
(2008) 10 KL CK 0045

In the High Court Of Kerala

Case No : Company Appeals No's. 29, 30 and 33 of 2003

K.R. Subramanian

APPELLANT

Vs

Official Liquidator, High Court of Kerala

RESPONDENT

Date of Decision : 15-10-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 124, 125, 126, 127, 128
Companies Act, 1956 — Section 230, 270, 283(1), 451, 454
Penal Code, 1860 (IPC) — Section 182

Citation : (2009) 147 CompCas 213 : (2009) 2 CompLJ 500 : (2008) 4 ILR (Ker) 549 : (2009) 1 KLJ 213

Hon'ble Judges : K.P. Balachandran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : Shaji P. Chaly, in C.A. No. 29 of 2003, Mohan Pulikkal, in C.A. No. 30 of 2003 and N.J. Mathews and George Varghese Kizhakkambalam, in C.A. No. 33 of 2003, for the Appellant; K. Moni, B.K. Purushothaman, Mohan Pulikkal, M.J. Mathews, P.V. Chandra Mohan and S.P. Chaly, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—Company Appeal No. 30 of 2003 is filed by the first accused in Criminal Complaint No. 4 of 2001 in Company Petition No. 41 of 1999. He was convicted by the impugned judgment of the company court and sentenced to undergo imprisonment for a period of six months and to pay a fine of Rs. 20,000. Company Appeal No. 29 of 2003 is filed by the second accused. He was convicted and sentenced to pay a fine of Rs. 20,000. Company Appeal No. 33 of 2003 was filed by accused Nos. 3, 4 and 5 in the above criminal complaint. They were also convicted and sentenced to pay a fine of Rs. 20,000 each. All of them were charge-sheeted for offences punishable u/s 454(5) of the Companies Act, 1956 (for short "the Act").

2. M/s. Kanippayyur Hire Purchase Co. P. Ltd., was incorporated on December 7, 1976, under the Indian Companies Act. The company went into liquidation and the liquidator of the company was appointed on January 25, 2002, in C. P. No. 41

of 1999. The complainant issued notice u/s 451 of the Companies Act, 1956, to the accused demanding them to file statement of affairs within 21 days from the date of winding up order. According to the official liquidator, there were nine ex-directors of the company including accused Nos. 1 to 7. Two of the directors expired. The company court exonerated accused Nos. 6 and 7. First we will deal with Company Appeals Nos. 30 and 33 of 2003. Appeal filed by the second accused is dealt with separately.

3. Exhibit P3 is the copy of the annual return filed by the company before the Registrar of Companies. It shows that all these accused were directors as on December 16, 1994. The technical assistant dealing with the affairs of the company under liquidation gave evidence on behalf of the official liquidator that the winding up order was passed on January 25, 2001 and on February 15, 2001 the official liquidator sent letters to all the directors in Form No. 55 directing them to furnish the statement of affairs in Form No. 57 as per law and none of the accused filed the statement of affairs. According to him, the official liquidator has taken possession of the records of the company, but, the up to date registers were not made available to the official liquidator and he got only old registers. The particulars of those registers obtained by the official liquidator were not furnished. It is the contention of the appellants in Company Appeals Nos. 30 and 33 of 2003 that they ceased to be the directors and they resigned from the board of directors of the company on March 9, 1998, nearly three years before the winding up order was passed and, therefore, they are not liable to be proceeded against u/s 454 of the Act. It has come out in evidence that first accused (the appellant in Company Appeal No. 30 of 2003) was the managing director of the company. There was a general body meeting on December 29, 1997 and in that meeting a new board had been elected. The second accused was elected as the managing director of the new board. Exhibit D25 is the minutes book of the general body meeting from October, 1991 to April, 1999. The minutes of the board of directors (exhibit D23) would show that in that meeting it was decided to get the accounts for the years 1994-95 and 1995-96 audited. It was further resolved that the second accused alone was responsible for all the mistake in the accounts and he has to be proceeded against for the same, but, after the second accused was elected as the managing director and a new board was elected, it was resolved that the earlier committee was responsible for all the activities/misdeeds of the company. The board meeting held on February 4, 1998, would reveal that the account books of the company was not given by the earlier committee to the newly elected committee. All these accused other than the second accused resigned from the company on March 6, 1998 and they did not attend any of the board meeting after April, 1998. Their resignation in March, 1998, is not disputed. The fact that they did not attend any of the board meetings after April, 1998, is admitted by the official liquidator and is evident from exhibit D22 records. Section 283(1)(a) of the Act reads as follows:

