
(1977) 02 P&H CK 0009
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 97 of 1973

K.S. Mathura Dass

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 15-02-1977

Acts Referred:

Companies Act, 1956 — Section 454(2), 454(3), 454(4), 454(5)
Criminal Procedure Code, 1973 (CrPC) — Section 242, 243

Citation : (1977) 79 PLR 362

Hon'ble Judges : Rajendra Nath Mittal, J; K.S. Tiwana, J

Bench : Division Bench

Advocate : M.L. Sethi and Gurbachan Singh, for the Appellant; K.S. Keer and J.S. Naurang, for the Respondent

Judgement

Kulwant Singh Tiwana, J.—The appellant, K.S. Mathura Dass, along with Hari Singh and his wife, Surjit Kaur, were the directors of Amar Hire Purchase (Private) Limited. The Punjab and Haryana High Court, vide its order dated November 11, 1971, wound up this company and appointed the official liquidator. The official liquidator sent notices to the accused on November 19, 1971, and December 31, 1971, to submit the statement of the affairs of the company as required under Sub-sections (2) and (3) of Section 454 of the Companies Act, 1956 (hereinafter referred to as the Act), within 20 days. The appellant, who is the managing director of that company, intimated the official liquidator that he had taken the records of the company to Patiala in connection with the Income Tax matter but lost those on his way back to Jullundur. It was further intimated that the company had no property, cash or bank balance.

2. As the appellant in his capacity as a managing director and the other accused (now acquitted), being officers of the company failed to furnish the required information without a reasonable cause, the official liquidator filed a complaint in this court for punishing the accused under Sub-section (3) of Section 454 of the Act. After taking cognizance of the offence, the learned single judge of this court

held proceedings u/s 454(5A) of the Act. Hari Singh and Surjit Kaur were acquitted. The appellant was convicted holding that the story of the loss of the records as stated by the appellant was not correct. He was sentenced to undergo simple imprisonment for six months. It was further held that the default of information has been caused from December 3, 1971, to January 18, 1973. On this basis, he was convicted and sentenced to pay a fine of Rs. 20 per day for the days, the total of which comes to Rs. 412 In default of payment of this fine the appellant was further sentenced to undergo simple imprisonment for six months. This appeal has been directed against this order of conviction.

3. Shri M. L. Sethi, advocate on behalf of the appellant, has assailed the order of conviction on the ground that it was for the prosecution to prove that the default made by the appellant in submitting the statement about the affairs of the company was " without any reasonable excuse ". He has further argued that the official liquidator who had filed the complaint did not lead any evidence against the appellant to prove his case. The learned counsel for the Punjab State and the official liquidator have tried to controvert the assertion of Mr. Sethi by arguing that the appellant filed an affidavit in the court on 19th of May, 1972, and after that his statement was recorded by the learned single judge on 15th of September, 1972, and these amount to the admission of guilt. Both the counsel have very heavily relied on this affidavit and the statement of the appellant recorded by the learned single judge in the question and answer form to argue that after this there was no necessity for the official liquidator to lead evidence.

4. Sub-sections (2), (3), (5) and (5A) of Section 454 of the Act, which are relevant for the decision of the point in issue, are as under:

" (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

(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 hundred 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, for the trial of summons cases by magistrates."

5. The argument of the learned counsel for the State and the official liquidator is that the words " without reasonable excuse " as used in Sub-section (5) of Section 454 of the Act show that it is for the accused to show the reasonable excuse. The burden of proof for this, according to them, is not on the prosecution. The argument lacks any basis. This is not provided by way of exception in the statute and the court cannot presume the circumstances of the absence of reasonable excuse against the accused. The argument almost in this very form was raised before a Full Bench of Delhi High Court in Security and Finance Private Ltd. (In Liquidation) Vs. B.K. Bedi and Another, which was seized of a legal question embracing the same point as in this case to the effect " 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 ? " The Full Bench negated the argument with the observations ;

" If the legislature desired to provide that a mere default by the director would be an offence by itself and wanted to provide an exception of reasonable excuse to be proved by the director, if he wanted to absolve himself, nothing would have been easier than by providing a proviso to the main part of the section and in that case Section 454(5) should have read as :

" If any person makes a default in complying with any of the requirements of this section he shall be punishable :

Provided that if there was a reasonable excuse for making default in complying with any of the requirements of this section no offence would be deemed to have been committed."

Had the sub-section been framed as above, it could legitimately have been argued that all that the official liquidator has to prove is that the default has been committed in complying with the requirements of Section 454, and, thereafter, if a director pleads any exception to bring his case within the proviso the burden to prove that would be on him. "

6. We are in respectful agreement with the observations of the Delhi High Court in Security and Finance Private Ltd. (In Liquidation) Vs. B.K. Bedi and Another, .

7. The piosecution cannot escape the responsibility by simply arguing that the onus is on the accused. It has to lead some evidence before it can say that the onus is to shift to the accused. The Full Bench of the Delhi High Court in Security and Finance Private Ltd. (In Liquidation) Vs. B.K. Bedi and Another, in the last paragraph of the judgment made very pertinent observations as under :

" As a result we hold that in a prosecution u/s 454 (5) and (5A) the burden of proving that the accused without reasonable excuse made a default is on the complainant in the first instance. The question of onus will have to be decided by keeping the distinction between legal burden of proof laid down by law and a provisional burden raised by the state of evidence as explained by us in detail above."

8. In the case in hand no evidence was led by the prosecution. The procedure provided in Chapter XX of the Code of Criminal Procedure, 1898 (which was in force when the proceedings in the case were going on), meant for the trial of summons cases, was to be followed according to Sub-section (5A) of Section 454 of the Act. The learned single judge did not opt for this procedure. Particulars of the offence, for which the appellant was to be tried, as required by Section 242 of the Code of Criminal Procedure, 1898, were not put to him nor the procedure provided in Section 243 of the Code was followed. In its place the appellant was allowed to file a reply to the complaint. Even this reply to the complaint does not amount to an admission of the guilt. The appellant in it had taken the plea that the records have been lost in the circumstances stated by him. The statement was made with reservations and the prosecution was required to prove that it did not amount to a reasonable excuse as intended by the above-quoted provisions of the Act. The accused cannot be convicted on the falsehood of his evidence nor the prosecution can be permitted to dissect his statement or plea for using it to do the patch-work to its own case. If the appellant did not object to the violation of the procedure provided in Chapter XX of the Code of Criminal Procedure, then he is not estopped from taking this objection in appeal. As the statement and affidavit of the appellant do not amount to admission, there is complete lack of evidence on the side of the prosecution to prove the requirements of Section 454(5) of the Act. Even the official liquidator did not take a stand in the witness box to state the circumstances which had led him to file the complaint because of the failure of the appellant, in his capacity as managing director of the company, to submit the statement of affairs of the company within the period provided by the statute. There is not an iota of evidence on the file to prove the absence of reasonable excuse on the part of the appellant.

9. With these observations we feel our inability to uphold the judgment of the learned single judge. The order of conviction is set aside and the appellant is acquitted of the charge.