(1995) 05 P&H CK 0085

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 96 of 1990

Haryana Electro Steel Ltd. (In Liquidation) — APPELLANT

Vs

Jagdish Gupta and Others — RESPONDENT

Date of Decision : 29-05-1995

Acts Referred:
Companies Act, 1956 — Section 454, 454(5)

Citation : (1996) 86 CompCas 99 : (1995) 111 PLR 507

Hon'ble Judges : N.K. Sodhi, J

Bench : Single Bench

Advocate : Anand Chhibbar, for the Appellant; L.M. Suri, Senior Advocate and Deepak Singh, for the Respondent

Judgement

N.K. Sodhi, J.—This is a criminal complaint filed under Sub-section (5) of Section 454 of the Companies Act, 1956 (for short, "the Act"), by the official liquidator against Sarvshri Jagdish Gupta, Pardeep Gupta, Kuldeep Parkash and P. C. Giya, who were managing the affairs of Haryana Electro Steel Ltd. (now in liquidation and hereinafter called "the company").

2. By an order passed by this court on January 16, 1986, in C. P. No. 36 of 1985, Haryana Electro Steel Limited (for short, "the company") was ordered to be wound up and the official liquidator was appointed as its liquidator. He took charge of the company including its factory on February 9, 1986, and sealed the premises but without preparing any inventory. On a petition filed by the ex-management of the company, the winding up proceedings were stayed on March 4, 1986, upon some conditions which are not fulfilled and consequently the stay order was vacated on March 11, 1988. In other words, the proceedings for winding up remained stayed for almost two years and it is not in dispute that the official liquidator did not hand over the possession of the company to the ex-management though he did not proceed with the winding up. During the-period when the stay order was operative, the Haryana Financial Corporation (hereinafter called "the corporation"), which was a secured creditor of the

company, exercising its powers u/s 29 of the State Financial Corporation Act broke open the locks of the company premises and took possession of the factory and office and all other assets lying therein. The Corporation, however, prepared an inventory of the machinery installed in the factory premises which is exhibit DW-4/1 on the record.

3. After the receipt of the winding up order, the official liquidator is said to have issued notices to the ex-directors of the company on July 28, 1989, calling upon them to file the statement of affairs of the company but in spite of this, they failed to do the needful as required u/s 454 of the Act. The allegations made in the complaint are that the accused have, without reasonable excuse, failed to submit to the official liquidator a statement of affairs of the company in the prescribed form and they have, therefore, committed an offence punishable under Sub-section (5) of Section 454 of the Act. The whereabouts of Shri Jagdish Gupta and Shri P. C. Giya, accused Nos. 1 and 4, were not known and the proceedings against them were, therefore, dropped to be taken up later as and when the official liquidator could trace them. The present complaint is against Shri Pardeep Gupta and Shri Kuldeep Parkash, accused Nos. 2 and 3 only. These accused appeared before this court and denied the commission of any offence as alleged. Shri Pardeep Gupta, in his statement made on February 18, 1993, admitted that ho had not filed the statement of affairs of the company and reserved his right to lead evidence in defence. Shri Kuldeep Parkash stated that he had resigned as a director of the company much prior to the date of passing of the winding up order and he was, therefore, not to file any statement of affairs. He too reserved his right to lead evidence in defence.

4. The prosecution, in support of its case, produced the official liquidator as CW-1 and Shri H. S. Jassi, junior technical assistant in the office of the Registrar of Companies, New Delhi, as CW-2. From the statements made by these two witnesses, it is clear that the official liquidator took charge of the company on February 9, 1986, and did not prepare any inventory and that the corporation sold the property of the company by public auction on July 24, 1989, and subsequently on September 5, 1989. It is also clear that the official liquidator had no knowledge as to whether the corporation had taken possession of the premises including the registered office of the company. CW-1 admitted that Shri Pardeep Gupta had filed an affidavit dated February 7, 198K, stating that he was not in possession of any of the assets or account books of the company. He further admitted that he had received a letter dated August 7, 1989, from Kuldeep Parkash informing the former that the latter had resigned as director of the company on December 28, 1983, i.e., much prior to the date of winding up order. Exhibit CW-1/2 is a copy of that letter and he proved the same. The record of the company was summoned from the junior technical assistant working in the office of the Registrar of Companies, New Delhi, and he produced two Forms 32, which are exhibits CW-2/I and CW-2/2. These forms were submitted by the company to the Registrar of Companies showing Sarvshri Jagdish Gupta, Kuldeep Parkash and Pardeep Gupta as first directors as named in the articles of

