

(1984) 04 GUJ CK 0034

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1279, of 1979 in Company
Petition No. 37 of 1977

Official Liquidator, Trimurthy Agro-chemical Ltd. (In
Liquidation)

APPELLANT

Vs

Niranjan Jayantilal Tolia and Others

RESPONDENT

Date of Decision : 02-04-1984

Acts Referred:

Companies (Court) Rules, 1959 — Rule 124
Companies Act, 1956 — Section 454, 454(5)

Citation : (1984) 56 CompCas 380

Hon'ble Judges : A.M. Ahmadi, J

Bench : Single Bench

Advocate : R.H. Mehta, for the Appellant; J.G. Shah and K.N. Raval, for the
Respondent

Judgement

1. The facts giving rise to this complaint lodged by the official liquidator under sub-ss. (5) and (5A) of s. 454 of the Companies Act, 1956 (hereinafter called "the Act"), may be stated as under :

Messrs Trimurthy Agro Chemicals Ltd. was incorporated as a private limited company on March 20, 1979, and was, thereafter, converted on May 16, 1973, into a public limited company under the Act. The authorised capital of the company was Rs. 50,00,000 comprising 5,00,000 equity shares of Rs. 10 each; 2,50,000 shares having been issued against the paid up capital of Rs. 24,74,000, the amount of the unpaid calls being Rs. 26,000. The company soon ran into financial difficulties. One of the editors of the company filed a Winding-up Petition No. 37 of 1977. By an order dated October 11, 1978, the company was ordered to be wound up and the official liquidator attached to this court was appointed the liquidator of the company.

2. At all times material to this complaint, the accused were on the board of directors of the company, accused No. 2 being the managing director. On the

appointment of the official liquidator as the liquidator of the company under the winding up order of October 11, 1978, a notice dated November 4, 1978, was issued to the accused calling upon them to submit statement of affairs of the company in the prescribed form, verified by an affidavit; as required by sub-s. (1) of s. 454 of the Act read with r. 124 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules"), framed under sub-ss. (1) and (2) of s. 543 of the Act. After the service of the notice, accused No. 1, by letter dated November 16, 1978, requested for extension of time of three months for submitting the statement of affairs. The liquidator extended the time form time to time up January 31, 1979, but the accused failed to submit the statement of fairs of the company. The liquidator was, therefore, constrained to lodge is complaint of December 20, 1979.

3. Sub-section (1) of s. 454 provides that where the court has made a binding up order or appointed the official liquidator as provisional liquidator, unless the court in its discretion otherwise orders, there shall be made at and submitted to the official liquidator a statement as to the affairs of the company in the prescribed from, verified by an affidavit, and containg the particulars mentioned in clauses (a) to (e) thereof. The use of the orders "there shall be made out and submitted" clearly indicate that the legislature has made it obligatory to file a statement of affairs of the company unless the court in its discretion otherwise directs. Sub-section (2) s. 454 fixes the liability on the persons who were, inter alia, the directors of the company at the relevant date. The "relevant date", according sub-s. (8), means, in a case where a provisional liquidator is appointed, date of his appointment, and in a case where no such appointment is made, the date of the winding-up order. According to sub-s. (3), the statement of affairs must 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. Sub-section (4) makes provision for meeting the expenses for making the statement of affairs. Then comes sub-ss. (5) and (5A) which came to be substituted for the original sub-section (5) by Act 65 of 1960. The said two sub-sections read as under :

"(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 of 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 itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898, for the trial of summons cases by magistrates."

4. (The word "trying" appears to be a misprint for the word "try") Sub-s. (5) provides the punishment in case of default while sub-s. (5A) confers jurisdiction on the winding-up court to try the offence as per the procedure laid down for the

trial of summons cases by magistrates under the Cr. PC, 1898. The Cr. PC, 1898, came to be repealed by s. 484 of the Cr. PC, 1973. Chapter XX of the new Code comprising ss. 251 to 259 lays down the procedure to be followed by magistrates in the trial of summons cases.

