(2012) 07 DEL CK 0394

In the Delhi High Court

Case No : Company Appeal No. 44 of 2012

Ashwani Suri APPELLANT

Vs

M/s Ganga Automobiles Ltd. (in Liquidation) RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Companies Act, 1956 — Section 454, 454(2), 454(3), 454(5), 454(8)
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2012) 174 CompCas 432 : (2012) 115 SCL 345

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rajive Sawhney and Mr. Vineet Jhanji, for the Appellant; Rajiv Behl, for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This appeal, u/s 483 of the Companies Act, 1956 read with Rule 9 of The Companies (Court) Rules, 1959, impugns the order dated 15.03.2012 of the learned Company Judge dismissing Company Application No. 798/2011 preferred by the appellant seeking his discharge from Crl.O.(CO) No. 9/1999 filed against him for violation / breach of Section 454 of the Act by non submission of Statement of Affairs of the company in liquidation. Two grounds were urged by the appellant before the learned Company Judge. Firstly, it was contended that the appellant had already ceased to be a Director of the M/s Ganga Automobiles Ltd. (in liquidation) way back in the year 1997 and could not be made responsible for the obligations of a Director; the second contention was that the requisite notice as required under Rules 124 and 125 of the Companies (Court) Rules, 1959 had not been served on him. The learned Company Judge held that there was no provision of discharge, once criminal proceedings had been initiated and cognizance been taken. The appeal was admitted for hearing and with the consent of the counsels for the parties heard finally. While reserving the judgment, without prejudice to the respective contentions of the parties, the appellant who was then present in the Court was directed to appear before the

Official Liquidator on 09.05.2012 and Official Liquidator directed to serve notice on the appellant and to also record the statement of the appellant under Rule 30 of the Companies (Court) Rules, 1959.

2. As far as the ground on which the learned Company Judge has dismissed the application for discharge, without considering the same on merits, is concerned, we are prima facie unable to agree that there is no provision for discharge once prosecution u/s 454(5) has been initiated and cognizance taken. Such power of discharge / quashing vests in the High Court u/s 482 of the Code of Criminal Procedure, 1973 and we are of the view that a Judge of the High Court exercising power as a Company Court, certainly will have a power of discharge / quashing a prosecution, if a case therefor is made out. The senior counsel for the appellant has relied on Fakhruddin Ahmad Vs. State of Uttaranchal (2008) 17 SCC 157 on the scope and ambit of powers u/s 482 of the Cr.P.C. However since no proper arguments have been addressed before us on this aspect and further since after hearing we are unable to find any case for discharge / quashing having been made out in facts of this case, we hesitate from giving any final opinion on this aspect. Moreover, the question as to whether the appellant had ceased to be a Director or not is not such which can be adjudicated u/s 482 Cr.P.C. and suffice it is to state that though the appellant claims to have left the country but no copy of the passport has been placed before us and even otherwise there is no document to prove the same and that is a matter of evidence. The learned senior counsel fairly agrees that the question, whether the appellant had ceased to be a Director or not, cannot be gone into at this stage and is to be decided in the prosecution, if to continue.

3. The only ground urged by the senior counsel for the appellant before us is that no case / charge of violation / breach of Section 454 of the Act can be made without service of a notice under Rule 124 of the Companies (Court) Rules, 1959 and which has not been served on the appellant. From the complaint u/s 454(5) of the Act, it is shown that it is the admitted position that the notices though issued to the appellant, were received back undelivered. Relying on the Full Bench dicta of this Court in Official Liquidator, Security & Finance P. Ltd. Vs. B.K. Bedi (1974) 44 CC 499, it is contended that service of notice is mandatory and without service of notice, there could be no complaint u/s 454(5) of the Act.

4. Per contra, the counsel for the Official Liquidator has contended that no such argument was raised before the learned Company Judge; that no notice under Rule 124 of the Companies (Court) Rules, 1959 was required to be issued to a Director; that the notice mentioned therein is required to be served only on persons other than Directors, if called upon to file the Statement of Affairs.

5. It will be apposite at this stage to set out the relevant provisions of Section 454 of the Act which are as under:

454. Statement of affairs to be made to Official Liquidator

(1) Where the Tribunal has made a winding up order or appointed the Official

Liquidator as provisional liquidator, unless the Tribunal in its discretion otherwise orders, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the company in the prescribed form, verified by an affidavit, and containing the following particulars, namely: -

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the manager, secretary or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned, as the Official Liquidator, subject to the direction of the Tribunal, may require to submit and verify the statement, that is to say, persons-

(a) who are or have been officers of the company;

(b) who have taken part in the formation of the company at any time within one year before the relevant date;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are, in the opinion of the Official Liquidator, capable of giving the information required;

(d) who are or have been within the said year officers of, or in the employment of, a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time not exceeding three months from that date as the Official Liquidator or the Tribunal may, for special reasons, appoint.

