
(2004) 05 P&H CK 0041
In the Punjab And Haryana At Chandigarh
Case No : Company Appeal No. 4 of 1996

Mrs. Mukta Devi

APPELLANT

Vs

The Official Liquidator

RESPONDENT

Date of Decision : 11-05-2004

Acts Referred:

Companies Act, 1956 — Section 454(5), 454(5A)
Criminal Procedure Code, 1973 (CrPC) — Section 235, 255

Citation : (2004) 138 PLR 786

Hon'ble Judges : N.K. Sud, J; Hemant Gupta, J

Bench : Division Bench

Advocate : sick.Mehta and M.S. Kohii, for the Appellant; V.M. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—The appellant has filed the present appeal u/s 483 of the Companies Act, 1956 (hereinafter to be referred as "the Act") aggrieved by the order passed by the learned Company Judge in a complaint under ` 454(5) of the Act convicting the appellant and imposing a fine of Rs. 40,000/-.

2. M/s Syp. Chem. (India) Pvt. Limited was ordered to be wound up by this Court on 30.4.1990 vide order passed by Company Petition No. 38 of 1989. The Official Liquidator attached to this Court was appointed as its liquidator.

3. The Official Liquidator issued notice to the appellant on 15.5.1990 calling upon the appellant to file statement of affairs of the company as required by Section 454 of the Act. Similar notices were issued to Pardip Kumar Gupta and Surya Partap Singh who were impleaded as ex-Directors of the company. The ex-Directors failed to file statement of affairs of the company without any reasonable excuse, the Official Liquidator filed a complaint u/s 454(5) of the Act.

4. Learned company Judge found that Surya Partap Singh has resigned as a Director of the company and was not a Director of the company after July 1988.

Learned Company Judge also found that Pardip Kumar Gupta was not the Director of the Company as there is no document on the record to show that Pardip Kumar Gupta was, in fact, inducted as a Director or Additional Director of the company. The only record produced is Exhibit PVV1/1, Form No. 32 submitted on July 7, 1988 showing resignation of Surya Partap Singh and appointment of Pardip Kumar Gupta as Director of the Company. Learned Company Judge also found that the inventory prepared at the time of taking over possession by the Haryana Financial Corporation vide Exhibit PW-3/1 is signed by Pardip Kumar Gupta as a witness and not as a Director. Thus, finding was returned that Pardip Kumar Gupta was never a Director of the company or otherwise liable to file statement of affairs of the company as he has denied knowledge about the whereabouts of the account books of the company. However, the appellant was convicted for not filing statement of affairs of the company as the appellant was found to be the Director of the company on the basis of the statement of the appellant herself. Her defence that the affairs of the company were being looked after by Surya Partap Singh and that she is a housewife and not associated with day to day business of the company being a lady Director was not found to be a reasonable excuse in not filing the statement of affairs of the Company.

5. Learned counsel for the appellant has vehemently argued that the appellant though a Director was not in charge of affairs of the company in liquidation. She was not proved to be in possession of the account books of the company. She is as a lady Director was not associated with day to day business of the company and the affairs of the company were being looked after by Surya Partap Singh. It is further contended that in the absence of any proof of account books in the possession of the appellant, the appellant cannot be convicted as the Official Liquidator has failed to discharge the burden of proof which was on the Official Liquidator. It is further contended that the appellant has not been heard on the question of sentence in terms of the provisions of Section 235 of the Code of Criminal Procedure and, thus, the order passed by the learned Company Judge is not sustainable.

6. A perusal of the statement of appellant appearing as RW3 shows that the appellant has admitted herself to be a Director of the company in liquidation. She has stated that she was not associated with day to day work of the company. Mr. Surya Partap Singh used to get her signatures on cheques etc. She denied attending the meetings of the Board of Directors or that Surya Partap Singh has written to her resigning from the Directorship of the company. Learned counsel for the appellant referred to the cases reported as Official Liquidator, R.S.Motors P.Ltd. v. Jagjit Singh Sawhney and Anr., (1974)44 Comp Cas 381 and Official Liquidator, Trimurthy Agro-Chemical Ltd. v. Niranjan Jayantilal Tolia and Ors. (1984)56 Comp Cas 380 in support of his argument that the Official Liquidator has failed to prove the failure of the appellant to file statement of affairs without any reasonable excuse and, thus, the order of conviction cannot be sustained.