5. Rules 124 to 134 concern the filing of the statement of affairs of the company by the persons mentioned in sub-s. (2) of s. 454 of the Act. Rule 124 provides that a notice by the official liquidator requiring any of the persons mentioned in sub-s. (2) of s. 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 of winding-up or the order appointing the official liquidator as provisional liquidator is made. Rule 127 provides that the statement as to the affairs of the company shall be submitted in Form No. 57 to the official liquidator within the prescribed time or within such extended time not exceeding three months from the relevant date. Where any person required to submit a statement of affairs under s. 454 requires an extension of time, rule 128 provides that he shall apply in the first instance to the official liquidator who may, if he thinks fit, give a written certificate extending the time, e. If the official liquidator refuses to grant an extension of time for submitting the statement of affairs, the concerned party may apply to the Judge in Chambers for extension of time on notice to the official liquidator. In the present case, accused No. 1 had sought such extension of time on more than one occasion and the same was extended by the official liquidator finally up to January 31, 1979. Rule 132 enjoins upon the official liquidator to report to the court any default on the part of any person in complying with the requirements of s. 454 of the Act. Rule 133 which has some relevance may be reproduced at this stage :

"133. An application to dispense with the requirements of section 454 shall be supported by a report of the official liquidator showing the special circumstances which, in his opinion, render such a course desirable. Where an order is made dispensing with the requirements, the court may give such consequential or other directions as it may think fit."

6. Admittedly, no such application to dispense with the requirements of s. 454 of the Act was made to the court.

7. Section 251 of the Cr. P.C., 1973, requires that when in a summons case, the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. In view of sub-s. (5A) of s. 454 of the Act, the winding-up court while trying an accused for the commission of an offence punishable under sub-s. (5) of s. 454 is required to follow the procedure laid down for the trial of summons cases by Magistrates. Accordingly, the substances if the accusation was stated to each accused on February 13, 1984, in the form of a charge. Accused Nos. 1, 2 and 4 pleaded guilty while accused No. 3 claimed to be tried. So far as original accused NO. 5 is concerned, since the process could

not be served on him (presumably because he is abroad) the case against him was ordered to be separated by my order dated February 13, 1984. On accused Nos. 1, 2 and 4 entering a plea of guilty, they are liable to be convicted under s. 252 of the Code. However, since accused No. 3 claimed to be tried, the prosecution was directed to lead evidence.

8. The official liquidator, Shri R. R. Gupta, P.W. 1, deposed that after the company was ordered to be wound up on October 11, 1978, his predecessor-in-office had sent registered notices to all the accused persons for filing their statements of affairs of the company in the prescribed form. The notices were served on accused Nos. 1 to 3 while the notice on accused No. 4 was returned unserved. He further deposed that he had received a telegram from accused No. 3 stating that he had not attended any of the meetings of the board of directors for the last three years and had no knowledge regarding the affairs of the company. Under cross-examination, the official liquidator admitted that the minute book disclosed that the accused No. 3 had remained absent at the board meetings, from June 30, 1974. He, however, stated that on each occasion leave of absence was recorded but he was not able to state whether leave of absence was sought by accused No. 3 or was suo motu granted by the other directors. He was also not able to state if the notice of the meeting of the board of directors was sent to accused No. 3 on and after June 30, 1974. He also could not state if accused No. 3 had signed the statement of accounts after 1974-75. He expressed his inability to deny the fact that accused No. 3 remained absent without making a formal request for leave of absence from the board meetings after March 28, 1974. He also could not state if accused No. 3 had applied for his re-election as director after March 28, 1974. He was, therefore, not in a position to state if accused No.3 actively participated in the affairs of the company after March 28, 1974. P.W. 2, Shri H. B. Trivedi, has deposed that in the year 1977 the directors of the company including accused No. 3 were prosecuted under Ss. 162 and 168 of the Act and they had pleaded guilty and were fined for the aforesaid offences. Under cross- examination, he admitted that the plea of guilty was entered through an advocate in the Ahmedabad court and it could have been similarly entered in the other case also. In his statement recorded under s. 313 of the Cr. P.C. accused No. 3 has stated that he did not comply with the requirements of s. 454 because he had not participated in the affairs of the company except for the first few meetings held in Bombay. In other words, according to accused No. 3, he had no knowledge regarding the affairs of the company to be able to submit a statement of affairs in the prescribed form No. 57 as required by sub- s. (1) of s. 454 read with r. 127 of the rules. It may at this stage be mentioned that a mere perusal of Form No. 57 is sufficient to show that the person 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.