(4) ....

(5) If any person, without reasonable excuse, makes default in complying with any of the requirements of this section, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees for every day during which the default continues, or with both.

(5A) The Tribunal by which the winding up order is made or the provisional liquidator is appointed, may take cognizance of an offence under sub-section (5) upon receiving a complaint of facts constituting such an offence and trying the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (5 of 1898), for the trial of summons cases by magistrates.

(6) ....

(7) ....

(8) In this section, the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order.

6. Rule 124 of the Companies (Court) Rules, 1959 is as under:

R. 124. Notice to submit statement. - A notice by the Official Liquidator requiring any of the persons mentioned in Sub-section (2) of Section 454 to submit and verify a statement of affairs of the company shall be in Form No. 55 and shall be served by the Official Liquidator as soon as may be after the order for winding-up or the order appointing the Official Liquidator as Provisional Liquidator is made.

7. The Full Bench (in Official Liquidator, Security & Finance P. Ltd. (supra)) was constituted to consider the following question:

Whether in a prosecution u/s 454(5) of the Companies Act, 1956, the burden of proving that the accused had no reasonable excuse for making the default in respect of which he is being prosecuted lies upon the prosecution?

8. The Full Bench in Official Liquidator, Security & Finance P. Ltd. (supra) held that:

(i) Rules 124 to 133 of the Companies (Court) Rules, 1959 lay down the procedure and the manner in which notice to the persons to submit the Statement of Affairs and for application to be moved by the Official Liquidator to the Court for an order directing any person to furnish a Statement of Affairs and the manner of preparation of Statement of Affairs and the form of Statement of Affairs;

(ii) That a mere making of default in complying with any of the requirements of Section 454 does not constitute an offence inasmuch as such default has to be without reasonable excuse as a necessary constituent of an offence;

(iii) The question of mens rea has no relevance to the matter;

(iv) That there is no statutory presumption of reasonable excuse for not filing the statement;

(v) That the very provision requiring the notice to be sent to the concerned Director and a provision enabling the Director to seek extension show that the burden, if placed on the Official Liquidator would not be onerous. The Official Liquidator need only prove that notice was sent to the concerned Director to submit a Statement of Affairs; that the prescribed time has lapsed and that no extension has been sought and that the necessary books were available for inspection by the concerned Director;

(vi) The fact whether the Official Liquidator issued notice to the Director would also be known to him;

(vii) It was thus concluded that the burden of proving that the accused, without reasonable excuse, made a default is on the complainant i.e. the Official Liquidator in the first instance.

9. Though undoubtedly there are observations as aforesaid in the judgment aforesaid of the Full Bench, of a notice being required to be sent but as would be obvious, the question which was referred for decision of the Full Bench was not concerning the requirement of service of notice but was of onus. Neither any arguments were addressed before the Full Bench nor has the Full Bench considered any contentions as to whether the notice at all is required to be issued or not. It is a settled principle of law that a judgment is a precedent for what was for decision before the Court and not on other matters. This would apply more to a case where the Larger Bench is answering a reference framed for its decision. The focus in such opinion on reference is on the legal question framed and if while answering the said legal question any other observations are made on matters which were not for decision, the same do not constitute a precedent. The Supreme Court recently in State of Orissa and Others Vs. Md. Illiyas, reiterated that a decision is an authority for what it actually and explicitly decides and no more. For the same reason, no advantage can be drawn by the counsel for the appellant from our judgment dated 17.01.2012 in Company Appeal No. 12/2011 titled Mrs. Jamna Datwani Vs. Official Liquidator referring to the Full Bench Decision in Official Liquidator, Security & Finance Pvt. Ltd. (supra).