association. He also stated on the basis of the annual return dated March 31, 1981, that accused Nos. 1 to 3 were the directors of the company as on that date. There is no other Form 32 pertaining to the company on the record of the Registrar of Companies and the last annual return filed is up to the period ending March 31, 1981.

5. The accused have also led evidence in their defence and appeared as their own witnesses. Pardeep Gupta appeared as DW-1 and stated that the books of account and other statutory books and records of the company were at its registered office and that he was not in possession of those records. He also stated that he filed an affidavit exhibit DW-1/1, dated February 1, 1986, before the official liquidator stating that the records of the company were not with him. He further stated that his father-in-law Shri Kuldeep Parkash remained a director of the company till 1983 when he resigned. The ex-chowkidar of the company premises appeared as DW-2 and stated that the factory was closed in the year 1986, and its premises were put under lock and key by some persons who had gone from the High Court. What he is referring to is probably the official liquidator. This witness has further stated that officials of the Haryana Financial Corporation thereafter came to the factory premises, broke open the lock and sea! put by the official liquidator and they took possession of the premises and they also prepared an inventory of the documents, machinery and other goods lying therein. C. P. Narang the then branch manager of the Haryana Financial Corporation appeared as DW-4 and stated that he had gone on behalf of the corporation to take possession of the company premises. He stated that possession was taken through the Collector, Sonepat, on November 2, 1987, and an inventory of the machinery and other goods lying therein was prepared. Exhibit DW-4/1 is that inventory. He further stated that nothing else was found in the factory premises other than the goods mentioned in the inventory. Ganga Sharan, an upper division clerk in the office of the Registrar of Companies appeared as DW-5 and stated that the originals of exhibits DW-5/1 to DW-5/3 were received in the office of the Registrar of Companies though they were not available on the records that were brought in court on the day he appeared as a witness. He stated that there were two other files C and D maintained by their office which he had not brought as the same had not been summoned from him, An official from the office of the official liquidator appeared as DW-7 and stated that no inventory was prepared at the time when the official liquidator took over the company after the winding up order was passed. Kuldeep Parkash accused appeared as DW-8 and stated that he resigned from the directorship of the company with effect from December 28, 1983. He further stated that exhibits DW-5/1 to DW-5/3 along with letters exhibits CW-1/1 and CW-1/2 were sent to the Registrar of Companies, New Delhi. This is the entire evidence that has been led by the parties.

6. From a perusal of the statements made by the witnesses, the following facts stand established ;

(i) The factory premises were sealed by the official liquidator on February 9, 1986, on receipt of the winding up order from this court but he did not prepare any inventory which he should have done.

(ii) The winding up proceedings were stayed by this court on March 4, , 1986, on a petition filed by the ex-management of the company.

(iii) The stay order was vacated on March 11, 1988, and during the period when the stay order remained operative, the official liquidator did not hand over the company to the ex-management.

(iv) The Haryana Financial Corporation broke open the locks put by the official liquidator and took possession of the factory and office of the company and everything lying therein on November 2, 1987, and prepared an inventory which is exhibit DW-4/1.