9. In order to bring home the guilt against the accused under sub-s. (5) of 454 of the Act, the prosecution must prove that the person required to comply with

the requirements of that sub-section has, without reasonable excuse, committed a default in doing so. Therefore, besides the factum of default in submitting the statement of affairs within the prescribed time, the prosecution must also prove that the default is without reasonable excuse. Both the ingredients, namely, absence of reasonable excuse and the factum of default in complying with the requirements of the section within the prescribed time must be established to sustain a conviction under sub-s. (5) of s. 454 of the Act. Mere default in complying with the requirements of sub-s. (1) of s. 454 is not punishable under sub-s. (5) of that section. If such a view is taken, the words, "without reasonable excuse" would be rendered redundant. It is well-settled that a penal provision must be strictly construed and if two constructions are reasonably possible, the one favorable to the accused must be adopted. The court must always see that the person to be penalised comes fairly and squarely within the language of the statute which makes his act an offence. The language of sub-s. (5) of s. 454 clearly states that a person who without reasonable excuse makes a default in complying with any of the requirements of the section shall be liable to punishment thereunder. Therefore, the prosecution must prove (i) that the accused is one of the persons who is statutorily liable to submit a statement of affairs; (ii) that he was called upon to comply with the statutory obligation; (iii) that the circumstances of the case reveal that he could have filed the statement of affairs if he was minded to do so; and (iv) that he did not comply with the requirements of law within the prescribed period, to hold him liable under sub-s. (5) of s. 454 of the Act.

10. The burden of proving both the ingredients constituting an offence under sub-s. (5) of s. 454 of the Act rests on the prosecution. Unless both the requirements are established, a conviction under the said sub-section cannot be sustained. Now, the expression "burden of proof" has two distinct meanings, namely, (i) the burden of finally establishing the case; and (ii) the burden of introducing evidence to discharge the onus. The former, that is, the statutory burden, never shifts and remains fixed on the prosecution throughout while the latter fluctuates during the course of evidence tendered by the contesting parties in court. The latter burden becomes academic once the evidence concludes. The court is then required to evaluate the evidence as a whole to come to the conclusion whether the prosecution has discharged the former, that is, the statutory burden. If, on the evaluation of evidence, the court comes to the conclusion that both the ingredients of sub-s. (5) of s. 454 of the Act have been established by the prosecution, a conviction can be based on that evidence.

11. In *Security and Finance (P.) Ltd., In re : Official Liquidator, Security and Finance (P.) Ltd. v. B. K. Bedi* [1974] 44 Comp Cas 499, the Full Bench of the Delhi High Court was called upon to answer : "Whether in a prosecution under 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 ?" The Full Bench, after stating the ingredients of the said sub-section, proceeded to observe as under (p. 503) :

"It will be seen that a mere making of default in complying with any of the requirements of s. 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."

12. Dealing with the argument that if the burden of proving absence of reasonable excuse is cast on the official liquidator, it will throw an onerous and insuperable burden on the official liquidator, the Full Bench observed at page 506 as under :

"It appears to us that the official liquidator need only prove that notice was sent to the concerned director to submit a statement of affairs, that the 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 the concerned director. These are facts which are conveniently available to the official liquidator and if he shows these facts *prima facie* he would have proved that the director has, without reasonable excuse, made the default in complying with the requirements of s. 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."

13. The last sentence refers to the shifting of onus, once the balance has tilted in favour of the prosecution on proof of the primary facts indicated by the court. Once the primary facts are proved by the prosecution, the onus shifts to the defence to show that there was reasonable cause for not complying with the requirements of s. 454 of the Act. If the defence fails to discharge this burden, the primary facts proved by the prosecution would be sufficient to hold that the statutory burden which remains constant has been discharged by the prosecution. The view expressed by the Full Bench of the Delhi High Court in the aforementioned case has been accepted by a Division Bench of the Punjab and Haryana High Court in *K. S. Mathura Dass v. State of Punjab* [1977] 47 Comp Cas 467 and the Kerala High Court in *Official Liquidator v. Smt. K. Indira* [1983] 54 Comp Cas 644. These decisions, therefore, support the view that I take and I am in respectful agreement with the view expressed by the Full Bench of the Delhi High Court on the question of burden of proof.

14. The next question is whether the prosecution has proved both the ingredients of s. 454(5) of the Act against accused No. 3. The defence of the said accused is two-fold, namely, (i) he had ceased to be the director of the company as he had absented himself from three consecutive meetings of the board of directors as well as from all the meetings of the board of directors held after March 28, 1974; and (ii) he had not without reasonable excuse failed to comply with the requirements of s. 454 of the Act. I will deal with both these contentions in the order in which I have set them out.