283. Vacation of office by directors.-(1) The office of a director shall become vacant if-

(a) he fails to obtain within the time specified in Sub-section (1) of Section 270, or at any time thereafter ceases to hold, the share qualification, if any, required of him by the articles of the company;

4. In any event, after April, 1998, they did not participate in any of the business or any of the activities of the company. It is their case that they have informed their resignation to the Registrar of Companies. According to them, immediately on receipt of notice, they informed the Registrar that they have not in the possession of any of the records of the company and they resigned three years prior to the receipt of notice and they also personally met the official liquidator and informed the same. It is their defence that no documents were in their possession after their resignation and the company continued business till it was wound up. It is also submitted by them that since they were not directors of the company, notice under Rule 55 cannot be issued to them without direction from the company court. The contention of the official liquidator that even though they were not directors at the time when the company went into liquidation, being ex-directors, they can be issued with notice and the board resolution after they left shows that ex-directors have not handed over the documents and, therefore, notice issued to them for filing statement of accounts is perfectly in order. Therefore, the main question to be considered is whether the appellants being ex-directors at the time of issuing the notice can be directed by the official liquidator to file statement of affairs without interdiction by the company court. The company court held that u/s 454(2)(d), ex-officers of the company also can be directed to file statement of affairs and, therefore, notice issued was valid. Therefore, we will first consider the question whether ex-directors can be directed by the official liquidator to file statement of affairs as provided u/s 454 without a direction from the company court.

5. Section 454 reads as follows:

454. Statement of affairs to be made to official liquidator.-(1) Where the court has made a winding up order or appointed the official liquidator as provisional liquidator, unless the court 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) the assets of the company, stating separately the cash balance in hand and at the bank, if any, and the negotiable securities, if any, held by the company;

(b) its debts and liabilities ;

(c) the names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts ; and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given ;

(d) the debts due to the company and the names, residences and occupations of

the persons from whom they are due and the amount likely to be realised on account thereof ;

(e) such further or other information as may be prescribed, or as the official liquidator may require.

(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 court, 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 court may, for special reasons, appoint.

(4) Any person making, or concurring in making, the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the court.

(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 court 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) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on

payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence u/s 182, of the Indian Penal Code (XLV of 1860); and shall on the application of the official liquidator, be punishable accordingly.

(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. A reading of the above section shows that in the case of a director, manager, secretary or other chief officer who were in the office on the date of winding up order, an obligation is cast to file a statement of affairs within 21 days of the relevant date or such extended time as provided under Sub-section (3) of Section 454. Whether the official liquidator calls for the records, particulars or not, from the relevant date the director, manager, secretary or other chief executive officer who were in office on the date of winding up order is bound to file such statement. If a statement of affairs is demanded from the officers who were directors on the relevant date, that is, the date of appointment of the official liquidator or the date of winding up, as the case may be, in the absence of any orders of the court to the contrary, they are bound to submit a statement of affairs. It is true that ex-officers of the company including ex-directors also can be asked to file statement of affairs. Sub-section (2) of Section 454 has two parts. First part deals with officers of the company as on the relevant date and second part deals with the case of ex-officers. A close reading of Section 454(2) shows that no order of the court is necessary for demanding a statement of affairs from the persons who are at the relevant time directors or chief executive officers of the company, but, persons mentioned in Clauses (a) to (d) of Section 454(2) (ex-officers) can also be demanded statement of affairs if directed by the court. In other words, apart from the directors and chief officers of the company on the relevant date, official liquidator can demand statement of affairs from the officers or ex-officers as mentioned in Clauses (a) to (d) of Section 454(2) by getting orders from the court. The resignation, etc., by itself will not absolve former officers from the obligation of filing statement of affairs. The official liquidator can obtain appropriate direction against them from the winding up court as held in Registrar of Companies v. Bihar Investment Trust Ltd. (in liquidation) [1978] 48 Comp Cas 579 (Pat). An officer includes a director as defined in Section 230. Therefore, ex-officers like the accused who resigned from the directorship about three years before the relevant date can be directed to file statement of affairs after getting directions from the court. The learned judge relied on the Division Bench decision of this Court in Poomuli Manakkal Anujan Nambudiripad v. Official Liquidator [1979] 49 Comp Cas 81, and also the decision of the Delhi High Court in Sipso Agencies P. Ltd. (in liquidation) v. Gajraj Singh [1978] 48 Comp Cas 30, wherein it was held that ex-directors who resigned more than one year of the order directing winding up of the company also could

