
(1974) 01 DEL CK 0013

In the Delhi High Court

Case No : Criminal Original Appeal No. 49 of 1969

Official Liquidator of Security and Finance P. Ltd.

APPELLANT

Vs

B.K. Bedi, etc.

RESPONDENT

Date of Decision : 18-01-1974

Acts Referred:

Citation : (1974) RLR 694

Hon'ble Judges : T.V.R. Tatachari, J;Rajinder Sachar, J;B.C. Misra, J

Bench : Full Bench

Advocate : Mohinder Narain and K.K. Luthra, for the Appellant;

Judgement

Sachar, J.

(1) M/S. Security and Finance Private Limited registered under the Companies Act was ordered to be wound up by this Court and on 20-3-1969 an Official Liquidator was appointed its provisional liquidator. The Official Liquidator filed a complaint on 16-7-1969 under Sections 454(5) and (5A) of the Companies Act, 1956 (hereinafter called the Act) on the allegation that though he had issued notice dated 21-4-1969, calling upon respondent No. 1 to submit before him the statement of affairs of the company but they have neither appeared before him nor have they complied with the notice nor the statement of affairs has been filed nor any reasonable excuse for the non-filing has been given. Accordingly it was prayed that this Court be pleased to summon the accused and punish them according to law. During the pendency of this complaint before the learned Single Judge question arose as to on whom the burden lies to show that there was no reasonable excuse for the respondent for not filing the statement of affairs of the company within the prescribed time. Rangarajan, J. considered that the matter was of great importance which was not only raised in a number of prosecution which are pendings but rather also likely to be raised in future in this Court and referred the following question to the Chief Justice for being referred to the larger bench:

"WHETHER in a prosecution u/s 454(5) of the Companies Act, 1956, the burden of proving that the accused had no reasonable excuse for making the default in respect of which he is being prosecuted lies upon the prosecution?"

This is how the matter has come up before us. As the complaint is still pending and as this bench is only called upon to answer the question referred it is unnecessary to deal with other facts as they are not relevant.

(2) Section 454(1) provides that where the Court has made a winding up order or appointed the Official Liquidator as provisional liquidator, unless the Court in its discretion otherwise order, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the company in the prescribed form.

(3) SUB-SECTION (2) specifies the persons, including the directors, at the relevant date, who are to submit the statement.

(4) SUB-SECTION (3) requires that 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.

(5) SUB-SECTION (4) provides that 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.

(6) SUB-SECTION (5) and (5A) on which the main arguments were raised read as under:

SUB-SECTION(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. Sub-section (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, for the trial of summons cases by magistrates.

(7) SUB-SECTION (8) defines "the relevant date" to mean 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.

(8) It cannot admit of any doubt that the object of Section 454 requiring the person concerned with the company at the relevant time to submit the statement

of affairs is a laudable one and is obviously with a view to facilitate the winding up proceedings by the Official Liquidator by seeing that full information is made available to it in as short a time as possible. It is apparent that the best persons to depose the information, about the assets, debts and liabilities of the company would be the persons dealing with it at the relevant time and the legislature advisedly thought of making it their statutory duty to submit the statement of affairs rather than leave it to the official liquidator to ferret out this information on his own with all the limitations. A similar provision like Section 454 was to be found in the English Act known as Companies (Winding up) Act, 1890. In *Re-The New Par Consols Limited* (1898) (1) Q.B. 573 Lord Russell of Killowen, C. J. referring to Section 7 which provides for statements of affairs to be made out and verified and submitted to the Official Receiver observed:

"IT is perfectly clear that that is an essential part of the proceedings in the winding up an essential part without which the whole machinery of the winding up must be most certainly imperfectIt is clear, upon looking at this section, that the object is to get at the persons who have the information which the Court requires for the purpose of winding up".

