Petitioner to explore and pursue

other legal remedies for recovery of interest or any dues due to him on the part of Respondent No. 3 Company. As such, no cause of action has arisen against the Respondents No. 1 & 2, Ministry of Corporate Affairs and Registrar of Companies, for adjudication between a matter pertaining to the private contract between two individual parties.

38. Hence, in light of the foregoing discussion and analysis, there are no cogent reasons to entertain the petition and allow the prayers sought therein. In the aforesaid terms, the instant petition stands dismissed.

39. It is made clear that any observations made herein shall have no bearing whatsoever on the merits of the case arising from the set of facts and circumstances of this case, in the course of any proceedings before any other Court.

40. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

July 15, 2022
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