15. Clause (g) of sub-s. (1) of s. 283 of the Act provides that the office of a

director shall become vacant if he absents himself from three consecutive meetings of the board of directors, or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board. Article 116(e) of the articles of association of the company is more or less on the same lines. The evidence to which I have referred earlier shows that the last meeting of the board of directors which accused No. 3 attended was held on March 28, 1974. He did not attend any of the meetings held thereafter from June 30, 1974, and onwards. The minute book of the meetings of the board of directors shows that he had remained absent but there is a note recording leave of absence. The official liquidator could not say if leave of absence was sought by accused No. 3 or was granted by the other directors suo motu without any such request on the part of accused No. 3. Immediately after accused No. 3 was served with a notice to submit a statement of affairs as required under s. 454 of the Act, he informed the official liquidator that he had not attended any of the meetings of the board of directors during the last three years and had no knowledge regarding the assets and affairs of the company. Notwithstanding this telegram, the official liquidator did not seek any orders from the court specifically to prosecute the said accused along with the other directors of the company for non-compliance with the requirements of that provision. The accused has in his statement recorded under s. 313 of the Code stated that except for the first initial meetings of the board of directors held in Bombay he had not attended any of the later meetings. In addition to the said statement, he has also filed a detailed written statement dated March 26, 1984, wherein he says that he hardly attended six meetings in 1973-74 and, thereafter, he remained absent without seeking leave of absence throughout. He also states that he had submitted his resignation from the directorship of the company but he was told that since he had not attended three consecutive meetings of the board of directors, he had ceased to be a director of the company. He has also stated that after 1973-74 he had ceased to take interest in the affairs of the company and was, therefore, not in a position to submit the statement of affairs in prescribed Form No. 57 for want of intimate knowledge about the affairs of the company. From the evidence on record I am inclined to think that after the meeting on March 28, 1974, accused No. 3 did not attend any of the meetings of the company nor did he take leave of absence. It seems that his companion directors made an entry in the minute book granting leave of absence without accused No. 3 seeking the same. Besides, the evidence clearly shows that he remained absent not only from three consecutive meetings of the board but from all meetings of the board held after March 28, 1974, and, therefore, he had vacated the office of the director of the company by virtue of clause (g) of sub-s. (1) of s. 283 of the Act read with art. 116(e) of the articles of association of the company.

16. It was urged by Mr. Mehta, the learned advocate for the official liquidator, that accused No. 3 had sought inspection of the records of the company by his applications dated November 14, 1983, and December 24, 1983, in his capacity

as a director of the company. It is true that in the application of November 14, 1983, he has described himself as a director of the company but not in the application dated December 24, 1983. It must be remembered that he was being prosecuted as one of the directors of the company and, therefore, if he described himself as such, it cannot affect the statutory consequence which had ensued on the operation of clause (g) of sub-s. (1) of s. 283 of the Act. Once he vacated the office of director of the company before the relevant date by virtue of the operation of that clause, it cannot be validly argued by the prosecution that he can still be punished for non-compliance with the requirements of s. 454 of the Act.

17. Even if I am wrong in the conclusion that I have reached on the first count, the contention of accused No. 3 that the prosecution had failed to establish that he had without reasonable excuse defaulted in the compliance of s. 454 must prevail. As stated earlier, the prosecution must prove both the ingredients of sub-s. (5) of s. 454 of the Act to sustain a conviction. There is no doubt that accused No. 3 has not submitted the statement of affairs of the company within the prescribed period. The question is whether he defaulted in filing the statement of affairs without reasonable excuse. The expression "reasonable excuse" means an excuse which a reasonable person considers just and acceptable in the circumstances of the case, that is, 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. That was his stand from the very beginning as is evidenced from the telegram sent immediately on receipt of notice under r. 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 thereunder, 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 a position to submit the statement of 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 s. 454 of the Act without reasonable excuse.

