(1993) 10 AP CK 0021

In the Andhra Pradesh High Court

Case No : Company Application No. 284 of 1991 in Company Petition No. 28 of 1987

Official Liquidator	APPELLANT
Vs	
Kolli Vengaiah Naidu	RESPONDENT

Date of Decision : 05-10-1993

Acts Referred:
Companies Act, 1956 — Section 303, 449, 454

Citation : (1993) 3 ALT 458 : (1995) 84 CompCas 951

Hon'ble Judges : S. Parvatha Rao, J

Bench : Single Bench

Advocate : M.P. Chandramouli and Katta Janardhana Rao, for the Respondent

Judgement

Parvatha Rao, J.—This company application is filed under sub-sections (5) and (5A) of section 454 of the Companies Act, 1956 (hereinafter referred to as "the Act") for summoning the respondent herein, i.e., Kolli Vengaiah Naidu and to punish him under sub-section (5) of section 454 of the Act for non-compliance with the requirements of section 454 of the Act and to direct him to file forthwith the statement of affairs as required by sub-sections (1), (2) and (3) of section 454 of the Act.

2. In the affidavit filed in support of this company application, it is stated that this court passed a winding up order dated September 8, 1989, in Company Petition No. 28 of 1987 directing the winding up of Weber Electric Private Limited and that the official liquidator was appointed as the liquidator of the company u/s 449 of the Act. It is further stated that the official liquidator issued notice to the respondent herein on November 30, 1989, to submit the statement of affairs of the company as required u/s 454 of the Act and that in spite of that notice, the statement of affairs has not been filed by any of "the ex-directors of the company" including the respondent herein. It is also stated that u/s 454 of the Act, the ex-directors of the company are required to file the statement of affairs of the company in liquidation furnishing the required details in the prescribed

form. As the respondent herein did not comply with the requirements of section 454 of the Act, it is stated that he has committed default in complying with the statutory requirement of sub-sections (1), (2) and (3) of section 454 of the Act and, therefore, he is punishable under sub-section (5) of section 454 of the Act and this court can take cognizance of the offence in view of sub-section (5A) of section 454 of the Act.

3. Summons was ordered on July 29, 1992. The respondent appeared through his counsel and his personal appearance was dispensed with. He filed a counter affidavit dated September 11, 1992. Therein he states that though he was inducted as a director of the company during September, 1978, he submitted his resignation from the said post on April 26, 1986, with immediate effect, to the board of directors and the board of directors in their meeting held on December 22, 1986, accepted the said resignation and the resignation of another director by name S. Ramachandraiah. He also states that on December 22, 1986, itself, the company submitted Form No. 32 as required under sub-section (2) of section 303 of the Act as regards his ceasing to be a director. He states that in the circumstances, he does not have any knowledge about the affairs of the company and that, therefore, he is not under any statutory duty to furnish the statement of affairs of the company.

4. Even though learned counsel for the official liquidator sought time on November 20, 1992, for filing a reply, he has not filed any reply till now controverting the averments in the counter-affidavit of the respondent that he ceased to be a director of the company with effect from April 26, 1986, that is long before the date of the winding up order.

5. After hearing learned counsel for the official liquidator and also learned counsel for the respondent, I am satisfied that no case whatever is made out against the respondent as regards his duty to file a statement of affairs of the company, in view of the uncontroverted fact that he ceased to be a director of the company several years prior to the date of winding up order. Under sub-section (2) of section 454 of the Act, the statement referred to therein shall be submitted in the manner required therein (i) by persons who are at the relevant date the directors of the company, and (ii) by the person who is by that date the manager, secretary or other chief officer of the company. In cases where no provisional liquidator is appointed, the relevant date is defined in sub-section (8) of section 454 of the Act as the date of the winding up order which in the present case is September 8, 1989. The respondent states that he ceased to be a director of the company from April 26, 1986, because he submitted his resignation with effect from that date and his resignation was accepted by the board of the company on December 22, 1986, on which date Form No. 32 was also submitted by the board to the Registrar of Companies.

6. Even apart from this, in the affidavit filed in support of the present company application, it is not stated whether the respondent was a director of the company on the relevant date, i.e., September 8, 1989. In the absence of such

an allegation in the affidavit in support of the application-taking it as the complaint filed by the official liquidator - I am afraid a very essential link in the chain of facts for making out the commission of me offence under sub-section (5) of section 454 of the Act is missing because the duty to file a statement as per sub-section (2) of section 454 of the Act will arise only in the case of a person who was a director of the company on the relevant date.

7. Sub-section (2) of section 454 of the Act also. obligates persons mentioned in clauses (a), (b), (c) and (d) therein to verify and submit the statement if the official liquidator so requires any of them, subject to the direction of the court. It is not the case of the official liquidator that any such direction was given to the respondent herein. What is stated in the affidavit is only that on November 30, 1989, a notice was got issued to the respondent. But the said notice was returned by the postal authorities. Even assuming that the official liquidator can issue such a notice to a person who was not a director on the relevant date without any direction from the court, in the present case, admittedly, no such notice, requiring the respondent to file a statement, was served on the respondent.

8. I am, therefore, satisfied that the official liquidator, the complainant herein, has not made out that the respondent committed any offence under sub-section (5) of section 454 of the Act. Under sub-section (5A) of the said section 454, the court may take cognizance of an offence under sub-section (5) upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure for the trial of summons cases by magistrates. The trial of summons cases by magistrates is under Chapter of the Code of Criminal Procedure. In K.M. Mathew Vs. State of Kerala and another, , the Supreme Court has held that the need to try the accused arises when there is an allegation in the complaint that the accused has committed the crime and that even after the accused enters appearance in response to the summons the Magistrate is not bound to proceed under Chapter XX of the Code of Criminal Procedure if it is shown that no offence is made out in the complaint. The Supreme Court has held as follows (at page 2208) :

"It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

9. In the present case, I am satisfied that the facts alleged against the respondent do not constitute an offence under sub-section (5) of section 454 of

the Act.

10. The proceedings against the respondent are, therefore, dropped and the company application is accordingly dismissed.