(9) Rules, 124 to 133 of the Companies (Court) Rules, 1959, (hereinafter called the Rules), lay down the procedure and the manner in which notice to the persons to submit the statements of affairs and for application to be moved by the Official Liquidator to the Court for an order directing any person to furnish a statement of affairs and the manner of preparation of statement of affairs for the form of the statement of affairs. Rule 128 provides that where any person required to submit a statement of affairs u/s 454 requires an extension of time for submitting the same, he shall apply in the first instance to the Official Liquidator who may, if he thinks fit, give a written certificate extending the time, which certificate shall be filed with the proceedings and where the Official Liquidator refuses to grant an extension of time for submitting the statement of affairs, the person required to submit the statement may apply to Judge in Chambers for extension of time on notice to the Official Liquidator.

(10) Rule 132 casts a duty on the Official Liquidator to report to the Court any default on the part of any person in complying with the requirement of Section 454. Rule 133 empowers the court to dispense with the requirement of Section 454 if an application to that behalf supported by a report of the Official Liquidator showing the special circumstances which in his opinion render such a course desirable is filed.

(11) A combined reading of the Act and the Rules thus shows that ordinarily within 21 days or subject to such extended time as may be granted by the Official Liquidator or the Court not exceeding three months a statement as to the affairs of the company in the prescribed form. has to be filed by the persons concerned. A person requiring extension has to apply in the first instance to the Official Liquidator who may grant him extension and if he refuses to do so he may apply to the Judge in Chamber.

(12) A reference to sub-section (5A) of Section 454 of the Act will show that the Court is to take cognizance of an offence u/s (5) upon receiving a complaint of facts Constituting such an offence.

(13) Section 4(c) of the Code of Criminal Procedures defines offence to mean any act or omission made punishable by any law for the time being in force. For Prosecution to succeed u/s 454(5A) of the Act it will be necessary to prove that the ingredients of offence u/s 454(5) have been established. Now what are the ingredients of offence u/s 454(5) ? The ingredients may be said to be satisfied if it is shown that any person.

(A)without reasonable excuse, (b) makes default in complying with any of the requirements of this Section.

It will be seen that a mere making of default in complying with any of the requirements of Section 454, does not constitute an offence because if that were so, the words "without reasonable excuse" would be redundant. It is apparent that qualification of a default being without reasonable excuse is a necessary constituent of an offence. So far there was not much of difference between two opposite counsel. The dispute arises on the question as to on whom is the onus to prove that a director has made a default without reasonable excuse. Mr. Luthra, the learned counsel for the accused, maintaining that it is on the prosecution, while Mr. Andley, appearing for the Official Liquidator maintains that this onus is on the accused to show that he had a reasonable excuse for making default. Rangarajan J. in his referring order has accepted the contention of Mr. Andley and repressed his view that the burden of proving reasonable excuse for not submitting the statement of affairs will be on the person concerned.

(14) That an offence under sub-section (5) entails penal consequence is clear because that sub-section provides that a person can be punished 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. We were referred to Section 5 of the Act which provides that where the Act enacts that any officer of the company who is in default shall be liable to any punishment or penalty the expression "officer who is in default" means any officer who is knowingly guilty of the default, non-compliance, failure or who knowingly and willfully makes such default for the argument that means read is not excluded for contraventions of the provisions of the Act. That the use of the words "knowingly" or "willfully" are usually used when the legislature wants to introduce the consideration of means read was accepted in *Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs and Others*, . It may also be taken to be well settled that:

"UNLESS the statute, either clearly or by necessary implication rules out means read as a constituent part of a crime an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Absolute liability is not to be lightly presumed but has to be clearly established".

State of Maharashtra Vs. Hans George, . We do not think that the question about means read has any relevance to the matter before us. No guilty mind is involved u/s 454(5). This is because a reference to Section 454(5) itself shows that mere making of default has not been made penal but one which is without reasonable excuse. So the controversy in the present case is not whether even if a person had a reasonable excuse in making the default in complying with the requirement of Section 454, he would be held guilty on the reasoning that there is an absolute liability under the sub-section. The very language of sub-section (5) militates against such a contention. The language being plain it is unnecessary to consider the various circumstances in which means read was held applicable even when the word "knowingly or willfully" were not mentioned or means read was held excluded because of the absence of the use of the word "knowingly or willfully" and also because the object of the statute was such that legislature must have intended to rule out means read and to have created absolute liability. The present is a case where the finding of default being "without reasonable excuse" would have to be given by the court before holding a person guilty; the real question being as to on whom does the onus lie ?

