

(2006) 11 AHC CK 0070
In the Allahabad High Court

Official Liquidator

APPELLANT

Vs

Shri B.K. Modi and Others

RESPONDENT

Date of Decision : 15-11-2006

Acts Referred:

COMPANIES ACT, 1956 — Section 113, 2, 30, 303, 313
Penal Code, 1860 (IPC) — Section 182
Transfer of Property Act, 1882 — Section 58

Citation : (2008) 141 CompCas 438 : (2008) 85 SCL 148

Hon'ble Judges : S.P. Mehrotra, J

Bench : Single Bench

Judgement

S.P. Mehrotra, J.—It appears that the Company in question, namely Modi Carpets Limited was ordered to be wound up by an order of this Court dated 21.12.1993 passed on the recommendation of the Board for Industrial and Financial Reconstruction (BIFR) (registered as Misc. Company Application No. 3 of 1993). The Official Liquidator attached to this Court was appointed as the Liquidator of the said Company.

2. It further appears that the Official Liquidator filed an application, namely, Company Application No. 4 of 1998, u/s 454 of the Companies Act 1956.

3. The following persons, who were stated to be the Ex-Directors of the said Company (in liquidation), were impleaded as the Opposite Parties in the said Company Application No. 4 of 1998 (Paper No. A-3):

1. B.K. Modi
2. S.K. Modi
3. K.K. Sen
4. Ravindra Narain
5. Shailendra Swarup

6. C.M. Maniar
7. R.P. Dongre
8. Rajeev Kumar
9. N.D. Bhatia
10. S.L Duggal

4. It is, interalia, stated in the said Company Application No. 4 of 1998 (Paper No. A-3) that on receipt of winding-up order dated 21.12.1993 in respect of the aforesaid Company (in liquidation) from this Court, the Official Liquidator issued notices to the Opposite Parties /Ex-Directors of the aforesaid Company (in liquidation) for filing the " Statement of Affairs" in terms of Section 454 of the Companies Act, 1956 read with Rule 113 of the Companies (Court) Rules,1959; and that in terms of the provisions of the said Section and the said Rule, the Ex-Directors of the aforesaid Company (in liquidation) were required to submit the " Statement of Affairs " duly affirmed within 21 days from the date of winding-up order.

5. It is, interalia, further stated in the said Company Application No. 4 of 1998 that the notices were issued to the Opposite Party Nos. 1 to 10, the Ex-Directors of the aforesaid Company (in liquidation) ; and that the notices issued to the Opposite Party Nos. 1 to 7 were served on the said Opposite Parties, while the notices issued to the Opposite Party Nos. 8 to 10 were received back undelivered with the Postal Remark " Left".

6. It is, interalia, further stated in the said Company Application No. 4 of 1998 that the " Statement of Affairs" was required to be filed within 21 days from the date of passing of the order of winding-up by this Court, but the same had not yet been filed by the Ex-Directors of the aforesaid Company (in liquidation), and therefore, the provisions of Section 454 of the Companies Act, 1956 read with the Rules framed there-under, were contravened.

7. It is, interalia, prayed in the aforesaid Company Application No. 4 of 1998 that this Court may take cognizance of the default committed by the Ex-Directors of the aforesaid Company (in liquidation) for non-filing of the "Statement of Affairs" with the Official Liquidator within 21 days, as provided u/s 454(5) of the Companies Act, 1956.

8. The aforesaid Company Application No. 4 of 1998 was supported by an affidavit of Shri Ram, Official Liquidator, U.P., attached to this Court, sworn on 2.3.1998.

9. By the order dated 3.3.1998, the Court directed for issuance of notice to the Opposite Party Nos. 1 to 10 on the aforesaid Company Application No. 4 of 1998 to show-cause as to why penal proceedings be not taken against the said Opposite Parties for not complying with the provisions of Section 454(5) read with Rule 113 of the Companies (Court) Rules, 1959. The said order dated

3.3.1998 is reproduced below.-

Issue notice to the opposite party Nos. 1 to 10 to show-cause why penal proceedings shall not be taken against the said parties for not complying with the provisions of Section 454(5) read with Section 113 of the Companies (Court) Rules, 1959. The notice shall be made returnable within one month.

10. It further appears that on 22.4.1998 appearance was put in on behalf of some of the Opposite Parties including the Opposite Party No. 1. B.K. Modi. Thereupon, the Court, by its order dated 22.4.1998, interalia, granted time for filing reply to the said Company Application No. 4 of 1998.

11. It further appears that on 19.5.1998, an application being Civil Misc. Application No. -- of 1998, dated 18.5.1998 (Paper No. A-14), shown at serial No. 1 above, was filed on behalf of the Opposite Party No. 1. B.K. Modi along with a Counter Affidavit sworn on 18.5.1998 by S.K. Gupta stated to be the Authorised Signatory of the Opposite Party No. 1. The Court granted time to the Official Liquidator for filing reply to the said application (Paper No. A-14) by 6th July, 1998.

12. It further appears from a perusal of the order dated 14.7.1998 passed by the Court that a Rejoinder Affidavit (Paper No. A-15) was filed by the Official Liquidator in reply to the aforesaid Counter Affidavit (Paper No. A-14). The Court, by the said order dated 14.7.1998, interalia, further directed for listing of the case for hearing on 6.8.1998.

13. The case was accordingly put up before the Court on 6.8.1998. On 6.8.1998, the Court directed the case to be put up on 7.8.1998.

14. It further appears that on 7.8.1998, the Court passed the following order:

Sri Rakesh Kumar Agarwal, Advocate, who was appearing for Sri B.K. Modi, one of the Opposite Parties in this case, is no more. Office is directed to issue notice to the concerned parties to engage another counsel in place of Sri Rakesh Kumar Agarwal, since deceased.

15. Pursuant to the said order dated 7.8.1998, notice was sent to the Opposite Party No. 1, and thereupon, the Opposite Party No. 1 engaged Sri Rajesh Kumar Agarwal, Advocate, as his counsel.

16. It further appears that on 23.10.1998, Civil Misc. Application No. --of 1998 dated 14.7.1998 (Paper No. A-20) shown at serial No. 2 above, was filed on behalf of the Opposite Party No. 1(B.KModi) along with a Counter Affidavit. sworn by the said B.K Modi, on 23.6.1998. Further, on 23.10.1998, another application, namely Civil Misc. Application No. -- of 1998, dated 23.10.1998(Paper No. A-21), was filed on behalf of the Opposite Party No. 1(B.K. Modi) along with a Supplementary Counter Affidavit, sworn by the said B.K. Modi on 5.8.1998. In the circumstances, the Court passed the following order dated 23.10.1998:

A Counter on behalf of the respondent No. 1 alongwith a Supplementary Counter

Affidavit has also been filed today. A Counter Affidavit has also been filed on behalf of the respondent No. 3, who was a nominee director of the respondent company. The Official Liquidator states that a Rejoinder to the said Counter Affidavits are not required and the matter can be listed for hearing.

List this case for hearing on 9.11.1998.

17. Before proceeding further, it is pertinent to note certain averments made in the aforesaid Counter Affidavit (Paper No. A-20), and the aforesaid Supplementary Counter Affidavit (Paper No. A-21) filed on behalf of the Opposite Party No. 1.

18. It is, interalia, stated in paragraph No. 4 of the said Counter Affidavit (Paper No. A-20) that the Opposite Party No. 1 was only one of the Directors along with other Directors of the aforesaid Company in question; and that the Opposite Party No. 1 had resigned from the Board of Directors by his resignation letter dated 7.2.1992 much before the winding-up order passed by this Court on 21.12.1993.

19. Photostat copy of the said Resignation Letter has been filed as Annexure C.A.I. to the said Counter Affidavit.

20. It is, interalia, further stated in paragraph No. 5 of the said Counter Affidavit (Paper No. A-20) that the aforesaid Company in question had subsequently filed Form -32 on 26.5.1992 through L.D. Kaushik, Manager, Secretarial and Legal before the Registrar of Companies, Kanpur.

21. Photostat copy of the said Form-32 has been filed as Annexure C.A.2 to the said Counter Affidavit (Paper No. A-20).

22. It is, interalia, further stated in paragraph No. 5 of the said Counter Affidavit that a perusal of the said Form -32 shows that the Opposite Party No. 1 had resigned from the post of Director by the letter dated 7.2.1992.

23. It is, interalia, further stated in paragraph No. 5 of the said Counter Affidavit (Paper No. A-20) that the said Form -32 was duly registered by the Registrar of Companies, Kanpur on 8.9.1993.

