(2010) 04 KAR CK 0174

In the Karnataka High Court

Case No : Company Application No. 902 of 2002 in Company Petition No. 130 of 1999

Official Liquidator of Canbay Polyfilms Ltd. (in Liquidation) APPELLANT

Vs

M.V. Guttedar and Others RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:
Companies Act, 1956 — Section 449, 454, 454 (5), 454 (5A)

Citation : (2010) 156 CompCas 229 : (2010) 103 SCL 373

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : V. Jayaram and K.S. Mahadevan, for the Appellant; Akkamahadevi Hiremath, for Respondent Nos. 1 and 2, Subash, Assts. Rajesh and S.K.M. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

Subhash B. Adi, J.—This company application is filed by the official liquidator u/s 454(5) and (5A) of the Companies Act, 1956, read with Rule 132 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Act and Rules"), inter alia, for taking cognisance of the offence committed by the accused in not complying with the requirement of provision of Section 454 of the Act and to try them for the aforesaid offence, in accordance with the procedure laid down in the Code of Criminal Procedure, 1908 and punish them accordingly.

2. The case of the official liquidator is that the M/s. Canbay Polyfilms Ltd., was ordered to be wound up by order dated April 17, 2002, in a Company Petition No. 130 of 1999 and the official liquidator attached to this Court was appointed as liquidator of the company u/s 449 of the Act. Respondents Nos. 1 to 5 were the directors of the company as on the dates of winding up order and the respondents despite after giving notice as contemplated u/s 454(i) of the Act, have not submitted statement of affairs of the company within twenty-one days from the date of winding up and thereby they have committed an offence

punishable u/s 454(5) of the Act.

3. Respondents Nos. 1, 2, 4 and 5 appeared through counsel and have filed their statement of affairs. Respondent No. 3 though represented by the advocate, but no statement of affairs was filed.

4. Respondents Nos. 4 and 5 have filed statement of affairs, which is produced at exhibit P9. Thereafter the defects were pointed out by the official liquidator as per exhibit P10. The official liquidator had pointed out the defects, for which respondents Nos. 4 and 5 by their reply dated August 28, 2003, produced at exhibit P11, have given their explanation. Respondent No. 2 did not file his statement of affairs within the time stipulated. However, he filed the statement of affairs after this company application is filed, i.e., on November 20, 2007. In view of the objections filed by respondents Nos. 1, 2, 4 and 5, this Court found that the case require consideration and accordingly posted the matter for recording the evidence of the parties.

5. In support of the company application, one Venkatesh, an assistant in the office of the official liquidator attached to the High Court of Karnataka has been examined as PW1. Respondent No. 1 is examined as RW1, respondent No. 2 is examined as RW2, respondent No. 4 is examined as RW3 and respondent No. 5 is examined as RW4. Respondent No. 3 did not choose to lead any evidence. During the course of the evidence, PW1 got marked exhibits P1 to P17 and exhibits D1 and D2 were also got marked in the cross examination of PW1.

6. In the evidence of RW1, no documents were marked. In the evidence of RW2, he has relied on exhibit P15, statement of affairs filed on November 19, 2007. RWs 3 and 4 did not mark any documentary evidence.

7. Learned Counsel for the official liquidator relying on the provisions of Section 454 of the Act, submitted that the company, which was wound up by order dated April 17, 2002. Consequent upon the winding up of the company, the official liquidator was appointed, however, the respondents did not file the statement of affairs of the company in prescribed from along with the affidavits verifying the statements within the stipulated time. Under Clauses (a) to (e) of Sub-section (1) of Section 454 of the Act they were required to file the statement of affairs of the company in time, however, no statement of affairs was filed by any of the director within twenty-one days from the relevant date and even thereafter also and as such the respondents being the directors have committed an offence punishable u/s 454(5) of the Act.