(15) It was not suggested nor indeed could it be that there is any statutory presumption under the Act, nor has the Act in so many words placed burden of proof on the accused to show that he had reasonable excuse to make a default. The language of Section 454(5) also does not make a mere default an offence. Now when sub-section 5A requires the court to take cognizance of an offence under sub-section (5) it is obvious that the court will have to consider whether the various ingredients of offence under sub-section (5) of Section 454 of the Act have been made out or not. The court cannot come to a finding of guilt unless it comes to the conclusion that a person has made the default without a reasonable excuse, Rangarajan, J. however, has expressed his view that the mischief sought to be averted is that the persons in charge of the company's affairs do not fail to furnish the needed information pertaining to the company's affairs in the manner set out above and prescribed by the concerned forms and by the Rules and that it could not be lightly assumed in the whole context that when the object of punishing the defaulting director under sub-section (5A) is to make him submit the statement of affairs an additional burden was intended to be placed on the official liquidator to prove that the persons concerned had no reasonable excuse for not submitting the statement of affairs and did not submit the same as required. He has expressed the view that the very object of the section would be frustrated and the provision would become dead letter if the official liquidator is required to prove absence of reasonable excuse of the default on the part of the defaulting director. No doubt the object of Section 454(1) of the Act requiring the statement of affairs to be submitted by the director is laudable one and no doubt the legislature has also provided that if any default is made by the-Director he would be punishable, yet the legislature has not in its wisdom chosen to so to the extent of making a mere default punishable. It has advisely chosen to specify and qualify that the making of default should be without reasonable excuse. We

think that Rangarajan, J. was presumably influenced by the fact that there are provisions which permit the director concerned to ask for an extension of time if he has not been able to submit the statement of affairs within the prescribed time and Therefore opined that if the default is made burden should be held to be on him to show the reasons and circumstances which prevented him from complying with the requirement. But we feel that to read the provision of sub-section (5) in such a manner would really be to redraft the sub-section so as to lay down that the words "without reasonable excuse" instead of qualifying the word "make default" as was even accepted by Rangarajan, J. would have to be read as an exception to the main provision. Of the legislature to provide that a mere default by the director would be an offence by itself but wanted to provide an exception of reasonable excuse to be proved by the director, if he wanted to absolve himself, nothing would have been easier than by providing a proviso to the main part of the section and in that case 454(5) should have read as :

"IF any person makes a default in complying with any of the requirements of this section he shall be punishable; Provided that if there was a reasonable excuse for making default in complying with any of the requirements of this section no offence would be deemed to have been committed."

(16) Had the sub-section been framed as above, it could legitimately have been argued that all that the official liquidator has to prove is that the default has been committed in complying with the requirements of section 454, and thereafter if director pleads any exception to bring his case within the proviso the burden to prove that would be on him. But the phraseology of the sub-section (5), in our opinion, however, does not support this contention which was accepted by Rangarajan, J. One of the reasons which seems to have weighed with Rangarajan, J. to take this view appears to be the apparent difficulty which may be faced by the official liquidator if he was called upon to show the absence of reasonable excuse. It appears to us that the very provisions which were referred to by the learned Judge requiring the notice to be sent to the concerned director and a provision enabling the director to seek extension from the official liquidator or the Court would show that the burden, if placed on the official liquidator is not onerous or insuperable one. It appears to us as that the official liquidator need only prove that notice was sent to the concerned director to .submit a statement of affairs, that prescribed time has lapsed and that no extension has been sought for from him or from the court and that the necessary books of the company were available for inspection by concerned director. These are facts which are conveniently available to the official liquidator and if he shows these facts prima fade he would have proved that the director has, without reasonable excuse, made the default in complying with the requirements of Section 454. In such a case it would obviously be for the concerned director to prove circumstances to justify his conduct and to show that he had a reasonable excuse in making the default. Support for the contention that the burden of proving that there was reasonable excuse for making a default should be on the accused is drawn by making reference to Section 106 of the Evidence Act which