24. It is, interalia, further stated in paragraph No. 5 of the said Counter Affidavit (Paper No. A-20) that as the Opposite Party No. -1 had resigned on 7.2.1992 much before winding-up order passed by this Court, the Opposite Party No. 1 could not be compelled to produce the "Statement of Affairs", as required u/s 454 of the Companies Act, 1956; and that the Opposite party No. 1 was not working as Director, and he did not have any asset of the aforesaid Company in question with him.

25. It is, interalia, stated in paragraph No. 7 of the said Counter Affidavit (Paper No. A-20) that as soon as the Opposite Party No. 1 received notice dated 28.1.1994 from the office of the Official Liquidator, U.P. Allahabad attached to this Court requiring the Opposite Party No. 1 to submit the "Statement of Affairs"

of the aforesaid Company (in liquidation), the Opposite Party No. 1 immediately on 12.2.1994 sent a letter stating that the Opposite Party No. 1 had resigned from the Directorship of the aforesaid Company in question on 7.2.1992, and the requisite Form -32 in respect of the aforesaid Company in question had also been filed before the Registrar of Companies, Kanpur.

26. Copy of the said letter dated 12.2.1994 has been filed as Annexure C.A.3 to the said Counter Affidavit (Paper No. A-20).

27. It is inter alia, further stated in paragraph No. 9 of the aforesaid Counter Affidavit (Paper No. A-20) that the Opposite Party No. 1 was not working Director on the Board of the aforesaid Company in question; and that day to day Management of Affairs were looked after by the Managing Director of the aforesaid Company in question as well as other Executives employed by the aforesaid Company in question.

28. As regards the said Supplementary Counter Affidavit (Paper No. A-21), it is, inter alia, stated in the said Supplementary Counter Affidavit that the Opposite Party No. 1 had no access to the aforesaid Company in question after he resigned on 7.2.1992 from the Board of Directors of the aforesaid Company in question; and that the Opposite Party No. 1 was not in possession of any asset of the aforesaid Company in question, and he was also not having any Record, Documents, Books of Accounts, Registers etc., of the aforesaid Company in question with him, nor had he any access to the same, and therefore, the Opposite Party No. 1 was not in a position to file the "Statement of Affairs" of the aforesaid Company (in liquidation).

29. On 21.8.1999, the Court passed an order, inter alia, directing for issuance of notice to L.D. Kaushik to submit the "Statement of Affairs" of the aforesaid Company (in liquidation) within one month from the date of receipt of the notice or to submit a reply as to why the orders be not passed against him.

30. The aforesaid order dated 21.8.1999 is reproduced below:

Heard the Official Liquidator and Sri Bharatji Agarwal, Senior Advocate, for Sri B.K. Modi, one of the Opposite parties.

The Official Liquidator has filed this application (A-3) praying that the cognizance of default committed by the Ex-Directors of the Company (in liquidation) be taken for non-filing of the statement of affairs with the Official Liquidator within 21 days as provided u/s 454(5) of the Companies Act, 1956.

Sri B.K. Modi has filed an affidavit alleging that he resigned from the Directorship on 7.2.1992 before the winding up order was passed by the Court on 21.12.1993. Sri L.D. Kaushik has filed an affidavit as prokari of Sri S.K. Modi, another Director, stating that Sri S.K. Modi had resigned before the winding up order was passed by this Court. I am not disposing of the application finally at this stage and it is not necessary to decide at present the question as to whether they in fact resigned and if so, its effect.

The statement of affairs has admittedly not been submitted by any of the Directors before the Official Liquidator. Section 454(2) of the Act provides that the statement of affairs shall be submitted and verified by one or more of the persons who are at the relevant date 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 mentioned in sub-section.

Sri L.D. Kaushik has filed a Counter Affidavit as pairokar of Sri S.K. Modi. He has annexed certain documents with the Counter Affidavit. Form -32 filed by him as Annexure "3" shows that he was the Manager and Secretary of Modi Carpets on the relevant date.

Let a notice be issued to Sri L.D. Kaushik, son of Sri L.D. Kaushik, resident of 45, Satish Park, Modinagar, Ghaziabad to submit the statement of affairs of the company (in liquidation) within one month from the date of receipt of the notice or to submit a reply as to why the orders be not passed against him, fixing 5.10.1999 for orders. The Official Liquidator shall take steps for service by registered post within one week.

List on 5.10.1999.

31. It is noteworthy that in the above-quoted order dated 21.8.1999, the Court, interalia, observed. "I am not disposing of the application finally at this stage, and it is not necessary to decide at present the question as to whether they in fact resigned and if so, its effect".

32. Hence, it is evident that the aforesaid Company Application No. 4 of 1998 (Paper No. A-3) was not finally disposed of by the said order dated 21.8.1999, and the same remained pending for consideration by the Court.

33. It is further evident that the Court in the said order dated 21.8.1999 left the question of resignation of the said B.K. Modi (Opposite Party No. 1), and if so, the effect thereof, to be decided in future.

34. It further appears that in response to the notice issued to the said L.D. Kaushik pursuant to the said order dated 21.8.1999, the said L.D. Kaushik filed an affidavit (Paper No. A-24), sworn on 4.10.1999. The said L.D. Kaushik filed another affidavit (Paper No. A-25), sworn on 5.10.1999.

35. Taking note of the said affidavits filed by the said L.D. Kaushik, the Court passed the following order dated 12.10.1999-

Sri L.D. Kaushik has filed an affidavit stating that he has come to know that Sri Sapan Bandopadhyaya, resident of 577, Amar Nagar, Rai Bareilly was employed as Manager, Accounts in the factory before winding up and is still associated with the Company and is looking after accounts of the Company. The Official Liquidator shall also send notice to submit the accounts, give the statement of affairs of the Company.

It will be open to the Official Liquidator to make his own enquiry in regard to the

property of the Company (in liquidation) and submit his report within one month.

List for orders on 15.11.1999.

36. It further appears that pursuant to the said order dated 12.10.1999, notice was issued to the said Sapan Bandopadhyaya.

37. In response to the said notice, the said Sapan Bandopadhyaya filed an affidavit (paper No. A-27), sworn on 2.12.1999 along with an application.

38. In reply to the said affidavit (Paper No. A-27) filed on behalf of the said Sapan Bandopadhyaya, the Official Liquidator filed a Counter Affidavit (Paper No. A-28), sworn on 10.12.1999.

39. It further appears that the said Sapan Bandopadhyaya filed another affidavit (Paper No. A-29), sworn on 26.2.2000 along with an application.

40. On 18.8.2000, the Court passed the following order:

Passed over for the day on the illness slip of Sri Piyush Agarwal, counsel for the respondent. List on 12.9.2000 peremptorily.

Sri J.N. Tiwari appearing for one of the respondents states that he should be allowed inspection of record so that statement of affairs may be filed. The possession over the Company is of the Official Liquidator. With the consent of the Official Liquidator 8.9.2000 is fixed as date of inspection of record at the premises of the Company (In liquidation) by Sapan Bandopadhyaya or his counsel. The case shall come up on 12.9.2000 with Company Application No. 10 of 1998.

41. Thereafter, the Official Liquidator submitted his report (Paper No. A-30), being Report No. 79 of 2000.

42. Thereupon, the Court passed the following order dated 12.9.2000:

The Official Liquidator, Sri J.N. Tiwari and Sri Bharatji Agarwal for the respondent appear.

By orders dated 21.8.1999 and 12.10.1999, notices were issued to Sri L.b. Kaushik and Sapan Kumar Bandopadhyaya to file the statement of affairs Under order dated 18.8.2000, learned Counsel for these persons was allowed inspection of record of the Company. A-30 is the report No. 79 of 2000 made by the Official Liquidator that his representative had reached the office of the Company on 8.9.2000 and the above noted two persons also appeared there. However, the inspection could not be possible as these two persons were not permitted to enter the office by certain Ex-employees. Under the circumstances, it is thought proper that the record be brought over here in the office of the Official Liquidator, so that it may be inspected. The parties' counsel also agree it to be the most convenient mode of inspection. It is accordingly directed that the Official Liquidator shall cause the record shifted to his office within one month. He shall then give notice to Sri J.N. Tiwari who shall inform his clients to come over to the office of Official Liquidator and inspect the record.

List after six weeks.