10. u/s 454(2) of the Act, the duty to submit the Statement of Affairs is cast on two categories of persons. The first category consists of only those persons who are officers of the company as specified in the said Sub-section "at the relevant date" which is defined in Sub-section (8) of Section 454 as meaning "in a case where a provisional liquidator is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order". The officers specified are the Directors of the company and the Manager, Secretary or other Chief Officer of the company. The second category of persons are those specified in Clauses (a) to (d) of the said Sub-section (2) in respect of whom "the Official Liquidator, subject to the direction of the Court, may require to submit and verify the statement". Clause (a) of Sub-section (2) might give rise to some confusion because it includes within its ambit persons "who are or have been officers of the company" thereby including not merely those who "have been" the officers of the company but also those who "are" officers of the company i.e. to say the Directors or Manager or Secretary or Chief Officers of the company on the relevant date, who form part of the first category aforesaid and on whom a duty to submit and verify a statement has already been imposed.

11. We are however of the view that Section 454(2) having created two categories and having made the duty, to submit and verify a statement on the first category, to be automatic and not dependent on any direction of the Court or a notice from the Official Liquidator, mere use of the word "are" along with the

words "have been" in Clause (a) of Sub-section (2) should not be allowed to dilute the obligation placed on the first category of persons aforesaid to submit Statement of Affairs within the time prescribed in Sub-section (3).

12. It is only in the case of second category of persons that the obligation to submit and verify the statement arises only when there is a direction of the Court or when the Official Liquidator issues notice requiring them to submit and verify the statement.

13. Again though Rule 124 undoubtedly talks of persons mentioned in Sub-section (2) of Section 454 and which would include both categories aforesaid but the reference therein necessarily has to be only to such persons, for whom to file the Statement of Affairs, a direction is necessary and cannot be to persons who are automatically mandated by the position held by them in the company at the relevant time to file the Statement of Affairs. When the Act has not made the filing of the Statement of Affairs by the Directors, Managers, Secretary and Chief Officer at the relevant time, subject to a direction of the Official Liquidator, the Rule cannot be read as limiting the scope and width of the main provision.

14. Unless we read the Act and the Rules in the manner aforesaid, it will also lead to inconsistency. Section 454(3) of the Act requires the Statement of Affairs to be submitted within 21 days of the relevant date. The relevant date is defined in Section 454(8) as the date of appointment of provisional liquidator or the date of winding up order. However Rule 124 provides for the notice to be in Form No. 55 and which Form though also requiring the statement to be submitted within 21 days of the winding up order or the date of appointment of the provisional liquidator has to be necessarily read as from the date of service of the notice.

15. A Division Bench of this Court in Devindar Kishore Mehra Vs. Official Liquidator (1980) 50 CC 699 also held that Section 454(2) speaks of two categories of persons, though the facts of that case were not concerned with the issuance of notice. However, we find High Court of Andhra Pradesh in Global Drugs P. Ltd. (In Liquidation) Vs. M. Venkatanarayana (2008)141 CC 935 and in The Official Liquidator, High Court of Andhra Pradesh, Hyderabad Vs. Koganti Krishna Kumar (1997) 89 CC 672, a Division Bench of the High Court of Kerala in Poomuli Manakkal Anujan Nambudiripad Vs. Official Liquidator (1979) 49 CC 81 as well as a Single Judge of this Court in Sipso Agencies P. Ltd. (In liquidation) Vs. Gajraj Singh (1978) 48 CC 30, to have taken the same view and held that for the first category of persons aforesaid, the time for filing the Statement of Affairs runs from the date mentioned in Section 454(8) and is not dependent on the service of the notice.

16. The complaint u/s 454(5) against the appellant has been filed in his capacity as a Director of the company in liquidation at the relevant time i.e. falling in the first category of persons aforesaid and thus the obligation of the appellant to submit the Statement of Affairs was not dependent on the service of any notice. That being the position, the argument of the senior counsel for the appellant that

no notice was served on the appellant is of no avail.

17. Besides the aforesaid, the facts of the present case show that summons of the criminal complaint were issued to the accused including the appellant as far back as on 18.05.1999. Bailable warrants were issued against the appellant. The appellant applied for cancellation of the said warrants and on 04.02.2011 sought two weeks time to file the Statement of Affairs. We are of the opinion that the accused having sought time to file the Statement of Affairs and nearly one and a half years having elapsed thereafter also, the present is not a case where at this stage it could be said that notice has not been served.

18. Moreover the plea in the complaint is of notice having been issued and having been returned undelivered. The persons u/s 454 of the Act who are required to submit the Statement of Affairs cannot create circumstances where neither can notice be served on them nor do they file Statement of Affairs. The appellant has all defences open to him in the prosecution and no case for discharging the appellant as sought is made out. There is no merit in this appeal, the same is dismissed. We refrain from imposing any costs.