states that where any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and suggesting that it may not be practicable for the official liquidator to prove anything and further in terms of illustration (a) to Section 106 of Evidence Act the non-filing of the statement of affairs within the time prescribed and the absence of application by accused within the prescribed time shows that he had committed default and that it was for the accused in these circumstances to show that the default by him was for reasonable excuse. We do not see how illustration (a) is applicable to the facts of the present case. Late filing or non-filing of the statement of affairs only shows that a default has been made. By itself it is consistent equally with there being a reasonable excuse as well as there being no reasonable excuse at all. This by itself has no relevancy to the question of onus. The Supreme Court in *Shambu Nath Mehra v. The State of Ajmer* 1956 2 Scr 199 cautioned against invoking section 106 of Evidence Act so as to place the burden of proof on the accused and pointed out that section 106 is an exception to section 101 which lays down that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and referred to illustration (a) which says that if A desires a court to give judgment that B shall be punished for a crime which A says B has committed, A must prove that B has committed the crime and went on to observe :

"THAT S. 106 of the Evidence Act does not abrogate the well established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and S. 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply."

(17) Another reason mentioned by Rangarajan, J. to place burden of proof on the accused is by referring to Section 5 of the Act which defines the expression "officer who is in default" to mean any officer of the company who is knowingly guilty of the default, or non-compliance, failure, refusal or contravention, against the expression used in Section 454(5) as "any person making a default" to show that it gives clue to the intention of the legislature that in the present context it is unnecessary to prove the guilty mind of that person on whom a duty has been cast to submit a statement and that it could not be contended that the onus of proving non-existence of the reasonable excuse is upon the prosecution, because of the obvious difficulty in requiring the official liquidator to prove a negative, namely the absence of reasonable excuse. With respect we are unable to agree. Section 5 of the Act is a definition clause so as to relieve the legislature from every time putting the word knowingly guilty of default, non-compliance, when the expression "officer who is in default" is used in the various provisions of the

Act. We cannot loose sight of the fact that Section" 454(5) uses the words "without reasonable excuse makes the default". When the legislature has itself qualified the default by providing that it should be without reasonable excuse it was obviously unnecessary for it to use the word knowingly guilty of default in this sub-section, because the qualification of default by "without reasonable excuse" itself shows that a mere making of default is not an offence. We also cannot agree that merely because some belief of the other party has to be proved, it is permissible to assume in criminal prosecution that the burden is on the accused. In this connection reference may be made to section 123(4) of the Representation of the Peoples Act, 1951, which makes the publication by a candidate of any statement of fact which is false or which he either believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate as one of the corrupt practices, on proof of which the election of the returned candidate can be set aside. Proof of corrupt practice has to be given" as a criminal trial. It could have been contended that as the requirement is to prove that the returned candidate did not believe the statement to be true or which he believed it to be false, the onus should be on him because those facts would be within his especial knowledge, and the election petitioner should not be asked to prove the negative i.e. the absence of belief of the returned candidate. The Supreme Court, however, in T. K. Gangi Reddy v. M. C. Anjaneya Reddy and others 22 E.L.R. 26 did not accept this approach and observed :

"BURDEN of proof has two distinct meanings viz. (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 deals with the former and Section 102 with the latter. The first remains constant and second shifts. In the present case, the burden of proof, in the first sense ,certainly lies on the first respondent but he has examined himself and has specifically stated in the evidence that he has neither committed the murder nor has he been guilty of any violent acts in his political career. He also placed before the court the circumstances, namely, the situation created by the murder of Narayanaswamy and the possible impact of that murder on the poll which was scheduled to take place in a few days thereafter indicating thereby a clear motive on the part of the appellant to make false allegations against him. A court of first instance or an appellate court is entitled to accept his evidence. If so, the onus shifts on to the appellant to prove those circumstances, if any, to dislodge the assertions of the first respondent. The appellant has failed to put before the court any facts to establish either that the first respondent did in fact commit the murder or any other acts of violence in the past or to give any other circumstances which made him bona-fide believe that he was so guilty. In the circumstances, the court is entitled to say that the burden of proving the necessary facts had been discharged by the first respondent."