43. It further appears that on 1.11.2001, the Court considered the application / reply filed by Shailendra Swaroop (Opposite Party No. 5) in response to the notice issued in the aforesaid proceedings u/s 454(5) of the Companies Act, 1956, and passed the following order dated 1.11.2001:

Order on the application /reply filed by respondent No. 5, Shri Shailendra Swaroop.

Notice in proceedings initiated u/s 454(5) of the Companies Act, 1956. Notices were issued in response to which Sri Shailendra Swaroop, respondent No. 5 has filed reply (Paper No. A-12) sought exemption from the proceedings on the ground that he was appointed as Atterate Director u/s 313 of the Companies Act for Mr. Lawry D. Maclean of Modi Corporation Ltd., (in liquidation) and thus he ceased to be a Director with effect from 26.5.1992. He has filed the return submitted to the Registrar on 26.5.1992 annexed as Annexure-D to the affidavit which discloses that Sri Shailendra Swaroop appointed as Atterraate Director ceased to be a Director with effect from 26.5.1992, much before the Company was wound- up by order dated 21.12.1993. The fact has been admitted in the Rejoinder Affidavit of the Official Liquidator. In the aforesaid facts and circumstances, Sri Shailendra Swaroop, respondent No. 5 is exempted from complying with the provisions of Section 454 of the Companies Act, 1956.

So far the other Directors are concerned, the matter shall be considered on the next date fixed. List again in the next cause list.

44. It is evident from the above-quoted order dated 1.11.2001 that the matter regarding other Ex-Directors of the aforesaid Company (in liquidation) was directed to be considered on a future date.

45. Thereafter, on 20. 11.2001, the Court passed the following order:

Sri Bharat Ji Agarwal, Senior Advocate assisted by Sri Piyush Agarwal have prayed for application No. A-14 for exempting Sri B.K. Modi from the proceedings u/s 454(5) of Companies Act, 1956, on the ground that Sri B.K. Modi had tendered resignation, on 26.5.1992 in proof of which, a photostat copy of certified copy of Form -32 dated 26.5.92 has been submitted by Sri L.D. Kaushik, Manager- Secretary of the Company in liquidation which was registered on 8.9.93. Hearing of this application was referred by this Court on 21.8.91, on the ground that statement of affairs has admittedly not been submitted by any of the Directors before the Official Liquidator. Section 454(2) of the Companies Act provides that verified statement has to be submitted by persons who are or have been officers of the company; who have taken part in the formation of the company at any time within one year before the relevant date; 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; 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. Sub-section 5 of Section 454 provides that if any person, without reasonable excuse, make a 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 both. Sub-section 8 provides "the relevant date" which in the present case is date of winding-up of the order, i.e., 21.12.93.

By the same order dated 21.8.99 Sri L.D. Kaushik who has admittedly the Secretary and Manager of the Company and who was acting as Parokar of Sri S.K. Modi was required to submit statement of affairs within one month fixing 5.10.99. He thereafter, filed an affidavit on which an order was passed on 12.10.99 to the effect that Sri Sapan Bandhopadhaya, was employed as Manager (Accounts) before winding-up, and he is still associated with the company has the knowledge of accounts on which notice was issued to Sri Bandhopadhaya. On 18.8.2000 this Court adjourned the matter to allow the respondents to inspect the records on the statement of Sri J.N. Tiwari, Senior Advocate. On 12.9.2000 the Court found that the representative of Official Liquidator and the said two persons reached the office of the company on 8.9.2000 but were not allowed inspection by certain ex-employees of the company. An order was passed that the Official Liquidator will bring over the records to his office so that the same may be inspected and give notice to Sri J.N. Tiwari, who shall inform his clients to come to the office of the Official Liquidator and inspect the records. Sri Sapan Kumar Bandhopadhyaya has filed an affidavit dated 26.2.2000 stating that Official Liquidator and Punjab National Bank be directed to afford an opportunity to the applicant to inspect all the records lying in the factory. Sri L.D. Kaushik was also praying repeatedly since 1993 to grant time to submit the statement of affairs.

The fact remains that pending applications to exempt the Directors, the officials who appeared before the Court and were required to file statement of affairs are delaying the filing of returns since 1993. It is a matter of serious concern. In the absence of statement of affairs, the company cannot be effectively dissolved and that is why liability has been fastened with punishment provided u/s 454(5) of the Act and these are the reasons why the hearing of the application of Sri B.K. Modi, A-14 was deferred.

In the aforesaid circumstances, taking serious note of the circumstances, the Court is constrained to give only four weeks further time to the Directors and employment of the Company as defined in Section 454 of the Act, to submit the statement of affairs, by inspecting the records which are available with the Official Liquidator. Sri S.K. Saxena, Official Liquidator has stated before the Court that records were brought over from the factory site at Raibareilly, to the office of the Official Liquidator by his predecessor, and that he will extend all possible help for inspection for preparing the statement of affairs.

Sri J.N. Tiwari, Senior Advocate who was appearing on behalf of Sri S.K. Modi and Sri Rakesh Tiwari has filed an application and filed affidavits on behalf of Sri L.D. Kaushik and Sri S.K. Bandhopadhyaya has taken notice of this order. If the statement of affairs is not filed within four weeks, the Court shall be constrained to issue warrants against the responsible Directors and Officials of the Company. This order does not amount to extending time for filing the statement of affairs.

46. Thereafter, it appears that the "Statement of Affairs" in respect of the aforesaid Company (in liquidation) was filed on 21.1.2002 under the signature of the aforesaid Sapan Bandhopadhyaya.

47. Thereupon, on 22.1.2002, the Court passed the following order:-

Official Liquidator submits that the statement of affairs of Modi Carpets Ltd/in liquidation) has been filed in his office at about 4.00 P.M. on 21.1.2002 under the signature of Sri Sapan Kumar Bandhopadhyaya, Manager Accounts.

Let the Official Liquidator submit a report with regard to the sufficiency and statutory information furnished in the statement of affairs, and whether the Director and officers responsible have given reason for delay in filing the statement of affairs in respect of the Company, which was wound up on 21.12.93.

List in the next cause list.

48. Pursuant to the said order dated 22.1.2002, the case was listed before the Court on 19.2.2002. On the said date i.e. 19.2.2002, the Court passed the following order:

The Official Liquidator submits that deficiencies in the statement of affairs have been intimated to Sri S.K. Bandhopadhyaya who had filed the statement of affairs on 21.1.2002. The respondents are directed to complete the statement of affairs within three weeks. List immediately thereafter.

49. It further appears that pursuant to the said order dated 22.1.2002 read with the said order dated 19.2.2002, the Official Liquidator submitted his report being Report No. 137 of 2003.

50. The Court, thereafter, passed the following order on 6.5.2003:-

Pursuant to the order dated 22.12002, Official Liquidator has submitted his report today being report No. 137 of 2003. In the said report, it has, inter alia, been stated that the deficiencies noted in the statement of affairs submitted by Sri Sapan Kumar Bandhopadhyaya have been brought to the notice of Sri Sapan Kumar Bandhopadhyaya by Registered A.D. letter, but no reply has so far been received to the said letter.

By the order dated 22.1.2002, Official Liquidator was further required to submit his report with regard to as to whether Director and the officers responsible have given reason for delay in filing the statement of affairs in respect of the company, which was wound up on 21.12.93. The report, submitted today, does not deal

with the said aspect.

Official Liquidator is directed to submit a further report regarding the said aspect mentioned in the said order dated 22.1.2002.

Sri Rakesh Tiwari, who was representing Sri L.D. Kaushik and Sri Sapan Kumar Bandhopadhaya, has since been elevated to the Bench of this Court.

Office is directed to issue notice to Sri L.D. Kaushik and Sri Sapan Kumar Bandhopadhaya at their respective addresses mentioned in the affidavits filed by them in these proceedings for engaging another counsel.

Notices will be issued fixing an early date.

51. It further appears that the case was, thereafter, listed before the Court on various dates, but was adjourned on account of the reasons mentioned in the respective orders passed on such dates.

52. On 12.7.2004, a Supplementary Counter Affidavit, sworn by B.K. Modi (Opposite Party No. 1) on 24.5.2004, was filed on behalf of the Opposite Party No. 1.

53. By the order dated 12.7.2004, the said Supplementary Counter Affidavit was directed to be taken on record.

54. I have heard Sri Bharat ji Agarwal, learned Senior Counsel assisted by Sri Piyush Agarwal, learned Counsel for the Opposite party No. 1, and Sri S.K. Saxena, Official Liquidator, and perused the record.