be directed to file statement of affairs u/s 454. But, in both cases, notices were issued as per the direction of the court as provided under the latter part of Section 454(2). It is true that on getting directions from the court, the official liquidator can require from the ex-officers also to file statement of affairs. In *Official Liquidator Vs. K.K. Nair and Another*, , it was held that those who cease to be directors within less than twelve months also be required to file statement. It is true that if he was a director within 12 months of the relevant date, statement of affairs can be demanded by the official liquidator even without the direction of the court. But, a director who ceased to be a director about three years before the relevant date can be required to file statement of affairs if the official liquidator satisfies the company court that it is appropriate to ask them to file the same on the facts and circumstances of the case. Here, admittedly, the appellants in these cases ceased to be directors about three years before the relevant date and, therefore, they cannot be directed to file statement of affairs without a direction from the court. This is further evident from Rules 124 to 134 describing how statement of affairs has to be filed and action to be taken thereon. Rule 124 of the Companies (Court) Rules reads as follows:

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. Here, notice was issued in Form No. 55. Rule 125 reads as follows:

125. Application by official liquidator u/s 454(2).-The official liquidator may apply by summons to the court for an order directing any person who, in his opinion, is liable to furnish a statement of affairs u/s 454, to prepare and submit such a statement or concur in making the same. Notice of the application shall be served on the person against whom the order is sought. Where the court makes the order, such order shall be in Form No. 56 with such variations as may be necessary.

8. A reading of Section 454(2) shows that with regard to ex-officers who are mentioned in Clauses (a) to (d) in the latter part of Section 454(2) should be issued notice under Rule 125 in Form No. 56 and the official liquidator has to apply for summons to the court for an order directing any persons liable to furnish statement u/s 454(2). It is true that time limit of Sub-section (3) applies only to persons who are directors of the company on the relevant date. It does not apply when ex-directors are called upon to submit a statement as held by the Andhra Pradesh High Court in *Official Liquidator, High Court, Andhra Pradesh v. Koganti Krishna Kumar* [1997] 89 Comp Cas 672. In this case, the accused were examined to show that they resigned from the service and they were not having the required documents and they also proved by relying on the copy of the minutes of the meeting of the board of directors that they never attended the board meetings after April, 1998. The copies of the resignation letters were also

produced. As soon as notice was issued they had not only written but also went to the office of the official liquidator to convince the official liquidator that no documents are available with them so as to file the statement of affairs. Merely by not filing the statement of affairs as required, it cannot be deemed that it was not filed without any reasonable excuse. From the evidence adduced in this case, it can be seen that the official liquidator also did not discharge the burden. Apart from that, notice issued to the ex-directors itself was bad in law. So, with regard to the ex-directors who resigned from service one year before the relevant date, the official liquidator can apply for summons to the company court for filing the statement from ex-officers also. In this case, they did not apply to the company court for an order directing the accused persons to file statement of affairs. Therefore, we are of the view that the notice issued to them for filing the statement of affairs was illegal and they cannot be convicted and sentenced on the basis of the notice. Since accused Nos. 1 and 3 to 5 resigned from service about three years before the relevant date, in the absence of directions from the court, they cannot be directed to file statement of affairs. Hence, their conviction and sentence are liable to be set aside. We do so and allow Company Appeals Nos. 30 and 33 of 2003.

