
(1981) 11 KL CK 0019

In the High Court Of Kerala

Case No : Criminal Complaint No. 1 of 1978 in Company Petition No. 1 of 1976

Official Liquidator

APPELLANT

Vs

Smt. K. Indira and Others

RESPONDENT

Date of Decision : 05-11-1981

Acts Referred:

Companies Act, 1956 — Section 454(5), 454(5A), 633(1)
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1982) 1 ILR (Ker) 465

Hon'ble Judges : S.K. Kader, J

Bench : Single Bench

Advocate : T.V. Ramakrishnan, for the Appellant; M. Ramanatha Pillai, for the 1st and 2nd accused, N. Raghava Kurup, M.S. Narayana Pillai and M.N. Narayana Pillai for the 3rd accused, for the Respondent

Judgement

S.K. Kader, J.—The official liquidator attached to the High Court of Kerala has filed this criminal complaint under Sub-sections (5) and (5A) of Section 454 of the Companies Act, 1956, hereinafter called "the Act", against the three accused persons, who were said to be the directors and manager respectively of Krishna Vilasom Industries (P.) Ltd. (in liquidation), hereinafter referred to as "the company". The company was incorporated on September 20, 1943, with its registered office situated at Krishna Vilasom House, Manikath Road at Ernakulam. On an application filed in Company Petition No. 1 of 1976, by Kamala Devi, this court by its order dated April 7, 1977, appointed the official liquidator attached to the High Court as the official liquidator of the company. An order was passed on Application No. 794/1977, on January 27, 1978, by this court directing the accused herein to file the statement of affairs of the company within four weeks from the date of that order. But in spite of this order, the accused have failed to file the statement of affairs of the company as contemplated u/s 454 of the Act. The default committed by the accused in this regard was without any reasonable excuse and they have thereby committed an offence punishable under Sub-section (5) of Section 454 of the Act. This in brief is the substance in

the complaint.

2. The accused appeared before the court and denied the commission of any offence as alleged. They pleaded that there was no deliberate or wilful default on their part in submitting the statements as contemplated u/s 454 of the Act, that they were not in possession or custody of any of the documents or records relating to the company, that the documents at the material time were in the custody of the court and they bona fide believed that necessary steps will, be taken by the official liquidator to get these documents and make them available to them for preparing statements. They also contended that they had acted honestly and reasonably and they had reasonable excuse for not having filed the statement within the time as directed.

3. In support of the prosecution case P.W.-I, an upper division clerk in the office of the official liquidator, was examined and Exs. P-1 to P-10 were marked. On behalf of the accused the 1st accused as R.W.-I, the 2nd accused as R.W.-2 and the 3rd accused as R.W.-3 were examined and Exs. D-1 to D-10 were marked.

4. The only question that arises for determination in this case is whether the prosecution has succeeded in proving beyond reasonable doubt that the accused persons have committed default in submitting the statement of affairs of the company as contemplated u/s 454 of the Act without reasonable excuse and whether the accused are entitled to be relieved u/s 633(1) of the Act.

5. It was strongly contended by the learned counsel appearing for the accused that the initial burden of proving that the accused persons have failed to submit a statement as required under the Act without reasonable excuse is heavily cast on the prosecution, that they have failed to discharge this burden, that the materials on record clearly show that the relevant records and documents were not in the possession or custody of the accused persons at the material time, that they had no access to the documents at the time when they were directed by this court to file the statements, that the documents and records of the company were not made available to the accused persons for preparing the statement by the official liquidator even after he recovered the same from the court, that no notice also was given to the accused persons about the recovery of the books from the court informing them that the documents are available with him for inspection and preparing statement and, therefore, this is a case where there was reasonable excuse for the accused for their failure to submit the statement.

6. Learned advocate appearing for the liquidator on the other hand contended that although the records and documents were in the custody of the court on January 27, 1978, and thereafter, the accused persons did not make any attempt to get them from the court and, therefore, they cannot contend that they have reasonable excuse for their failure to file the statement. The counsel also contended that the accused have been indifferent throughout and, therefore, they are not entitled to the benefit of Section 633(1) of the Act.

7. Section 454(5) reads:

(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.

8. It is clear from the express words of the above sub-section that mere default in complying with any of the requirements of the section is not an offence punishable under the sub-section. It is only when it is made out that the default was without reasonable excuse that Sub-section (5) can be invoked. The word "default" in Sub-section (5) of Section 454 is qualified and the qualification is that the default must be without reasonable excuse. Under Sub-section (5) of Section 454, before punishing a person thereunder, the court has to give a finding whether the default committed by the person was without reasonable excuse. There is nothing in Sub-section (5) or in Section 454 as a whole which shows or indicates that there is any burden cast on the accused, at that stage, of proving that the accused had reasonable excuse. The important ingredient of an offence punishable under sub-s.(5) of Section 454 is that the accused has committed the default without reasonable excuse. Unless, on the evidence available, the court is in a position to come to this conclusion, the accused cannot be convicted. The question, whether in a prosecution u/s 454(5) of the Act, the burden of proving that the accused had no reasonable excuse for making the default lies upon the prosecution or not, came up for consideration before a Full Bench of the Delhi High Court in *Security & Finance (P.) Ltd., In re* [1974] 44 Comp Cas 499. After an elaborate consideration of the relevant provisions in the Act and similar provisions in the English Act, known as the Companies (Winding up) Act, 1890, the Full Bench, held that in a prosecution u/s 454(5) and (5A) of the Act, the burden of proving that the accused had no reasonable excuse for making the default is on the prosecution in the first instance. This is because it is clear from the plain words in Section 454(5) of the Act that the requirement of the absence of a reasonable excuse is made as essential ingredient of the offence under the section and not an exception to the main provision. In another case which came up before the Delhi High Court in *Official Liquidator, R. S. Motors (P.) Ltd. v. Jagjit Singh Sawhney* [1974] 44 Comp Cas 381, it was held that any excuse that would reasonably suggest that the accused could not comply with the provisions of law is a "reasonable excuse" within the meaning of Section 454(5) of the Act and that if the books of the company were in a state of disorder and a number of records and files were with the police, it would be most difficult for the accused persons to prepare a statement of affairs and that the law does not impose an impossible liability on the directors. It was further held that what one has to see in such a case is whether a reasonable person placed in the same situation as the directors would be able to complete the statement of affairs without reference to the books with the police. I am in respectful agreement with the dictum laid down in the above decisions.