55. Sri Bharat ji Agarwal, learned Senior Counsel appearing for the Opposite Party No. 1 has made the following submissions:-

1. The said B.K. Modi (Opposite Party No. 1) resigned from the Directorship of the Company in question on 7.2.1992 i.e. prior to the passing of the winding-up order on 21.12.1993.

It is further submitted that Form 32 in this regard was submitted in the office of the Registrar of Companies, Kanpur on 26.5.1992. It is further submitted that information in this regard was given by the said B.K. Modi (Opposite Party No. 1) to the Official Liquidator by a letter dated Feb., 12, 1994. Reference is made to paragraph Nos. 4,5 and 7 of the said Counter Affidavit(Paper No. A-20), filed on behalf of the Opposite Party No. 1, as also Annexures C.A.I., CA.2 and C.A.3 to the said Counter Affidavit.

It is submitted that relevant date, as contemplated under Sub-section (2) read with Sub-section (8) of Section 454 of the Companies Act, 1956, was 21.12.1993, i.e., the date of winding-up order. The said B.K. Modi (Opposite Party No. 1) having already resigned with effect from 7.2.1992, the submission proceeds, had ceased to be the Director of the aforesaid Company in question on the relevant date i.e. 21.12.1993, and as such, he was absolved from the liability for filing the "Statement of Affairs" in respect of the aforesaid Company (in

liquidation).

2. There was no specific direction to the said B.K. Modi (Opposite Party No. 1) to file the "Statement of Affairs" in respect of the aforesaid Company in liquidation. Specific directions, if any, were issued to the aforementioned L.D. Kaushik and Sapan Kumar Bandhopadhaya.

3. Even if the said B.K. Modi (Opposite Party No. 1) was treated to be an "Officer" of the aforesaid Company in question in view of the provisions of Sub-section (30) of Section 2 of the Companies Act, 1956, and as such, covered under Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956, he may be exonerated from the liability of filing the "Statement of Affairs" in view of the facts and circumstances of the present case.

It is submitted that the said S.K. Modi was the Managing Director of the aforesaid Company in question, and he was involved in the day to day affairs of the aforesaid Company. The said B.K. Modi (Opposite Party No. 1) was not involved in the day-to-day affairs of the aforesaid Company in question.

Reference is made to the Extract of the Memorandum of Association of the aforesaid Company in question containing the names of the persons, who subscribed to the said Memorandum of Association, filed as Annexure S.C.A.1 to the aforesaid Supplementary Counter Affidavit, sworn on 24.5.2004.

It is pointed out that while the name of the said S.K. Modi finds place amongst the persons, who subscribed to the said Memorandum of Association, the name of the said B.K. Modi (Opposite Party No. 1) does not appear amongst the persons, who subscribed to the said Memorandum of Association.

Reference is further made to Annexure S.C.A. 2 to the said Supplementary Counter Affidavit, which is a copy of the Notice dated 6.12.1991 with Explanatory Statement issued for convening 15th Annual General Meeting of the aforesaid Company in question.

It is pointed out that the said Explanatory Statement, interalia, mentioned as follows:

Since Sri Satish Kumar Modi from the inception of Modi Carpets Ltd. had been functioning as Managing Director of Modi Carpets Ltd. and even after ceasing to be Managing Director has continued to take interest in the business affairs of Modi Capets Ltd., his continued association with Carpets business even after the merger would be desirable. Hence the Board of Directors has recommended his appointment as one of the Managing Director in Modi Rubber Ltd. to look after the Carpet business.

Reference is further made to Annexure S.C.A.3 to the said Supplementary Counter Affidavit, which is a copy of the Directors' Report for the Accounting Year ended on March 31, 1991. The said report was signed by the said S.K. Modi.

On the basis of the aforesaid documents filed along with the said Supplementary

Counter Affidavit, it is submitted that even though the said B.K. Modi (Opposite Party No. 1) was technically the Director of the aforesaid Company in question, and as such, he was an Officer of the aforesaid Company in question, still he was not involved in the day to day affairs of the aforesaid Company in question. In fact, the said S.K. Modi was looking after the day to day affairs of the aforesaid Company in question, and as such, he was liable for filing the "Statement of Affairs" u/s 454 of the Companies Act, 1956.

It is further pointed out that by the order dated 1.11.2001, the Opposite Party No. 5(Shailendra Swaroop) was exempted from the liability for filing the "Statement of Affairs".

It is further emphasized that in any case, the Statement of Affairs" has already been filed.

4. On the facts and circumstances of the present case, discretion be exercised in favour of the said B.K. Modi (Opposite Party No. 1), and he may be exonerated from the liability for filing the "Statement of Affairs" u/s 454 of the Companies Act, 1956.

56. Reliance in this regard is placed on the following decisions:

(1) The Official Liquidator, High Court of Andhra Pradesh, Hyderabad v. Koganti Krishna Kumar 1994 Criminal Law Journal 797 (A.P.).

(2) Mother Care (India) Limited v. Prof Ramaswamy P. Aiyar [2004] 51 SCL 243 (Kar).

57. In reply, Sri S. K. Saxena, Official Liquidator, has made the following submissions-

(1) On an analysis of Section 454 read with Sub-section (30) of Section 2 of the Companies Act, 1956, it is apparent that even if the said B.K Modi (Opposite Party No. 1) is assumed to have resigned on 7.2.1992, still he remained liable to submit the Statement of Affairs as an "officer" of the aforesaid Company in question.

(2) The Statement of Affairs in respect of the aforesaid Company (in liquidation) has already been filed under the signature of Sapan Kumar Bandhopadhyaya.

(3) The question of liability of the said B.K. Modi (Opposite Party No. 1) may be considered by the Court at this stage, and the Court may examine as to whether the failure on the part of the said B.K. Modi (Opposite Party No. 1) was "without reasonable excuse".

(4) On the facts and circumstances of the case, the said B.K. Modi (Opposite Party No. 1) was liable to be punished for his failure to submit and verify the Statement of Affairs.

58. In order to appreciate the submissions made by Sri Bharat Ji Agarwal, learned Senior Counsel appearing for the Opposite Party No. 1, and Sri S.K.

Saxena, Official Liquidator it is necessary to refer to certain provisions of the Companies Act, 1956.

Section 454 of the Companies Act, 1956 lays down as under:

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 realized 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 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 (5 of 1898), for the trial of summons cases by magistrates. f

(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 (45 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.

59. Sub-section (30) of Section 2 of the Companies Act, 1956 provides as follows:

2. Definitions. In this Act, unless the context otherwise requires, -

(30). "officer" includes any director, [managing agent, secretaries and treasurers,] manager or secretary, [or any person in accordance with whose directions or instructions the Board of directors or any one or more of the director is or are accustomed to act,] [and also includes-

(a) where the managing agent, [or the secretaries and treasurers] is or are a firm, any partner in the firm;

(b) where the managing agent or the secretaries and treasurers is or are a body corporate, any director or manager of the body corporate;]

(c) [omitted by the Companies (Amendment) Act, 1974, w.e.f.1.8.1975:]

but, save in Sections 477, 478, 539, 543, 545, 621, 625 and 633, does not include an auditor].

60. A perusal of Section 454 of the Companies Act, 1956 shows that Sub-section (1) of Section 454 of the Companies Act, 1956 interalia, provides that where the Court has made a winding-up order or appointed the Official Liquidator as provisional Liquidator, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the Company in the prescribed form. The statement will be verified by an affidavit, and will contain the particulars, mentioned in Clauses (a) to (e) of the said Sub-section (1) of Section 454 of the Companies Act, 1956.

61. It may be mentioned that in view of Rule 127 of the Companies (Court) Rules, 1959, the statement as to the affairs of the Company to be submitted u/s 454 of the Companies Act, 1956 shall be in Form No. 57 and shall be made out in duplicate, one copy of which shall be verified by affidavit. The said Rule 127, interalia, further provides that an affidavit of concurrence in the statement of affairs shall be in Form No. 58.

62. It is further noteworthy that Sub-section (1) of Section 454 of the Companies Act, 1956 is subject to the power of the Court to order otherwise "in its discretion".

63. Hence, Sub-section (1) of Section 454 imposes a duty to make out, verify and submit to the Official Liquidator a statement as to the affairs of the Company.

64. Sub-section (2) of Section 454 of the Companies Act, 1956 specifies the persons, who are required to carry out the aforementioned duty of making out, verifying and submitting the Statement of Affairs to the Official Liquidator. The said Sub-section (2) is in two parts:

(A) This Part deals with the persons who are "at the relevant date" the directors of the Company, and the person who is "at the relevant date" the manager, secretary or other chief officer of the Company.