7. A bare perusal of the inventory, exhibit DW-4/1, shows that the books of account and other statutory records of the company are not mentioned therein. It can, therefore, be presumed that those were not in the factory premises on November 2, 1987, when the corporation took possession of the premises. Earlier to this, the official liquidator put his locks on February 9, 1986, and sealed the premises but unfortunately he did not prepare an inventory. Had he prepared an inventory and found the books and other records of the company in the premises, the ex-directors could have been called upon to file a statement of affairs and if they were not there, the ex-directors could have been asked to locate and produce them. It is also clear from the evidence on record that the official liquidator did not issue any notice to the ex-directors of the company when he sealed the premises on February 9, 1986. The defence taken up by Shri Pardeep Gupta is that the records were not with him but those were at the registered office of the company where the factory premises were located. Soon after he sealed the premises, proceedings in the winding up were stayed by this court on March 4, 1986, and this stay order remained operative for almost two years. During this period, the ex-management was not handed over the company. There is no evidence on the record to show as to where the statutory books and other records of the company were. In other words, there is no evidence to show that the books were in the possession of the accused or they were accessible to them at the time when they were required to file the statement of affairs.

8. In terms of Sub-section (5) of Section 454 of the Act, 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 hundred rupees for every day during which the default continues. Now, it will be seen that every default made in complying with any of the provisions of Section 454 of the Act is not an offence. A default is punishable only if it is made without reasonable excuse. In other words, if an accused had reasonable excuse in making a default, then he

will not be punished. The important ingredient of an offence punishable under Sub-section (5) of Section 454 is that the accused had committed a default without reasonable excuse. As held by a Full Bench of the Delhi High Court in Security and Finance P. Ltd. (In Liquidation), In re, : Official Liquidator, Security and Finance P. Ltd. v. B.K. Bedi [1974] 44 Comp Cas 499 , in a prosecution u/s 454(5) and (5A) of the Act, the burden of proving that the accused had no reasonable excuse for making the default is on the prosecution in the first instance because the absence of a reasonable excuse has been made an essential ingredient of the offence under the section. In Official Liquidator of R.S. Motors (P) Ltd. (In Liquidation) Vs. Jagjit Singh Sawhney and Another, it has also been held that any excuse that would reasonably suggest that the accused could not comply with the provisions of law is a reasonable excuse within the meaning of Section 454(5) of the Act. It is for the prosecution to initially prove that the books and records of the company from where the statement of affairs could be prepared were available or accessible to the directors and that '' in spite of that they did not file the statement of affairs. If the prosecution succeeds in discharging this onus, it is then only that the accused have to show that they had some reasonable excuse for not complying with any of the requirements of Section 454 of the Act. In the instant case, there is no evidence that the books were available with the accused. As a matter of fact, there is no evidence to show as to where the books were though Pardeep Gupta accused claims that those were at the registered office of the company from where they have not been found. If the liquidator had prepared the inventory when he sealed the factory premises, it could have been known whether the books and the records were in the premises of the company as alleged by Pardeep Gupta. Thus in the absence of any such evidence as to where the books were, the prosecution must be held to have failed to discharge its burden of proving that the accused committed a default without any reasonable excuse.

9. Shri Kuldeep Parkash accused claims that he had resigned from the directorship of the company on December 28, 1983, much before the winding up order was passed and, therefore, when the company was ordered to be wound up, he was not required to file any statement of affairs. The letter of resignation has not been brought on record. He stated that he sent this letter of resignation to the Registrar of Companies but it is not to be found there. Exhibits DW-5/1 and DW-5/2 are letters written by this accused to the Registrar of Companies in reply to the notices of default received from the latter. The accused has, however, mentioned in these letters that he had resigned on December 28, 1983. These letters were written prior to the winding up of the company and even before the winding up petition was filed in this court. Therefore, there could be no reason for the accused to have written about his resignation to the Registrar of Companies unless he had actually resigned. It is true that the originals of these letters were not on the record that was summoned from the official in the court. The witness who brought the record categorically stated that there were two other files C and D relating to the correspondence of the company which he

had not brought. It is possible that the originals of these documents are on those files but be that as it may, it is quite safe to conclude from the letters exhibits DW-5/1 and DW-5/2 written by the accused in the ordinary course that he had resigned.

10. In the result, I must hold that the prosecution has failed to prove that the accused have committed a default without any reasonable excuse. Both the accused, therefore, stand acquitted.