7. While taking over possession of the company in liquidation by the Haryana Financial Corporation on July 27, 1988 the list of inventories does not contain any reference to the account books of the company. The account books of the company in liquidation were not taken into possession by the Haryana Financial Corporation, therefore, as a Director of the Company in liquidation, the appellant is under a statutory duty to file statement of affairs of the company in liquidation. The appellant has failed to file such statement of affairs of the company without any reasonable excuse and, therefore, there is no illegality in the order convicting the appellant u/s 454(5) of the Act.

8. u/s 454(2) of the Act, the statement of affairs is required to be submitted and verified by one or more of the persons who are at the relevant date the Directors. The "relevant date" u/s 454(8) of the Act is the date of the winding up order or where a provisional liquidator is appointed is the date of his appointment. Such statement of affairs could also be filed by a person who on the relevant date is the Manager, Secretary or other Chief Officer of the company, or by such of the persons mentioned in clauses (a), (b) (c) and (d), if any person who is required to submit and verify the statement of affairs as referred to in sub-section (2) of Section 454 of the Act, without reasonable excuse, makes default in complying with any of the requirements of this section, he is liable to be imprisoned for a term which may extend to two years. The relevant provisions of Section 454(1), (2) and (5) of the Act read as under:-

"S.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) to (d) xx xx xx xx

(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 years, 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) aid (4) xx xx xx xx

(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.

9. A Full Bench of Delhi High Court in *Official Liquidator, Security & Fiance P. Ltd. v. B.K.Bedi and Anr.* (1974)44 Comp Cas 499, has held that in a prosecution u/s 454(5) and (5-A) of the Companies Act, 1956, the burden of proof that the accused without reasonable excuse had made default is on the prosecution in the first instance and the same if accepted by the Court, shift the onus on to the accused to satisfy that he had a reasonable excuse for making the default. The following observations of the Full Bench of Delhi High Court are relevant:-

"...Now it cannot be seriously argued that in a prosecution for an offence u/s 454(5), the complainant will be placed in an impossible position if the initial burden is placed on it. It appears to us that it is open to the prosecution, with due diligence and with facts available to it, to prove that the accused has without reasonable excuse made a default. The relevant date and the time within which the statement as to the affairs of the company has to be filed by the director is known to the official liquidator. The fact whether any extension was sought for by the accused and was granted or refused are also equally within his knowledge. The fact whether the official liquidator issued notice to the director would also be known to him. All these thus are matters which are ordinarily within the knowledge of the complainant. If, therefore, the prosecution shows that statement as required by section 454(1) has not been filed within the prescribed time and that no extension has been granted, and that facility for preparation of statement and available, the same would, if accepted by the court, shift the onus on to the accused to satisfy the court that in spite of these circumstances he had a reasonable excuse for making the default, and to show the circumstances justifying his default. It appears to us that if the distinction between a burden of proof as a matter of law and burden of proof as a matter of evidence, as pointed out in *T.K.Gangi Reddi v. M.C.Anjaneya Reddy* (1960) 22 E.L.R. 261 (S.C.) was kept in view, the question of onus of proof in prosecution u/s 454(5) would really present no difficulty and would be automatically resolved on the facts of each case."

10. A Division Bench of this Court in *K.S. Mathura Dass v. State of Punjab* (1977)54 Comp Cas 467, while considering the burden of proof in a complaint u/s 454(5) of the Act, has held that the prosecution 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. In the said case, the Official Liquidator has led no evidence inasmuch as he has not stepped into the witness box to state the circumstances which led him to file the complaint.

11. Still later, Gujarat High Court in *Official Liquidator, Trimurthy Agro-Chemical Ltd. v. Niranjan Jayantilal Tolia and Ors.* (1984)56 Comp Cas 380, has considered Division Bench judgment of this Court as well Full Bench judgment of Delhi High Court and held that the prosecution must prove:

(i) that the accused is one of the persons who is statutorily liable to submit a statement of affairs;

(ii) that he was called upon to comply with the statutory obligation;

(iii) that the circumstances of the case reveal that he could have filed the statement of affairs if he was minded to do so; and

(v) that he did not comply with the requirements of law within the prescribed period, to hold him liable under sub-section (5) of section 454 of the Act.