It is provided that the Statement of Affairs shall be submitted and verified

(i) by one or more of the persons who are at the relevant date the directors

and (ii) by the person who is at that date the manager, secretary or other Chief Officer of the Company.

Hence, this Part of Sub-section (2) of Section 454 of the Companies Act, 1956, requires that one or more of the persons, who are at the relevant date the directors, and the person, who is at that date the manager, secretary or other chief officer of the Company, will jointly submit and verify the Statement of Affairs.

It may be further mentioned that the expression "the relevant date", has been defined in Sub-section (8) of Section 454 of the Companies Act, 1956.

Accordingly, 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.

(B) This Part deals with the persons, mentioned in Clauses (a) to (d) of Sub-section (2) of Section 454 of the Companies Act, 1956.

It is provided that the Official Liquidator, subject to the direction of the Court, may require the following persons to submit and verify the Statement of Affairs:

(a) The persons, who are or have been officers of the Company.

(b) The persons, who have taken part in the formation of the Company at any time within one year before the relevant date.

(c) The persons, who are in the employment of the Company, or have been in the employment of the Company within one year before the relevant date, and are, in the opinion of the Official Liquidator, capable of giving the information required.

(d) The persons, who are or have been within one year before the relevant date" 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.

65. In case, the Official Liquidator, subject to the direction of the Court, requires the persons, mentioned above, to submit and verify the Statement of Affairs, the said persons will be under duty to submit and verify the Statement of Affairs of the Company.

66. It will be noticed that Part (A) mentioned above, deals with such persons, who are the directors "at the relevant date", and such person, who is the manager or secretary or other chief officer of the Company "at the relevant date".

67. Clause (b) of the said Sub-section (2), mentioned in Part (B) above, requires participation in the formation of the Company at any time within one year before the relevant date.

68. Similarly, Clause (c) and Clause (d) of the said Sub-section (2) mentioned in Part (B) above, require employment either in praesenti or within one year before the relevant date.

69. However, Clause (a) of the said Sub-section (2), mentioned in Part (B) above, mentions the persons, "who are or have been officers of the Company". Therefore, Clause (a) does not lay down any time limit as to when a person has been an officer of the Company. In other words, Clause (a) applies to any person who has been an officer of the Company at any point of time.

70. Consequently, in view of the said Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956, a person, who has been an officer of the Company at any point of time, may be required by the Official Liquidator to submit and verify the Statement of Affairs.

71. Of course, this may be done by the Official Liquidator subject to the direction of the Court.

72. Sub-section (30) of Section 2 of the Companies Act, 1956 defines the word "Officer"."

73. Accordingly, the word "Officer" includes any director of the Company.

74. Hence, in view of the definition of the word "Officer", as given In Sub-section (30) of Section 2 of the Companies Act, 1956, the word "Officers" occurring in Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956, will include the directors of the Company also.

75. Evidently, reading Clause (a) of Sub-section (2) of Section 454 of the Companies Act 1956 with Sub-section (30) of Section 2 of the Companies Act, 1956, a person, who has been a director of the Company at any point of time, may be required by the Official Liquidator to submit and verify the Statement of Affairs.

76. Hence, even if a person has ceased to be a director of the Company at the relevant date, and as such, he does not fall in Part (A) above, still such a person may be required by the Official Liquidator to submit and verify the Statement of Affairs in view of the provisions of Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956 read with Sub-section (30) of Section 2 of the Companies Act, 1956.

77. Before proceeding further, it is relevant to note that the aforesaid conclusion that even if a person has ceased to be a director of the Company at the relevant date, and as such, he does not fall in Part (A), mentioned above, still such a person may be required by the Official Liquidator to submit and verify the Statement of Affairs in view of the provisions of Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956 read with Sub-section (30) of Section 2 of the Companies Act, 1956, is supported by the following decisions:

(i) Devinder Kishore Mehra v. Official Liquidator and Ors. [1980] 5 CompCas 699(Delhi)

(ii) Lakshman Narayan Arora and Ors. v. Registrar of Companies. Bihar and Ors. [1980] 5 CompCas 536 (Pat).

78. In Devinder Kishore Mehra case (supra), a Division Bench of the Delhi High Court opined as follows(at pages 705-706):

The first point which arises for determination is whether an ex-director like the appellant falls within the ambit of Sub-section (2) of Section 454 of the Companies Act. Our brother, D.K. Kapur, J, revising an earlier opinion given by him, has held that an order u/s 454 of the Companies Act can be passed in respect of persons who were directors of the company even more than one year prior to the passing of the winding-up order. What led our learned brother to revise his opinion was a peculiar circumstance disclosed in this case. It seems

that all the respondents in C.A. No. 664 of 1975 claimed that they had resigned as directors between the years 1965 and 1969, long before the winding-up order was passed. Thus, in the case of M/s. Sipso Agencies Private Ltd., it appeared that there was nobody who could be called upon to file a statement of affairs as none was a director on the relevant date. Analyzing Section 454 of the Companies Act, the learned Judge, therefore, came to the conclusion that it could not be envisaged that nobody could be called upon in such a situation to file a statement of affairs of the company and so. the ex-directors of a company who resigned even more than one year before the winding-up order could be directed to submit a statement of affairs. We are in agreement with the approach of the learned Judge that Sub-section (2) of Section 454 speaks of two categories of persons-first, persons who are. on the relevant date, the directors or other officers of the company and. second, such persons other than the first category whom the Official Liquidator, subject to the directions of the court, may call upon to submit and verify the statement of affairs. The second category is comprised of persons, inter alia, mentioned in Clause (a). There is no conflict between persons falling in the category under Clause (a) of Sub-section (2) and Clause (d) thereof. The learned Judge, we say with respect, was right in observing that at first sight Clause (d) seems to refer to officers of the company which is being wound up but "in fact it refers to persons employed by a person which itself is a company being wound up". Therefore, ex-directors of the company who resigned even more than one year before the winding-up order could, in appropriate cases, be directed to submit a statement of affairs.

(Emphasis supplied)

79. In Lakshman Narayan Arora case (supra), a Division Bench of the Patna High Court held as follows (at pages 541-543):

It is not possible to accept the submissions made. As pointed out earlier, apart from the directors, manager, secretary or other chief officer of the Company who are in those offices at the relevant date, other classes of persons who may be called upon to file the statement have been categorized in Sub-section (2). They have however, been categorized under different heads. Parliament in categorizing classes of persons under Clauses (b) to (d) has specifically provided that those persons must have been in the employment of the company concerned within one year before the relevant date. But, for those mentioned under Clause (a), this period has not been provided. This clearly demonstrates the intention of the legislature that the direction of the court in calling upon persons who are mentioned in Clause (a) is not confined only to those who have been in the employment of the Company within one year from the relevant date.

The submission that it would lead to monstrosity has also to be rejected inasmuch as in the first Sub-section itself it is provided that the court in asking for a statement of affairs from a person shall do so in its discretion. It, therefore, follows that if, in certain circumstances, the court finds that an officer of the company who had been in the employment of the company will not be

able to submit the statement as required, it will not call upon such a person to do so.

Similarly, the submission that in construing the plain words of a section, punctuations could not be relied upon is of no assistance in the present case. Firstly, as I have pointed out, it is not a question of punctuation when Clauses (a), (b), (c) and (d) of Section 454 are to be construed. As pointed out earlier, different classes of persons have been grouped under different clauses and, in the absence of any other good reason, the provision with regard to one class cannot be imported into the provision with regard to the other class. The words used in Clause (a) are very distinct and clear and, in the absence of any restriction with regard to the period as provided in Clauses (b),(c) and (d), it is not possible to import those restrictions in Clause (a).

Learned counsel has relied upon three decisions for his submission that punctuations can be ignored in considering the plain words of a section. In the case of *The Indian Cotton Company Limited Vs. Huri Poonjoo*, it was held that in interpreting the plain words of a section, punctuations can- not be relied upon. This observation was made in construing Section 58(f) of the Transfer of Property Act and it was held that the comma beyond the word " towns" does not go with " person"but with "delivers". This decision is, therefore, of no help Similarly, the Privy Council in the case of *Maharani of Burdwan v. Krishna Kamini Das* [1887] LR 14 IA 30:ILR 14 Cal 365 in interpreting Regulation VIII of 1819, had held that in a certain provision the comma after the word "katcheri" could be construed to apply to the whole expression " upon the land of the defaulters" just as easily as to the last three words only. And in that background, their Lordships observed that it is an error to rely on punctuation in construing Acts of the Legislature. This decision also is not relevant for the purpose of the present case. Similarly, in a Full Bench judgment of the Lahore High Court in the case of *Seth Gurmukh Singh v. CIT* [1944] 12 TTR 393 (Lah) Munir, J. held that if a provision as punctuated leads to absurd results or conflict with some other provision of the statute, punctuation must yield to a reasonable and consistent interpretation. No conflict or absurdity has been pointed out in interpreting Clause (a) in the manner in which we have done.

