
(2004) 04 AP CK 0025

In the Andhra Pradesh High Court

Case No : CA No. 1012 of 2002 in CP No. 67 of 1999

Sunrise Oleo Chemicals Ltd.

APPELLANT

Vs

M.U.S. Rao and Others

RESPONDENT

Date of Decision : 21-04-2004

Acts Referred:

Companies Act, 1956 — Section 454(5), 454(5A)

Citation : (2004) 4 ALD 657 : (2004) 122 CompCas 519 : (2005) 59 SCL 341

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : M. Anil Kumar, Official Liquidator, M. Chandanamuthu, Official Liquidator, for the Appellant; P.V. Ramu Raju, for the Respondent

Judgement

T. Ch. Surya Rao, J.—The official liquidator representing M/s. Sunrise Oleo Chemicals Limited which is in liquidation, filed a complaint u/s 454(5) and (5A) of the Companies Act, 1956 (for short "the Act").

2. It is alleged inter alia that, by an order dated 29-3-2001 in Company Petition No. 67 of 1999, M/s. Sunrise Oleo Chemicals Limited was directed to be wound up and the Official Liquidator attached to the Company Court was appointed as Liquidator thereof. Pursuant to the said orders, he took possession of the factory premises on 2.6.2001 and deputed one of his officials to inspect the registers pertaining to the Company in question. When it revealed names of the accused herein as Ex-Directors of the Company, he sent notices by means of registered post with acknowledgement due to them, calling them upon to file the statement of affairs pertaining to the Company. The notices were served upon Accused Nos. 2 to 5. However, Accused No. 2 informed him by reply letter dated 1.6.2001 that he resigned from the Directorship of the Company with effect from 2-10-1998. Accused No. 3 replied by his letter dated 1-6-2001 that he was only a Professional Director and had not taken any remuneration from the Company, and had not involved himself in day to day affairs of the Company, and that he resigned from the Company by filing Form No. 32 with the Registrar of

Companies. Accused No. 5 replied by his letter dated 1-6-2001 that he was Honorary and Non-Executive Director of the Board of Directors of the Company and that he too resigned with effect from 18-3-1997.

3. It is further alleged in the complaint that Ex-Directors of the Company were required to file the statement of affairs, furnishing the required details in the prescribed form, within 21 days from the date of winding up order or within such extended time not exceeding three (3) months from the relevant date i.e., date of winding up order, and that the accused failed to file the statement of affairs with the Official Liquidator, thereby rendered themselves liable for the penal consequences under Sub-sections (5) and (5A) of Section 454 of the Act.

4. Summonses were sent to Accused Nos. 1 to 5 after taking the complaint on file. Accused No. 1 appears to be at large Accused Nos. 2 and 3 appeared before this Court through their Counsel. Accused No. 4 expired during pendency of the proceedings. Therefore, the proceedings against him stand abated. Accused No. 5 too has not been served. The case against Accused Nos. 2 and 3 has thus been directed to be split up. Thereafter, they have been examined u/s 251 of the Code of Criminal Procedure, 1973 by putting the substance of accusation to them. Both of them have pleaded not guilty and claimed to be tried,

5. On behalf of the complainant, one witness was examined and Exs.A1 to A8 were got marked. Thereafter, the evidence on behalf of the Company was closed. The accused were examined u/s 313 of the Code of Criminal Procedure, 1973 and they denied the incriminating material put to them.

6. Arguments have been heard on either side.

7. The only point that arises for determination in this case is, whether there has been non-compliance of the notice got issued by the Official Liquidator calling upon both the accused to file the statement of affairs in accordance with the provisions contained in Section 454 of the Act.

8. There is nothing much to appreciate the oral evidence on the point, PW1, who is one of the Senior Technical Assistant in the office of the Official Liquidator, deposed only with reference to the records, but claimed no personal acquaintance with the matter. It is expedient at the outset to have a glance at the provision, which is germane in the context for consideration. Section 454 of the Act, which is the relevant provision, reads as under :

Section 454 :

(1) Where the Court has made a winding up order or appointed the Official Liquidator as provisional liquidator, unless the Court in its discretion otherwise orders, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the company in the prescribed form, verified by an affidavit, and containing the following particulars, namely :

(a) the assets of the company, stating separately the cash balance in hand and

at the bank, if any and the negotiable securities, if any, held by the company;

(b) its debts and liabilities;

(c) the names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts; and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be 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 Court, may require to submit any verify the statement, that is to say, persons--

(a) who are or have been officers of the company;

(b) who have taken part in the formation of the company at any time within one year before the relevant date;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are, in the opinion, of the Official Liquidator, capable of giving the information required;

(d) Who are or have been within the said year officers of, or in the employment of, a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty one days from the relevant date, or within such extended time not exceeding three months from that date as the Official Liquidator or the Court may, for special reasons, appoint.

(4) Any person making, or concurring in making, the statement and affidavit required by this section shall be allowed, and shall be paid by the Official Liquidator or Provisional Liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the Official Liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, makes default in complying with any of the requirements of this section, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one hundred rupees for every day during which the default continues, or with both.

(5A) The Court by which the winding up order is made or the Provisional Liquidator is appointed, may take cognizance of an offence under Sub-section (5) upon receiving a complaint of facts constituting such an offence and trying the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (5 of 1898), for the trial of summons cases by magistrates.

(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.

9. Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence u/s 182 of the Indian Penal Code (45 of 1860); and shall, on the application of the Official Liquidator, be punishable accordingly.

10. 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.

11. A perusal of the said provision shows that the Directors of a Company or a person, who at the relevant date, is Manager, Secretary, or other Chief Officer of the Company, or other persons who in the view of the Official Liquidator have been Officers of the Company, or have been taken part in the formation of the company at any time within one year preceding the relevant date, or have been in the employment of the company within the said year, or capable of giving information required by the Official Liquidator in his view, or within the said year, was an Officer of the Company, or in the employment of the Company, they are obliged to file the statement of affairs of a Company, within 21 days from the relevant date or within such extended time not exceeding three months from the relevant date. If without any reasonable excuse, such persons who have been called upon to file the statement of affairs commit default in complying with any of the requirements of the section, they render themselves punishable with imprisonment for a term which may extend to two years, or fine which may extend to one hundred rupees for every day during which the default continues or with both.

12. It is further obvious that the persons can show the reasonable excuse for not being able to comply with the notice issued to them. Here is a case, where both the accused pleaded even earlier to the filing of the complaint by the Official Liquidator, by giving a reply notice that they resigned from the Company long prior to the relevant date i.e., the date of winding up of the Company by an order of the Court and therefore, they are not in a position to supply the necessary information as regards the statement of affairs of the Company.

13. The first accused in this case is the Ex-Managing Director and according to the Accused Nos. 2 and 3, he is the person who can file the statement of affairs giving necessary information to the Official Liquidator for proceeding with the administration of the assets and liabilities of the Company. At the time of

examination of the accused u/s 313 of the Code of Criminal Procedure Code, 1974, certain documents were filed on behalf of the Accused No. 2. The documents that have been filed include the Articles of Association of the Company, office copy of the resignation letter dated 1-10-1998 by Accused No. 2, office copy of the reply letter dated 1-6-2001, office copy of the resignation letter dated 5-8-2000 addressed to the Registrar of the Companies while enclosing the office copy of the resignation letter submitted to the Managing Director and Form No. 32 issued by the Registrar of the Companies. The Articles of association enable the directors to tender resignation. The other documents show that way back on 1-10-1998 Accused No. 2 tendered his resignation by addressing a letter to the Managing Director on account of his personal grievance. He further addressed a letter dated 5-8-2000 to the Registrar of the Companies setting forth inter alia the same grievance and the factum of tendering resignation, while enclosing therewith the office copy of the resignation letter sent by him to the Managing Director of the Company. It appears that the same has been duly incorporated in the Register of the Company. Form No. 32 is the extract of the Register, which shows that the change has been made with effect from 1-10-1998 in the Registers of the Company, insofar as Accused No. 2 is concerned. Therefore, it is obvious that the resignation came into effect on 1-10-1998.

14. Similarly Accused No. 3 addressed a letter dated 15-4-1995 submitting his resignation, as he intended to go abroad. This letter has been addressed to the Managing Director of the Company. It is not known whether the same has been forwarded to the Registrar of the Company and has been duly incorporated in the registers of the Company. The other accused appears to have disassociated himself with the affairs of the company since then and so he is not aware of the state of affairs of the Company since then. Having regard to the above statement of affairs, it is to be seen whether both the accused, or, either one of them have/has acted contrary to the provisions of Section 454 of the Act

15. The learned Counsel appearing for both the accused seeks to place reliance upon the judgment of this Court in the case of The Official Liquidator, High Court of Andhra Pradesh, Hyderabad Vs. Koganti Krishna Kumar, . A learned Single Judge of this Court while reviewing various provisions contained in the Companies Act, including the one which is germane in the context for consideration, was of the view that the Official Liquidator has to prove the alleged contravention and should make out the case by placing material to establish that the accused was in a position to file the statement of affairs, which he could not place. Even other wise, as discussed herein above, Sub-section (5) of Section 454 makes it clear that any person, who is called upon to produce the statement of affairs, without reasonable excuse makes a default, then he is liable for the penal consequences. The expression "without reasonable excuse", will make it obvious that the person called upon to produce the statement of affairs can show a reasonable cause for not complying with the request. The position per se of that person in the Company is not the only criterion but his ability to

produce the statement containing the statement of affairs of the Company is the sine quo non. In the instant case, Accused No. 2 resigned from the Company way back in the year 1998, Accused No. 3 is said to have resigned from the Company way back in the year 1995. Although, Form No. 32 has not been produced by Accused No. 3, the uncontroverted fact reveals that he went abroad and on that ground alone, he resigned from the Company. Obviously Accused No. 1 in the case, whose case has been split upon account of his non-appearance before this Court, was the Managing Director of the Company.

16. In that view of the matter, it cannot be said that both the accused having been able to furnish the necessary details or the statement of the affairs of the Company committed default.

17. For the foregoing reasons, it cannot be said that the Official Liquidator is able to make out a case that both the Accused Nos. 2 and 3 committed default in filing the statement of affairs, having been compelled under law to file the same. Therefore, they cannot be made liable for penal consequences.

18. In the result, the complaint against Accused Nos. 2 and 3 fails, and I find both of them are not guilty of the alleged contraventions. Therefore, Accused Nos. 2 and 3 are acquitted of the offence punishable under Sections 454(5) and (5A) of the Companies Act, 1956.