8. In this regard, he has relied on the documents, such as the annual report of the year 1994-95, which is produced at exhibit PI and Form No. 32 issued by the Registrar of Companies, as on September 19, 1991, produced at exhibit P2. A notice issued by the official liquidator to the directors calling upon them to submit the statement of affairs as per exhibit P3 and the acknowledgments, exhibits P4, P5, P6, P7 and P8. Exhibit P9 is the communication from counsel for respondents Nos. 4 and 5 along with the statement of affairs filed on July 14,

2003, with the acknowledgments. Exhibit P10 a notice issued by the official liquidator dated August 11, 2003, calling upon respondents Nos. 4 and 5 to comply with the defects pointed out therein. Exhibit P11 is the reply to the same by respondents Nos. 4 and 5. Exhibit P12 is the letter from respondent No. 1 intimating that he has resigned from the position of director, exhibit P13 another notice from the lawyer on behalf of respondent No. 1. Exhibit P14 is the mahazar, exhibit P15 is a letter from respondent No. 2 along with the statement of affairs submitted on November 20, 2007. Exhibit P16 is the letter from the official liquidator to respondent No. 2 to rectify the defects. Exhibit P17 a letter from the official liquidator to respondent No. 2 again pointing out the defects.

9. Relying on these documents, learned Counsel for the official liquidator submitted that, it is mandatory u/s 454 of the Act that, the director as on the relevant date should submit the statement of affairs of the company as on the date of winding up of the company and they have failed to comply with the same. In this regard, the official liquidator apart from examining PW 1 has produced relevant documents, such as exhibits P10 and P16 showing that the defects have not been complied with by the directors and submitted that the official liquidator is only required to show that the requirement to be complied in terms of Section 454(1)(a) to (e) if they have not been complied by the directors within the stipulated time, it amounts to commission of offence u/s 454 of the Act. He further submitted that the evidence on record clearly establish the case of the official liquidator. He further relied on the evidence of RWs 1 to 3 and submitted that nothing has been produced to show to the contrary, the defence that relevant records were not with the director is not substantiated by any relevant documents. It is further submitted that even assuming that such records were in the custody of KSIIDC, no steps were taken by the respondents to secure those documents and file appropriate statement of affairs. He submits that the statement of affairs is not filed, the requirement u/s 454(1) of the Act having not been complied with and no extension of time is granted, in such circumstances, it does require any further proof. The provisions of Section 454(5) clearly got established by the conduct and also from the evidence and material produced by the official liquidator and submitted that the action been taken in accordance with the provisions of Section 454 of the Act.

10. Learned Counsel appearing for respondents Nos. 4 and 5 vehemently submitted that, the winding up of the company is ordered by this Court on April 17, 2002, whereas the annual report relied upon by the official liquidator pertains to the year 1994-95, which is produced at exhibit PI. He further relied on exhibit P2 and pointed out that the list of directors as shown in September 19, 1991, is taken for the purpose of prosecuting these directors u/s 454 of the Act. He also relied on the cross examination of PW 1 and pointed out that after the statement of affairs was filed by respondents Nos. 4 and 5, which is admitted by the official liquidator in the cross examination, the official liquidator on his own hand filed a Company Application No. 1030 of 2007, inter alia, for deleting respondents Nos. 4 and 5 and thereafter, the said application was dismissed as not pressed. He

relied on the said application and submitted that the official liquidator admittedly had found that there was some delay in filing the statement of affairs of the company by respondents Nos. 4 and 5 and they have not committed any offence and accordingly having filed such application, without any decision got the same dismissed as not pressed. However, the facts remain that the statement made in the application is not denied. In this context, he relied on the cross examination of PW1, wherein PW1 admits, that he is not aware as to who were in the custody of the books of account and the records when he visited the office of the company. He also admits that Company Application No. 1030 of 2007 has been filed for recovery of 11 crores and further admits "It is true that respondents Nos. 4 and 5 have sent the statement of affairs through post which is received on July 14, 2003, which is already marked as exhibit P9. It is true that in the letter dated June 28, 2003, respondents Nos. 4 and 5 have intimated the transfer of Bangalore Registered Office to Mangalore". As on the date of filing of the complaint, respondents Nos. 4 and 5 had not filed the statement of affairs, the complaint was filed on September 10, 2002. "It is true that after filing the complaint, respondents Nos. 4 and 5 have attended the meeting as called by the official liquidator" and further admits that "it is true that the official liquidator has filed Company Application No. 1030 of 2007 before the Hon?ble High Court for deleting the names of respondents Nos. 4 and 5 from the array of the respondents in Company Application No. 902 of 2002 as per exhibit DI", the certified copy of the application, filed under Rules 6 and 9 of the Companies (Court) Rules, 1959.