From the discussions made above, it is obvious, therefore, that u/s 454(2)(a) even if the appellants had resigned from the office of directors in the year 1966. they could still be called upon to submit the statement of affairs as provided u/s 454(1) of the Companies Act. 1956.

(Emphasis supplied)

Sub-section (3) of Section 454 of the Companies Act, 1956 provides time limit within which the persons, mentioned above, will carry out their duty of submitting the Statement of Affairs of the Company to the Official Liquidator.

80. It is provided that the Statement of Affairs shall be submitted:

(i) within 21 days from the relevant date [as defined in Sub-section (8) of Section 454 of the Companies Act, 1956], or

(ii) within such extended time not exceeding three months from the relevant date, as the Official Liquidator or the Court may, for special reasons, appoint.

81. Sub-section (4) of Section 454 of the Companies Act, 1956 deals with the payment to be made by the Official Liquidator or provisional Liquidator, as the case may be, to the aforementioned persons in respect of costs and expenses incurred in and about the preparation and making of the Statement of Affairs and affidavit by such persons.

82. It is provided that any person making, or concurring in making, the statement and affidavit required by Section 454 shall be allowed, and shall be paid by the Official Liquidator or provisional Liquidator, as the case may be, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the Official Liquidator may consider reasonable. Such payment will be made out of the assets of the Company.

83. It is further provided that the determination by the Official Liquidator is subject to an appeal to the Court.

84. Sub-section (5) of Section 454 of the Companies Act, 1956 deals with the consequences of default committed by the aforementioned persons in carrying out the duty regarding the making, verification and submission of the Statement of Affairs, as per the provisions of Section 454 of the Companies Act, 1956.

85. It is provided that in case any person makes default in complying with any of the requirements of Section 454 of the Companies Act, 1956, and such default is without reasonable excuse then such a person shall be punishable with punishments mentioned in Sub-section (5) of Section 454 of the Companies Act, 1956. The punishment may be imprisonment for a term which may extend to two years, or with fine which may extend to Rs. one hundred for every day during which the default continues, or with both.

86. It is noteworthy that mere default in complying with any of the requirements of Section 454 of the Companies Act, 1956 is not punishable.

87. It is further required that such default should be without reasonable excuse.

88. Sub-section (5-A) of Section 454 of the Companies Act, 1956 deals with the jurisdiction and procedure for taking cognizance of an offence under Sub-section (5) of Section 454 of the Companies Act, 1956, and for trial of such an offence.

89. It is provided that 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) of Section 454 of the Companies Act, 1956. Such cognizance will be taken by the said Court upon receiving a complaint of facts constituting such an offence.

90. It is further provided that the said Court will try such offence itself. Such trial will be conducted in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (V of 1898), for the trial of summons cases by Magistrates. It may be mentioned that Code of Criminal Procedure, 1898 has now been replaced by the Code of Criminal Procedure, 1973 (II of 1974).

91. Sub-section (6) of Section 454 of the Companies Act, 1956, makes provision for inspection of the Statement submitted in pursuance of Section 454 of the Companies Act, 1956, and for obtaining copy thereof or extract therefrom.

92. It is provided that any person stating himself in writing to be a creditor or contributory of the Company shall be entitled, by himself or by his agent, to inspect the statement submitted in pursuance of Section 454 of the Companies Act, 1956, and to a copy thereof or extract therefrom.

93. Such inspection of the statement and obtaining copy thereof or extract therefrom may be under- taken at all reasonable times on payment of the prescribed fee.

94. Sub-section (7) of Section 454 of the Companies Act, 1956 provides that if a person untruthfully states himself to be a creditor or contributory under the aforesaid Sub-section (6) of Section 454 of the Companies Act, 1956, then such a person will be guilty of an offence u/s 182 of the Indian Penal Code. Such a person will be punishable accordingly on an application of the Official Liquidator.

95. Sub-section (8) of Section 454 of the Companies Act, 1956 as noted above, defines the expression "the relevant date", as used in Section 454 of the Companies Act, 1956. Accordingly, "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.

96. Let us now consider the submissions made by Sri Bharat Ji Agarwal, learned Senior Counsel appearing for the Opposite Party No. 1, and those made by Sri S.K. Saxena, Official Liquidator, keeping in view the legal position, as mentioned above.

97. In the present case, no provisional Liquidator has been appointed. Hence, "the relevant date", as per the provisions of Sub-section (8) of Section 454 of the Companies Act, 1956, was the date of the winding-up order, namely 21st December, 1993.

98. It is claimed by the Opposite Party No. 1 (B.K. Modi) that he had resigned from the Board of Directors by his resignation letter dated 7.2.1992.

99. Photostat copy of the said Resignation Letter has been filed as Annexure C.A. 1 to the said Counter Affidavit (Paper No. A-20) filed on behalf of the Opposite Party No. 1.

100. It is further claimed by the Opposite Party No. 1 (B.K. Modi) that Form No. 32 was filed by the aforesaid Company in question on 26th May, 1992 before the

Registrar of Companies, Kanpur, and the said Form 32 was duly registered by the Registrar of Companies, Kanpur on 8.9.1993.

101. Photostat copy of the said Form 32 has been filed as Annexure C.A. 2 to the said Counter Affidavit (Paper No. A-20) filed on behalf of the Opposite Party No. 1.

102. It is submitted that the said resignation letter and the said Form 32 show that the Opposite Party No. 1 had resigned from the Board of Directors on 7.2.1992 i.e., much before the winding- up order was passed by this Court on 21.12.1993.

103. I have considered the submissions made on behalf of the Opposite Party No. 1(B.K. Modi) in this regard.

104. A perusal of Form 32 [photostat copy of which has been filed as Annexure C.A. 2 to the said Counter Affidavit (Paper No. A-20)] shows that the said resignation letter dated 7.2.1992 given by the said B.K. Modi (Opposite Party No. 1) was placed on the table at the Board Meeting dated 26th May, 1992. The said Form 32 further shows the decision of the Board of Directors on the said resignation letter, and it is mentioned that the decision was taken to request the said B.K. Modi (Opposite Party No. 1) "to continue as Director" of the aforesaid Company in question.

105. It has not been brought on record as to what happened after the said request was made by the Board of Directors of the aforesaid Company in question. As such, in my opinion, it is not possible to come to a definitive conclusion on the basis of the aforesaid two documents that the said B.K. Modi (Opposite Party no. 1) ceased to be a Director of the aforesaid Company in question when he claims to have submitted his resignation letter.

106. Even otherwise, as per the own showing of the said B.K. Modi (Opposite Party No. 1), he was the Director of the aforesaid Company in question till he submitted his resignation letter dated 7.2.1992. As such, in view of the provisions of Sub-section (30) of Section 2 of the Companies Act, 1956, the said B.K. Modi (Opposite Party No. 1) has been an * Officer" of the aforesaid Company in question. Therefore, even if, the version of the said B.K. Modi (Opposite Party No. 1) regarding his ceasing to be a Director of the aforesaid Company in question on submission of his resignation letter on 7.2.1992, is assumed to be correct, still he could be required by the Official Liquidator to submit and verify the Statement of Affairs in view of the provisions of Clause (a) of Sub-section (2) of Section 454 of the Companies Act, 1956.

107. It is evident from the facts narrated above, that the Official Liquidator issued notices, interalia, to the Opposite Party No. 1(B.K. Modi) for filing the Statement of Affairs in terms of Section 454 of the Companies Act, 1956 read with Rule 113 of the Companies (Court) Rules, 1959. Therefore, the Official Liquidator required the said B.K Modi (Opposite Party No. 1) to submit and verify

the Statement of Affairs.

108. Consequently, the said B.K. Modi (Opposite Party No. 1) was liable to submit and verify the Statement of Affairs, as per the provisions of Section 454 of the Companies Act, 1956, notwithstanding his alleged resignation from the Board of Directors on 7.2.1992.