9. It is true that second accused was the managing director of the company during the relevant date. Hence, the official liquidator, even though without any direction from the court, can demand for filing the statement of affairs. But, merely by making default in filing the same, automatic punishment is not attracted. The punishment can be imposed only if default is made without any reasonable cause.

10. Now, we will consider Company Appeal No. 29 of 2003 filed by the second accused who was the managing director of the company at the relevant date. In order to rope in accused Nos. 1 and 3 to 7, representative of the official liquidator, PW1, gave evidence that ex-directors did not give any documents to the second accused who was elected as the managing director. As held by this Court in *Official Liquidator v. Smt. K. Indira* [1983] 54 Comp Cas 644, mere default in complying with the requirements of the section is not enough. The onus is on the prosecution to show that the default was without reasonable cause. In *Official Liquidator, Trimurthy Agro-chemical Ltd. (In Liquidation) Vs. Niranjan Jayantilal Tolia and Others*, , it was held that penal provisions must be strictly construed. The prosecution has to prove (1) that the accused is statutorily liable to submit the statement; (2) that he was called upon to do so; (3) that the circumstances showed that he was in a position to do so ; and (4) that he did not do so within the prescribed period without a reasonable excuse. The burden of proof rests upon the prosecution. To cast liability to the accused Nos. 1 to 3 and A7 ex-directors, the official liquidator adduced evidence to show that no documents were handed over by them to the second accused. The company court considered the evidence of the official liquidator and observed as follows:

It was true that the initial burden was on the complainant to prove that the non filing of the statement of affairs was without any reasonable excuse. In fact, the offence alleged is one of technical in nature. The evidence would reveal that the earlier board of directors did not hand over the up to date registers and records of the company to the newly elected committee and that they did not produce the relevant upto date registers and records before the official liquidator also. In the above circumstances even if they file the statement of affairs, it is not possible for the official liquidator to verify the genuineness or correctness of the statement with the relevant registers and to take appropriate action. The evidence of PW1 coupled with the circumstances would reveal that the official liquidator was not capable of proceeding against the debtors of the company and also to discharge the liabilities of the creditors due to non-filing of statement of affairs and the failure to produce the relevant books of accounts. In such circumstances, it has to be held that there was no reasonable excuse for the non-filing of the statement of affairs. It has to be presumed that the registers and records of the company were with the earlier committee wherein the first accused was the managing director. Hence, the directors of the earlier committee were responsible for the filing of the statement of affairs and they failed to file the statement of affairs.

11. This finding will show that the official liquidator failed to show that the second accused did not file the statement of affairs for reasonable cause as no documents were entrusted to him. No evidence was adduced to show that default was committed without reasonable cause. In fact, second accused adduced evidence to show that immediately on receipt of notice, he went to the office of the official liquidator and appraised him that he was not having any documents and was unable to file the statement of affairs. He has also informed the official liquidator in writing. In any event, the official liquidator gave evidence to the effect that ex-directors did not hand over any of the documents to the second accused in his enthusiasm to rope in the ex-officers. Hence, it is not proved by the official liquidator that the second accused has committed default without reasonable cause. Hence, second accused is also entitled to be acquitted and his conviction and sentence is also liable to be set aside.

12. In the above circumstance, we set aside the conviction and sentence and allow all the company appeals.

13. We make it clear that we are only considering the alleged crime of violation of Section 454 of the Act as alleged by the official liquidator. This is not a bar in proceeding of winding up. The official liquidator is free to take action for misfeasance or malfeasance or any other action as per law untrammelled by the observations of this Court in this judgment. This judgment is pronounced without prejudice to the right of the official liquidator or the company court to take such actions as prescribed under the Companies Act.