12. Still further, the Court held that the expression "burden of proof has two distinct meanings, namely, (i) the burden of finally establishing the case; and (ii) the burden of introducing evidence to discharge the onus. The former is statutory burden, never shifts and remains fixed on the prosecution throughout while the latter fluctuates during the course of evidence tendered by the contesting parties in Court. The latter burden becomes academic once the evidence concludes. The Court is then required to evaluate the evidence as a whole to come to the conclusion whether the prosecution has discharged the former, that is, the statutory burden. If, on the evaluation of evidence, the Court comes to the conclusion that both the ingredients of sub-section (5) of Section 454 of the Act have been established by the prosecution, a conviction can be based on that evidence.

13. Keeping in view the principles of law laid down above, it is required to be examined whether the order of the learned Company Judge convicting the appellant for an offence u/s 454(5) of the Act for not filing the statement of affairs is sustainable in law. It has been found by the learned Company Judge that the appellant is a Director of the Company. Such fact is admitted by her when she appeared as a witness. The stand of the appellant that she is a lady Director and not participating in day to day affairs of the company has not been believed by the learned Company Judge. We find no reason to differ with the said findings. It has been found that the appellant was a Director of the company from the date of its inception till the date of order of winding up. She has not stated that she is not in possession of books of accounts of the company. Her stand that she is a house wife and not actively engaged in day to day affairs of the company cannot be accepted for the reason that she was a Director of the company from the date of its inception and her denial now is not believable. It

has come on record that she has been signing various documents on behalf of the company though it is her stand that it was at the asking of Surya Partap Singh, a friend of her son. Once she has signed the documents for and on behalf of the company, she is bound to take up the responsibility. Form No. 32 regarding change of Directors of the company is also signed by her. Therefore, we are unable to believe her stand that he cannot be called upon to submit the statement of affairs of the company in liquidation as its Director.

14. Still further, a perusal of section 454(2) of the Act shows that the statement of affairs is to be submitted and verified by one or more of the persons who are at the relevant date the Directors or by the person who is Manager, Secretary or other Chief Officer of the company or by such other persons, as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement. Such order persons include who are or have been officers of the company; who have taken part in the formation of the company; who are in the employment of the company, etc. It is, thus, apparent that the appellant being Director of the company was required to submit statement of affairs of the company subject to reasonable cause, if any, in not complying with any of the requirements.

15. The appellant has been called upon to comply with the statutory obligation as Director of the company which is evident from the statement of the witness produced by the official liquidator. The appellant was engaged with the affairs of the company from the date of its inception and that her statement of not in the Knowledge of the affairs of the company is not to be bona fide, therefore, it is concluded that she could have filed the statement of affairs of the company in liquidation.

16. The appellant has not complied with the requirement of filing the statement of affairs of the company within the prescribed time. Therefore, we find that the order of learned Company Judge holding the appellant guilty of not filing the statement of affairs of the company in liquidation is legal, just and proper.

17. The other argument raised by the learned counsel for the appellant that the statement of the appellant was not recorded after conviction in terms of the provisions of Section 235 of the Code of Criminal Procedure is wholly incorrect. Sub-section (5-A) of Section 454 of the Act contemplates that in a complaint u/s 454 of the Act, the Court shall follow the procedure as that of a summary trial before the Magistrate. It is Chapter XX of the Code of Criminal Procedure, 1973, which provides for the procedure of trial the summons case. Section 255 of the Code of Criminal Procedure, 1973 provides that after convicting the accused, the Magistrate shall pass the sentence. Therefore, it is the provision of Section 255 of the Code of Criminal Procedure which is applicable and not that of section 235 of the Code of Criminal Procedure which is part of the procedure of a case before the Court of Sessions.

18. Consequently, we do not find any merit in the present appeal which is hereby

dismissed with no order as to costs.