109. The submissions made by Sri Bharat Ji Agarwal, learned Senior Counsel appearing for the Opposite Party No. 1(B.K. Modi) in this regard, cannot, in my view, be accepted.

110. Let us now consider the submission made by Sri Bharat Ji Agarwal that even if the said B.K. Modi (Opposite Party No. 1) was liable to submit and verify the Statement of Affairs, he may be exonerated from the said liability in view of the facts and circumstances of the present case.

111. It is evident from the facts narrated above, as also from the submissions made by Sri S.K.Saxena, Official Liquidator that the Statement of Affairs in respect of the aforesaid Company (in liquidation) has now been filed under the signature of Sapan Kumar Bandhopadhaya, Manager (Accounts).

112. Further, even though it is not possible to come to a definitive conclusion that the said B.K. Modi (Opposite Party No. 1) ceased to be a Director of the aforesaid Company in question with effect from 7.2.1992, it is evident that the said B.K. Modi (Opposite Party No. 1) had submitted his resignation letter dated 7.2.1992 which was placed before the Board Meeting on 26th May, 1992.

113. It is further evident that Form No. 32 was filed by the aforesaid Company in question on 26th May, 1992 before the Registrar of Companies, Kanpur wherein the decision of the Board of Directors requesting the said B.K. Modi (Opposite Party No. 1) to continue as Director, was mentioned.

114. It is further evident that the said Form No. 32 was registered by the Registrar of Companies on 8th September, 1993.

115. It is further relevant to note that in response to the notice dated 28.1.1994 sent by the Official Liquidator, U.P., Allahabad, the said B.K. Modi (Opposite Party No. 1) sent a letter dated 12.2.1994 [Annexure C.A. 3 to the said Counter Affidavit (Paper No. A20)], inter alia, stating that he (B.K. Modi) (Opposite Party No. 1) had resigned from the directorship of the aforesaid Company in question on 7.2.1992, and the requisite Form No. 32 had already been filed before the Registrar of Companies, Kanpur.

116. In my view, having regard to the facts and circumstances mentioned above, it cannot be said that the failure on the part of the said B.K. Modi (Opposite Party No. 1) to submit and verify the Statement of Affairs, as per the requirements of Section 454 of the Companies Act, 1956 was "without reasonable excuse".

117. Hence, in view of the facts and circumstances, the said B.K. Modi (Opposite Party No. 1) is liable to be discharged from his liability for filing and verifying the

Statement of Affairs, as per the requirements of Section 454 of the Companies Act, 1956.

118. As held above, it is true that the aforesaid fact regarding resignation of the said B.K. Modi (Opposite Party No. 1) from the Board of Directors would not absolve him from his liability to file the Statement of Affairs in respect of the aforesaid Company (in liquidation). However, the said fact may be considered for deciding the question as to whether the failure on the part of the said B.K. Modi (Opposite Party No. 1) in filing the Statement of Affairs was "without reasonable excuse", or not.

119. Before parting with the case, it is relevant to refer to the decisions relied upon by Sri Bharat Ji Agarwal in support of his submissions.

120. In The Official Liquidator, High Court of Andhra Pradesh, Hyderabad case (supra), a learned Single Judge of the Andhra Pradesh High Court held as follows (paragraphs Nos. 7, 8, 9, 13 and 15 of the said Criminal Law Journal):

7. Even though the respondent was not a Director on the relevant date, he was a Director of the Company earlier and therefore, I am of the view that he would be attracted by Clause (a) of Sub-section (2) of Section 454 which refers to persons who "have been officers of the Company" also under Sub-section (30) of Section 2 of the Act the expression "officer" includes among others any Director. Therefore, the respondent can be required to submit and verify the statement. The Official Liquidator can require the respondent by himself or obtain the directions of the Court in that regard. Rules 124 and 125 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules") provide for notice by the Official Liquidator and for application by the Official Liquidator to the Court for direction respectively to persons mentioned in Sub-section (2) of Section 454 and they are 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.

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.

Form No. 56 referred to in Rule 125 provides for the manner in which the order of the Court is to be communicated by the Court to the person to whom the direction is given. The time within which the person to whom the direction for

submitting and verifying etc., of a statement of affairs of the company is to submit the same, has to be mentioned. The said order may also require the person to attend on the Official Liquidator at his office at such times as the Official Liquidator may appoint and give him all the information that he required as to the affairs of the Company. When a notice to submit a statement is issued to a person by the Official Liquidator under Rule 124 or when an order is issued in Form No. 56 to a person under Rule 125, such a person is bound to comply with the same and failure to do so would attract him to Sub-section (5) of Section 454.

8. The question that then arises is whether the respondent can be directed to submit and verify a statement as to the affairs of the Company either by the Official Liquidator or by the Court on an application by the Official Liquidator. The respondent contends that he cannot be so directed for three reasons: (i) because he was not a director of the Company within one year before the relevant date; (ii) because he ceased to be a Director of the Company more than 8 years before the relevant date; and (iii) because he neither has intimate knowledge of the affairs of the Company nor has in his possession any assets, books of accounts, papers etc., of the Company and therefore he does not have the wherewithal to submit and verify the statement of affairs of the Company.

9. The respondent is not right in contending that he cannot be called to submit and verify the statement because he was not a Director of the Company within one year before the relevant date. Clause (a) of Sub-section (2) of Section 454 does not specify that those who have been officers of the Company should have been officers within one year before the relevant date : such a limitation is found only in Clauses (b), (c) and (d) of the said Sub-section (2) in respect of persons specified in the said Clauses and the said limitation cannot be extended to persons covered by Clause (a) by any interpretative process. In *P.M.A. Nambudiripad's case* (1979) 49 CompCas 81 : 1979 TAXLR 1640 (Kerala) referred to earlier, an argument was advanced that the use of the present perfect tense "have been" would indicate that unless a person was an "officer" on the relevant date or one immediately preceding that date, he could not be said to "have been an officer", and since persons who were director on the relevant date were obliged to submit the statement even without the Official Liquidator asking for it, Clause (a) should so far as directors were concerned, be confined to such of them who were directors just before the relevant date. The Division Bench of the Kerala High Court in that case rejected that argument relying on the decision of the Supreme Court in *The State of Maharashtra Vs. Vishnu Ramchandra*, and held as follows 1979 TAXLR 1640 (Kerala):

While Clauses (b) to (d) of Sub-section (2) of Section 454 mentioned a period of one year preceding the relevant date as the period during which the persons referred to therein shall have fulfilled the requirements stated therein. Cl. (a) does not specify any such period nor does it refer to any date. There can be no doubt that Clause (a) is comprehensive enough to rope in any person who at any

time was an officer of the Company....

13... In *Official Liquidator, Trimurthy Agro - Chemical Ltd. v. Niranjana Jayantilal Tolia* (1984) 56 CompCas 380 Ahmadi, J. of the Gujarat High Court (as he then was) has observed that:

A mere perusal of Form No. 57 is sufficient to show that the persons required to file the statement of affairs must have intimate knowledge about the host of information sought under this form which runs into several pages.

The learned Judge has also held as follows:-

The expression "reasonable excuse" means an excuse which a reasonable person considers just and acceptable in the circumstances of the case, that is to say which appeals to the reason of a reasonable man. In other words, the excuse must be such as may appear to be probable in the facts and circumstances of the case to a prudent, and not to a gullible person. The evidence on record clearly shows that he did not attend any of the board meetings after March 28, 1974. This was his stand from the very beginning as is evidenced from the telegram sent immediately on receipt of notice under Rule 124 of the Rules. The statement of affairs of the Company has to be filed in prescribed form No. 57. A bare perusal of the form shows that only a person having intimate knowledge about the affairs of the Company would be able to furnish the host of information required thereunder. It is true that the accused could have inspected and did inspect the account books of the Company but a mere perusal of the accounts would not enable him to supply the particulars demanded hereunder. I am, therefore, of the opinion that even if accused No. 3 continued to be one of the directors of the company, he was not in position to submit the statement of affairs in the prescribed form as he had no intimate knowledge regarding the affairs of the company since 1974-75. In these circumstances. I am not inclined to think that the prosecution has proved that accused No. 3 committed a default in complying with the requirements of Section 454 of the Act without reasonable excuse.