18. That brings me to the question of conviction and sentence of accused Nos. 1, 2 and 4 on their plea of guilty. While pleading guilty, they have filed written statements explaining the circumstances under which they could not comply with the requirements of s. 454 of the Act within the prescribed time. On the last occasion, that is, on March 26, 1984, they filed an additional statement pointing out the extenuating circumstances having a bearing on the question of sentence. The extenuating circumstances mentioned in the first written statement are : (i)

the pendency of letters patent appeal against the winding-up order; (ii) the efforts made for revival during the pendency of the appeal; (iii) the payment of Rs. 25,000 to the Federal Bank Ltd., one of the secured creditors of the company, (iv) the passing away of the company secretary, Shri Vyas, in April, 1981; (v) the filing of the interim statement on November 28, 1978; and (vi) the payment of Rs. 5,000 in court towards costs for adjournments. In the second written statement while restating some of the grounds, the accused have pointed out that (i) they and their family members had contributed a sum of Rs. 4 lakhs towards the share capital of the company; (ii) a further sum of Rs. 2 lakhs was brought as unsecured loan from the relatives and family members of the accused; (iii) the managing director did not draw any remuneration throughout; and (iv) being novices in business, they got into financial difficulties at the take-off stage itself and because of the unreasonable attitude adopted by the Federal Bank Ltd., the crisis aggravated. I have heard the learned advocate, Shri J. G. Shah, for the said accused on the question of sentence. Shri Shah submitted that the ends of justice would be met if a warning or admonition is administered to the accused.

19. In the first place, the pendency of the appeal in which no stay was granted against the operation of the winding-up order did not entitle the accused to think that they were absolved of their statutory obligation under s. 454 of the Act merely because they hoped to succeed in the appeal. There was no valid reason to wait after the extended time was over on January 31, 1979. The appeal was dismissed for default on February 16, 1981, and even thereafter no attempt was made for having it restored to file. This shows total indifference. The Federal Bank forfeited the sum of Rs. 25,000 because the accused were not able to honour their commitments. They had ample time to get the statement of affairs prepared even before Shri Vyas expired. The interim statement filed on November 28, 1978, was under r. 130 of the rules and had nothing to do with the statement of affairs of the company. The payment of costs in court became necessary because the accused sought time on one pretext or the other for filing a statement of affairs to minimise their liability for payment of fine. The trial could not begin because the accused sought time on one ground or the other and in order that they may realise the urgency, costs had to be imposed because the complaint was pending since 1979. The conduct of the accused during the pendency of the complaint was far from satisfactory. Bailable warrants had to be issued on more than one occasion and accused No. 2 even jumped bail and his surety had to pay the price for the same. His presence could be procured only after a non-bailable warrant was executed, not without difficulty. It was in these circumstances that orders for costs had to be passed from time to time. The investment of Rs. 4 lakhs towards the share capital and Rs. 2 lakhs during the pendency of the liquidation proceedings is partly by the accused and partly by their friends and relatives, that everyone desiring to float a company must bring in some capital and, therefore, it is not unusual that the accused and their friends and relatives brought in a sum of Rs. 4 lakhs towards the share capital.

The Legislature has for good reason prescribed the period within which the statement of affairs should be filed. It has not permitted even the court to extend the time beyond three months. The basic idea is that the particulars regarding the assets and liabilities of the company which has been ordered to be wound up or in respect of which a provisional liquidator is appointed are placed on record promptly so that the liquidator may be in a position to take necessary action to protect the interests of all concerned. The very laudable object and purpose of the statute would be frustrated if the exdirectors and officers of the company do not file the statement of affairs within the prescribed period. The fact that subsequently the accused brought in a sum of Rs. 25,000 and Rs. 2 lakhs in the hope of reviving the company must be borne in mind while deciding the question of punishment. I am, however, not inclined to think that this is a case in which the ends of justice would be met if the accused are merely admonished. That would in fact be a mockery of justice.

20. The punishment provided u/s 454(5) of the Act is two years of fine at the rate of rupees one hundred for every day during which the default continues or with both. In the present case, the default continued from February 1, 1979, till the date of the filing of the statement of affairs in September, 1983, that is, four years and six months. The fine for this entire period calculated at Rs. 100 per diem would run into thousands of rupees. Taking an overall picture and the young age of the accused into consideration, I do not think that too strict a view need be taken although the conduct of the accused during the course of the trial was none too satisfactory.

21. For the above reasons, I convict accused Nos. 1, 2 and 4 under sub-s. (5) of s. 454 of the Act and direct each of them to suffer simple imprisonment for three months and to pay a fine of Rs. 5,000 and, in default, to suffer further simple imprisonment for three months. Their bail bonds will stand cancelled after three weeks. So far as accused No. 3 is concerned, he is acquitted. His bail bond will stand cancelled. Warrants to issue after three weeks against accused Nos. 1, 2 and 4.