Again in Kumara Nand Vs. Brijmohan Lal Sharma, , it was held that the burden of proof is on the election petitioner though it was held to be very light and the

court observed:

"THE burden of proving that the candidate publishing the statement believed it to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise."

(18) In this connection it may be of assistance to refer to Section 10 of the Hindu Marriage Act which enables either party to a marriage to move the court praying for a decree for judicial separation on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately proceeding the presentation of the petition. Explanation to Section 10(1) of the Hindu Marriage Act defines desertion to mean the desertion of the petitioner by the other party to the marriage without a reasonable cause. Dealing with the question as to on whom the burden of proof lies in such cases it was held in *Lachman Utamchand Kirpalani Vs. Meena alias Mota*, :

"IT is settled law that the burden of proving desertion-the "factum" as well as the "animus deserendi"-is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just case".

Their Lordships in the above case accepted that the law in India was the same as laid in *Dunn v. Dunn* (1948)2 Aer 822(6), where in dealing with a petition for divorce on the ground of wife's desertion without just cause, Denning L. J. said:-

"THE fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional burden raised by state of evidence. The burden he (counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of evidence..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal, and indeed it is usually wise for her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

(19) Similarly, in cases u/s 9 of the Hindu Marriage Act which provides for a

remedy of restitution of conjugal rights if either the husband or wife has without reasonable excuse withdrawn from the society of the other, it has been held that the initial burden to prove the allegation on the basis of which such a decree is sought is on the petitioner who comes to the court, See *Ratnaprabhabai Vs. Sheshrao Shankarrao Bhore*, and *Kanna alias Mahalakshmi Ammal Vs. Krishnaswami Achari*, . It will be seen that in none of these cases was it accepted that the onus should be on the deserting spouse either by invoking Section 106 of the Evidence Act on the alleged ground that the facts were especially within her knowledge or on the impracticability of proving a negative by the petitioning spouse. Now it cannot be seriously argued that in a prosecution for an offence u/s 454(5), the complainant will be placed in "an impossible position if the initial burden is placed on it. It appears to us that it is open to the prosecution. with due diligence and with facts available to it to prove that the accused has without reasonable excuse made a default. The relevant date and the time within which the statement as to affairs of the company has to be filed by the director is known to the official liquidator. The fact whether any extension was sought for by the accused and was granted or refused are also equally within his knowledge. The fact whether official liquidator issued notice to the director would also be known to him. All these thus are matters which are ordinarily within the knowledge of the Complainant. If Therefore the prosecution shows that statement as required by Section 454(1) has not been filed within the prescribed time and that no extension has been granted, and that facility for preparation "of statement was available, the same would, if accepted by the court, shift the onus on to the accused to satisfy the court that in spite of these circumstances he had a reasonable excuse for making the default, and to show the circumstances justifying his default. It appears to us that if the distinction between a burden of proof as a matter of law and burden of proof as a matter of evidence, as pointed out in 22 E.L.R. 261 was kept in view, the question of onus of proof in prosecution u/s 454(5) would really present no difficulty and would be automatically resolved on the facts of each case.

(20) We thus do not envisage any practical much less insuperable difficulty in the way of the prosecution if the question of onus of proof in a prosecution u/s 454(5) of the Act is dealt with on the lines indicated above.

(21) Rangarajan, J. made a reference to the judgment of Prakash Narain J. in *Official Liquidator of M/s. Globe Associates (P) Ltd. v. Shri F.C. Mehta* (Cr. O. 17/69) decided on 7-9-1970(9). In that case his lordship referred to the evidence on record and found that the accused had reasonable cause, in not filing the statement of affairs within the stipulated time as the accused had taken the plea that he was ill for most of the time and was cut of touch with the affairs of the company. During the course of the judgment the learned judge observed :

"SO, before a person can be convicted under sub-section (5) and 5(A) the prosecution must conclusively prove that the default is without reasonable cause."