9. I shall now consider the materials on record in the light of the principles stated above.

10. Admittedly, the third accused was not either a director or a manager at the material time and the counsel for the liquidator submitted that he was brought in as an accused on the ground that he was a previous manager. It is not disputed that this company was struck off the Register in the year 1964 and thereafter in Company Petition No. 14 of 1972, the company was restored by this court on 18th June, 1973. As per the directions given by this court the first accused was appointed as director and manager of the company on August 30, 1973, and the second accused became the director by virtue of the decision of the meeting held on May 9, 1975. The third accused was the manager from 1954 to 1964. According to accused Nos. 1 and 2, although they made efforts, they could not get any records or books of the company from the previous manager who contended that he also did not get possession of any of the records of the company. To the notice issued by the official liquidator, a reply, Ex. D-1, was sent by the 1st accused wherein she has stated that she has no books or properties in her custody. Exhibit D-1 is the reply notice sent to Ex. P-1 notice. Exhibit D-2 is the reply given by the third accused to the first accused which shows that the predecessor of the third accused did not hand over any books or property to him and that the company had not conducted any business during the period he was the manager. That there was no business conducted during this period was not disputed. On January 1, 1975, the first accused wrote another letter to the third respondent requesting to hand over the minutes books of the company. Exhibit D-3 is the reply received from the third accused that the minutes books had been taken away by K. Krishna Menon alias Unni and the same were with the advocate. It is not disputed that in the meanwhile proceedings u/s 145 (Cr. PC) was initiated by the local Revenue Divisional Officer and some time in August, 1975, the property of the company, Krishnavilasom House, and the records and books therein were all placed in the custody of the village officer who was appointed as the receiver. The registered office of the company was sealed and was in the custody of the Revenue Divisional Officer. It was on April 7, 1977, that the official liquidator was appointed by this court and the direction issued by this court was on January 27, 1978. It is not disputed that on these relevant dates the records and accounts of the company were in the custody of the receiver appointed by the Revenue Divisional Officer. According to the accused persons, the official liquidator had already been informed of the fact that the relevant records and books of the company were in the custody of the Revenue Divisional Officer, Exhibit P-5 notice sent by the official liquidator calls upon the office bearers of the company to furnish full particulars of the case and the other litigations relating to the company and in which the property and the documents and books of the company have been attached. This supports the contention of the accused that they had already informed the official liquidator of the company about the fact that the records and books were in the custody of the Revenue Divisional Officer. Admittedly, the official liquidator recovered the records and

books of the company from the village officer only on June 13, 1978. Exhibit P-10 is the list of books so recovered by the inspector attached to the official receiver's office. No notice has been issued by the official liquidator after the recovery of the books as per ex. P-10 to any of the accused informing them that the records and books of the company were available with him for inspection and preparation of the statements. In these circumstances, it cannot be said that the prosecution has succeeded in proving that the records and books have been made available to the accused persons for preparing and submitting statements in accordance with the Act. Various particulars have to be furnished in this statement to be submitted under s, 454. Unless the accused have had an opportunity to inspect the records and books carefully and conveniently they cannot prepare and submit a true statement in accordance with the Act. On the evidence, it cannot be said that the accused persons have not made any effort to recover the records and books of the company. Exhibit D-9 shows that a decision was taken at one of the meetings to institute legal proceedings for the recovery of books. Exhibit D-8 shows that a committee was constituted to approach Kamaladevi and her son, Krishna Menon, for recovering the records and books of the company, who were residing in Krishnavilasom House, which was the registered office of the company and who were then in possession of the records and books. The third accused was not a party to the proceedings u/s 145 of the Cr.PC. It may also be noted that the third accused filed a statement of affairs of the company during the pendency of this case and that the other accused also have similarly filed statements. The non-availability of the account books at the relevant date or dates is a reasonable excuse. P.W. 1 has not even gone to or visited the registered office and he has admitted that he cannot say who was in possession of the property of the company at the material time. P.W. 1 also stated that he could not say from whom the village officer got possession of the records and accounts of the company. There is nothing in the evidence of P.W. 1 to show or indicate that any notice or information was given to the accused persons that the records and accounts of the company were available with the official liquidator since June 13, 1978.

11. On due consideration of the entire evidence in this case, it cannot be said that the prosecution has succeeded in proving that the failure to submit the statements are contemplated u/s 454 of the Act, was without reasonable excuse. It cannot also be said that the accused had nor reasonable excuse in this regard. The result is that the accused are entitled to the benefit of reasonable doubt and they are hereby acquitted.