11. In addition to this, he also submitted that respondents Nos. 4 and 5 apart from filing the statement of affairs have admittedly attended the meeting as and when the official liquidator has called for. He further submitted that respondent No. 5 appointed as the additional director under the provisions of Section 260 of the Act and there is no evidence to show that respondent No. 5 has been continued thereafter. In this regard, he further submitted that respondents Nos. 4 and 5 have also shown a reasonable excuse for the delay in filing the statement of affairs apart from the fact that they never participated in the affairs of the company, they had attended the meeting even though they are not the persons residing in Bangalore and submitted that when respondents Nos. 4 and 5 have shown reasonable cause to excuse, there is no reason for the official liquidator to file an application for action against them.

12. Learned Counsel for respondents Nos. 1 and 2 relied on exhibit P15, letter addressed by respondent No. 2 along with the statement of affairs, inter alia, stating that there was delay in submitting the statement of affairs. It is the categorical case of respondents Nos. 1 and 2 that the records were seized by KSIIDC. In this regard, she also relied on the balance-sheet, of the year 1997-98 to point out that the KSIIDC was also one of the director on account of loan advanced by it and all the records of the company were seized, as the KSIIDC had taken steps for recovery of loan and in this regard the records and the assets were seized. Learned Counsel for respondent No. 2 has relied on exhibit

P15, statement of affairs and submitted that in the statement of affairs filed as per exhibit P15, the name of the first respondent is not shown as the director of the company, and on the date of winding up of the company, respondent No. 1 was not the director. She also submitted that since admittedly the company premises was seized by the KSIIDC and all the records of the company were taken into the custody by the KSIIDC and under these circumstances the statement of affairs was not filed within the stipulated time. Further as per exhibit P15 statement of affairs has been filed. She further submitted that for the purpose of prosecuting u/s 454 of the Act, the annual report of the year 1994-95 has been relied, whereas for the purpose of claim, the annual report of the year 1997-98 has been relied. From the annual report, exhibit PI, she pointed out that even according to the annual report of 1994-95, there were eight directors shown in the list of board of directors. However, only four directors are prosecuted in this application and it is not shown as to why the prosecution has not initiated against other four, in turn respondent No. 5 is added in the list of the respondents in the application even though his name is not shown in the list of directors. She further submitted that, the application u/s 454 of the Act, and the proceeding being criminal in nature, the accusation is required to be proved beyond the reasonable doubt. The evidence of PW 1 do not explain as to why the statement of affairs filed by respondents Nos. 4 and 5 and respondent No. 2 are not in consonance with the requirement of 454(1)(a) to (e). Except referring to the statement and marking, there is no explanation and submitted that the official liquidator has not established the case against these respondents by producing cogent and reliable evidence.

13. In the light of the submissions made by both counsel, it is appropriate to refer to the provisions of Section 454 of the Act:

454. Statement of affairs to be made to official liquidator--(l) Where the Tribunal has made a winding up order or appointed the official liquidator as provisional liquidator, unless the Tribunal 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 realised 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 Tribunal, 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 Tribunal 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 Tribunal.

(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 thousand rupees for every day during which the default continues, or with both.

(5A) The Tribunal 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.

(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, 1860 (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.

14. By reading the above provision of Section 454 of the Act, it makes clear that on winding up of a company, the directors of the said company were required to file the statement of affairs of the company wound up, along with the affidavit. It is necessary to notice that the proceedings u/s 454 are criminal in nature. The procedure prescribed is the summary trial under the provisions of the Code of Criminal Procedure. Section 454(5A) stipulates 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) upon receiving a complaint of facts constituting such an offence and trying the offence itself is in accordance with the procedure laid down in the Code of Criminal Procedure, 1973, for the trial of summons cases by Magistrates.

15. The procedure followed in trying the summons case is stated in Chapter 20 of the Code of Criminal Procedure. Chapter 20 of the Code of Criminal Procedure, which requires accusation and conviction if the accused plead guilty. As otherwise u/s 254 of the Code of Criminal Procedure when the accused has not pleaded guilty the court by taking all such evidence, as may be produced in support of the prosecution case and after hearing the accused and taking into consideration of all the evidence as produced in the defence and in case the evidence referred u/s 254 of the Code is not sufficient, to convict the accused, the court may acquit the accused or if the prosecution proves the accusation, may convict the accused.