In the present case, the Official Liquidator has not placed any material whatsoever to establish even Prima-facie that the respondent is in a position to file the statement of affairs. He has not obtained any directions from this Court by making an application under Rule 125 of the Rules for an order directing the respondent to submit a statement of affairs u/s 454 or concur in making the same, especially when the respondent replied to the notice issued by the Official Liquidator under Rule 124 of the Rules by stating that he ceased to be a Director of the Company more than 8 years prior to the relevant date and did not have any material whatsoever based on which he could submit a statement of affairs. Even assuming that such a direction can be given now in the present application, the Official Liquidator has not placed any material before me to disbelieve the averments made by the respondent in his counter-affidavit dated 10.7.1991 or to establish that the respondent is having the material and information necessary for the purpose of filing the statement of affairs.

15. In the light of the above discussion, 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 as it is not alleged that the respondent committed default in complying with the requirements of Section 454 "without reasonable excuse" and at any rate, nothing is shown to establish that he did not have reasonable excuse for not filing the statement when he has clearly stated in his reply to the notice of the Official Liquidator that he ceased to be a Director eight years prior to the relevant date and he did not have any material whatsoever to submit the statement of affairs of the Company. The Company Application is therefore dismissed.

(Emphasis supplied)

121. The above decision of the Andhra Pradesh High Court, thus, supports the conclusion, mentioned above.

122. In Mother Care (India) Ltd. case (supra), a learned Single Judge of the Karnataka High Court, has held as follows (paragraph Nos. 5, 6, 13 and 14 of the said SCL):

5. Opposing the said application, the Official Liquidator has filed his statement of objections. It is stated in the said objections that the applicant was appointed as a Director on 8.8.1990 and the records maintained with the Registrar of Companies shows that he continues to be the Director; company has not filed Form No. 32 u/s 303 of the Companies Act as required under law. Therefore, it cannot be said that the applicant ceased to be the director of the company. The affidavit of another Director of the Company cannot be relied upon to relinquish any liability of the other Director. Therefore, he has sought for rejection of the said applications.

6. The respondent-company was ordered to be wound up by this Court on 15.11.1999. The Director of the Company who is in-charge of the affairs of the company under liquidation has sworn to an affidavit stating that the applicant has resigned from the Board as per his letter dated 5.7.1995 which was duly accepted on 9.8.1995. But, due to inadvertence Form No. 32 was not filed. The said fact is also clear from the annual report of the Company for the year ending 31.3.1995 where the name of the applicant is not shown. The fetters of the auditor of the Company addressed to the Tax Recovery Officer shows that the applicant ceased to be the Director. It is also evidenced by the certificate issued by the auditors. Under these circumstances, it is clear that the applicant ceased to be the Director of the Company under liquidation from 5.7.1995, the date of resignation letter which was duly accepted on 9.8.1995. Merely because the Company has not riled Form No. 32 as required under law and the same is not registered with the Registrar of Companies it cannot be said that the applicant continues to be the Director of the Company under Liquidation.

13. A reading of Section 454(2) of the Act makes it very clear that the statement of affairs to be made by the Official Liquidator u/s 454(1) is to be submitted and

verified by one or more of the persons who are at the relevant date the directors. Therefore, the relevant date would be the date on which the winding up order is made and it is persons who are on that date directors and who are in charge of the company and its affairs who are expected to furnish the particulars mentioned in 454(1) and if a person has ceased to be a director on that relevant date, there is no obligation cast upon him to furnish the aforesaid particulars contemplated u/s 454(1). Even if a person is not a Director on the aforesaid relevant date in exceptional cases the Official Liquidator can call upon such person who has taken part in the formation of such company at any time within one year before the relevant date to furnish the particulars. Only if a default is committed in furnishing those particulars, the Director would be punishable u/s 454(5) of the Act. Therefore, the intention of the legislature is very clear. After the winding up order, Director on the date of the winding up order commits default in performing his statutory obligation u/s 454(1) of the Act, action may be taken against such director u/s 454(5) of the Act. In exceptional cases even persons who are director one year anterior to the date of the winding up order would be called upon to furnish such particulars But if a person has ceased to be director of the company either on the date of the winding up order or one year before the date of the winding up order then no action could be taken against him u/s 454(5) for non-compliance with Section 454(1) of the Act as there is no statutory obligation cast on such director to comply with the said requirement. If the date of communication of the intention to resign is taken into consideration and if that date happens to be anterior to the winding up order, such director who has resigned is under no obligation to comply with Section 454 of the Act, as such no action could be taken u/s 454(5) and (5A) of the Act.

14. In that view of the matter, in the instant case, the applicant resigned from the Board on 5.7.1995 which resignation was accepted on 8.9.1995. The winding up order was passed on 15.11.1999. Therefore, on the date of winding up order he was not a Director of the Company, as such he was under no obligation to comply with the statutory requirement as contemplated u/s 454 of the Act. Therefore, the action taken by the Official Liquidator against the applicant-Director for non-compliance of Sections 454, 538(1)(a)(b)(c) of the Act is one without jurisdiction and therefore, the same is liable to be ordered to be dropped. Consequently, the applications filed by the applicant for deleting his name are allowed. Hence, I pass the following order:-

The Official Liquidator is directed to delete the name of the third respondent from the application which he has filed for non-compliance with the statutory requirements by the Director of the Company under liquidation. Company applications 610, 611 and 612/2001 are, accordingly allowed.

(Emphasis supplied)

123. Thus, the learned Judge of the Karnataka High Court has expressed the opinion that in case a person has ceased to be a Director of the Company on the date on which the winding-up order is made (i.e., the relevant date), there is no

obligation cast upon him to furnish the particulars contemplated u/s 454(1) of the Companies Act, 1956.

124. The learned Judge has further opined that if a person has ceased to be a Director of the Company on the relevant date (i.e., the date of the winding-up order), but he has been a Director of the Company at any time within one year before the relevant date and has taken part in the formation of such Company then in exceptional cases, such a person can be required to furnish the particulars as contemplated u/s 454(1) of the Companies Act, 1956.

125. It is further opined that if a person has ceased to be Director of the Company either on the date of the winding-up order or one year before the date of the winding-up order, then no action could be taken against him u/s 454(5) of the Companies Act, 1956 for non-compliance with Section 454(1) of the Act, as there is no statutory obligation cast on such Director to comply with the said requirement.

126. The learned Judge of the Karnataka High Court has noticed that the applicant resigned from the Board of Directors on 5.7.1995 which resignation was accepted on 8.9.1995, while the winding-up order was passed on 15.11.1999. Noticing the said facts, the learned Judge has concluded that on the date of the winding-up order, the applicant was not a Director of the Company, as such, he was under no obligation to comply with the statutory requirement contemplated u/s 454 of the Companies Act, 1956.

127. Thus, the learned Judge of the Karnataka High Court is of the view that if a person has ceased to be Director of the Company either on the date of the winding-up order, or within or beyond one year prior to the date of the winding-up order, then such a person is under no obligation to comply with the requirements of Section 454(1) of the Companies Act, 1956, and no action can be taken against such a person u/s 454(5) of the Companies Act, 1956 for non-compliance of Section 454(1) of the said Act.

128. With deep respect for the learned Judge of the Karnataka High Court, I regret my inability to agree with his conclusion.

129. In view of the discussion in the earlier part of my judgment, it is evident that if a person has been a Director of the Company at any point of time, and he has ceased to be so on the relevant date (i.e., the date of the winding-up order), or within or beyond one year prior to the relevant date, still such a person can be held responsible for submitting and verifying the Statement of Affairs in view of the provisions of Section 454(2)(a) read with Section 30 of the Companies Act, 1956.

130. Further, in case of failure on the part of such a person in submitting and verifying the statement of affairs, he can be held liable under Sub-section (5) of Section 454 of the Companies Act, 1956.

131. With deep respect, the question as to whether a person who has ceased to

be a Director of the Company on the relevant date, can be held liable for submitting and verifying the Statement of Affairs as an "Officer" of the Company in view of the provisions of Section 454(2)(a) read with Section 2(30) of the Companies Act, 1956, was not considered in the above decision of the Karnataka High Court.

132. In view of the above discussion, the said B.K. Modi (Opposite Party No. 1) is discharged from his liability for filing and verifying the Statement of Affairs, as per the requirements of Section 454 of the Companies Act, 1956.

133. The aforesaid Application dated 18.5.1998 (Paper No. A-14) and the aforesaid Application dated 14.7.1998 (Paper No. A-20) stand disposed of accordingly.

134. It may be clarified that even though the submissions were made by Sri Bharat Ji Agarwal regarding position of S.K. Modi vis-avis the aforesaid Company in question, I have refrained from expressing any opinion in this regard as the matter of S.K. Modi is not being dealt with by me in the present order.