Mr. Andley for the Official liquidator contested this prosecution and Rangarajan,

J. also found himself in respectful disagreement with this view. As we read this observation all that it means is that the initial burden of proving the ingredients of offence when prosecution is launched under sub-Section (5) and (5A) is on the complainant. We do not think that these observations were, in any manner, laying down a proposition of law on onus of proof in a very different form what we have said. To the extent that it lays down that the initial onus will be on the prosecution, it accords with our view, and it is not correct to read it as laying down a stricter test than the one being laid by us. Reference was made to Official Liquidator of M/s. R. S. Motors (P) Ltd. v. Shri Jagjit Singh Sawhney and another (Cr. O. 23 of 1970) decided on 25-9-73 by Kapur, J. (10). In that case also the learned Judge discussed the evidence which was led by the accused to justify his failure to file the statement of affairs and accepting that evidence the learned Judge found that a very limited time was allowed by the C.I.D. Crime Branch and that it was not surprising that the statement of affairs could not be filed within time prescribed by law. The learned Judge also found that the books of account were not available and on that the learned Judge concluded that it could be urged on behalf of the directors that there is a reasonable excuse for not submitting the statement of affairs. As a matter of fact the learned Judge gave a definite finding that there was no material to come to a finding that the excuse of the accused is not reasonable and Therefore it was held that the accused had made out their defense and they had a reasonable excuse for not submitting the statement of affairs within the time prescribed by Section 454(3) of the Act. It will thus be seen that case was decided on its on facts and no question of onus of proof arose.

(22) One of the reasons for departing from well established rules of interpretation that the burden. in a criminal case is always on the prosecution is stated to be the object of the Act which is to force a person concerned to file the statement as to affairs of the company with a view to facilitate the work of the Official Liquidator to be able to manage the company"s affairs well and to realise the amount due and safeguard the assets of the company. No doubt, the object is laudable one. But that by itself is not decisive of the question more especially when the legislature has not specifically placed the burden on the accused or created a statutory presumption and it would not be correct to read this by implication. In Nathulal Vs. State of Madhya Pradesh, it was observed :

".....BUT it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by accessory implication excluded means rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. means read by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated."

(23) We cannot agree that though no statutory presumption has been created nor has statute placed the burden of proof of showing absence of reasonable excuse on the accused, we must nevertheless hold that the onus is on the accused. We have already held that we do not find that if initial onus is on the prosecution, as explained by us, any insuperable difficulties are created or that the object of the statute would be defeated. It is no doubt true as a general proposition of law that if a statute creates an offence subject to exception it is for the accused to bring himself within that exception if he wishes to take advantage of its vide *Ravnolds v. C. H. Austin and Sons Ltd.* 1951 (2) K. B. 135. But in the present case on a plain reading of Section 454(5) which creates an offence the requirement of absence of reasonable excuse" is made an Ingredient of the offence and not an exception to the main provision. Normally, it is for the prosecution to prove each and every ingredient. No exception having been provided in the statute we find no compelling reasons to supply that exception by us. The legislature has not so provided and it is not permissible for this court to recast the statute and provide the same. It may be that considering the necessity of compelling the officers of the company to submit the statement of affairs as to the company the legislature may have made their liability absolute. But the Parliament not having so provided, this Court cannot supply that necessity, as it would be beyond its province. It may also be seen that whenever the legislature wanted to place burden of proof on the accused it has done so clearly vide Section 178A of the Sea Customs Act, 1878 which states that:

"178-A.(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized. (2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf. (3) Every notification issued under sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued."

(24) If Therefore the Parliament wanted that mere making of default would be an offence and that onus was on the accused to show that he had a reasonable excuse for the same, Section 454(5) of the Act would have been differently worded. Admittedly, the legislature has not so provided and we do not find any compelling reasons to imply and place that onus on the accused.

(25) As a result we hold that in a prosecution under Sec. 454(5) and (5A) the burden of proving that the accused without reasonable excuse made a default is on the complainant in the first instance. The question of onus will have to be decided by keeping the distinction between legal burden of proof laid down by law and a provisional burden raised by state of evidence, as explained by us in detail above. The question is answered accordingly. As the matter is still pending the case will now go back to the learned Single Judge for being disposed of in accordance with law and on merits and in the light of the answer given by us.