16. If the trial is required to be conducted under Chapter 20 of the Code of Criminal Procedure, necessarily the prosecution is required to establish the case against the accused by producing such cogent, clinching and clear evidence. In the light of the provisions of Section 254 of the Code and more particularly Section 454 of the Act, the evidence in this case shows that respondent No. 5 is additional director under the provisions of Section 260 of the Act, the period of additional director is up to the next annual general meeting. Exhibit P2 is the certificate issued in Form No. 32, which disclose the name of the director, but exhibit P2 is dated September 19, 1991, which is absolutely not the relevant date for the purpose of prosecuting the director. The relevant date is the date of winding up of the company and as on the date of the winding up of the company, whoever were the directors, the appointment of manager, secretary or other chief officer of the company, they should file a statement of affairs, but from the evidence of PW1 and the documents produced in support of the same, the official liquidator has relied on the annual report of the year 1994-95 and Form No. 32 of the year 1991. Though these documents are produced, it is not explained in the evidence as to why those documents are relied. There is no document to

show as to who are the directors as on the date of winding up of the company or the appointment of manager, secretary or other chief officer of the company. The list of directors as on September 19, 1991, cannot be construed as a valid list of directors as on the date of winding up of the company. The company was wound up by order of this Court dated April 17, 2002, the list of directors relied by the official liquidator is nearly 11 years prior to the winding up of the company.

17. Section 454(2) refers to the filing of statement of affairs, which shall be submitted and verified by one or mere 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. The relevant date, though not defined, but is explained in Section 454(8) of the Act, 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 winding up order. If that is the relevant date for the purpose of requiring the persons to submit the report, PW1 for the purpose of prosecuting the respondents relied on exhibit PI. Exhibit PI admittedly is annual report of the year 1994-95. It is not in dispute that the relevant date as stated in Section 454(5A) is the date of winding up of the company, i.e., on April 17, 2002. It is not explained as to why the official liquidator has relied on annual report of the year 1994-95. Further, for the purpose of knowing who were the directors, the annual report of 1991 is relied and which discloses that there are eight directors. However, only four directors out of them have been chosen in this case.

18. Apart from this, in respect of respondents Nos. 4 and 5, an application in Company Application No. 1030 of 2007 was filed, wherein a request was made by the official liquidator to delete respondents Nos. 4 and 5. As far as respondent No. 5 is concerned, he has stated that he was an additional director. Thus his period comes to an end with the general body meeting. It is also not disputed that the statement of affairs was filed. Further PW1 in the cross-examination admits that respondent No. 1 was not the director of the company from September 30, 1997 and PW1 has relied on Form No. 32. He also admits that the application was filed for deleting the name of respondents Nos. 4 and 5 and subsequently the application was dismissed as not pressed. As against respondent No. 1 is concerned, he has filed statement of affairs though there is delay in filing, however he has explained the delay. Specific case of respondent No. 2 is that the KSIIDC has attached his properties and seized the properties and all books were with KSIIDC and this fact is not denied by PW1. He has admitted that KSIIDC was one of the directors till winding up and it is not seriously disputed by PW1 as regards to the allegations that the records were with KSIIDC. This is also clear from exhibits P11 and P16, the statement of affairs filed by respondents Nos. 4, 5 and 2. It has also come in the evidence that on January 4, 2008, this Court has passed an order for rectifying the defects by respondents Nos. 4 and 5. These facts are not disputed by PW1.

19. From the evidence on record the official liquidator has not established as to

who were the directors on the date of winding up of the company by producing the relevant documents, nor the defects cured by respondents Nos. 4 and 5 and 2 was not in consonance with Section 454(b) and further respondents Nos. 4 and 5 apart from their evidence, have stated that they had appeared before the official liquidator as and when they were called, and this is admitted by PW1. This circumstance also shows that there was justification for respondents Nos. 4 and 5 in not filing the company affairs statement in time and have shown the bona fides, and reasonable cause to excuse.

20. In case of criminal prosecution, the prosecution is required to prove the charge beyond reasonable doubt, in this case the official liquidator has failed to prove the accusation against the respondents. The material produced is not sufficient to hold the respondents guilty u/s 454 of the Act. In the circumstances stated above, these respondents cannot be held guilty u/s 454 of the Act and accordingly they have to be acquitted. Hence the application is liable to be dismissed.

21. Accordingly the application is dismissed.