

(1989) 12 DEL CK 0021

In the Delhi High Court

Technical Consultancy House Private Ltd.

APPELLANT

Vs

Kuldip Raj Narang and others

RESPONDENT

Date of Decision : 12-12-1989

Acts Referred:

Citation : (1989) 66 CompCas 410

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Judgement

D.P. Wadhwa, J.—M/s Technical Consultancy House (P.) Ltd., the company, was ordered to be wound up by order dated October 20, 1978 (O.P. No. 74 of 1977). This was on a creditor's petition filed u/s 439(1)(b) of the Companies Act, 1956 (for short "the Act"), on the ground that the company was unable to pay its debts (section 433(e)). The company was incorporated on November 24, 1971, and was established with the object of providing technical consultancy to companies. The company had various other objects also.

2. On making of the winding-up order, the statement of affairs was to be filed as required u/s 454 of the Act. This was not done within the prescribed time and the official liquidator, Therefore, as a complainant, filed the present complaint u/s 454(5) of the Act. This sub- section (5) is 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."

3. There are three accused. The case against accused No, 2 was separated and the present complaint, Therefore, proceeded only against accused No. 1, Kuldip Raj Narang, and accused No. 3 Moka Singh. In the complaint, it is mentioned that on the passing of the winding-up order, the complainant came to be in charge of the affairs of the company and that he caused the registered office of the company and the records of the company maintained in the office of the

Registrar of Companies, Delhi, to be inspected. A visit to the company's registered office at 3, Cavalry Lines, Delhi, showed that those premises were used by "The Narang Group of Industries" which appeared to be the proprietary concern of Kuldip Raj Narang as the head. An inspection of the records in the office of the Registrar of Companies showed that accused Nos. 1, 2 and 3 were the directors of the company at the relevant date. The complainant called upon the accused to submit the statement of affairs as required and for this purpose he sent notices dated November 18, 1978, and January 25, 1979, addressed to all the accused. In his reply dated January 25, 1979, addressed to all the accused. In his reply dated November 29, 1978 (exhibit OW 3/1), accused, Kuldip Raj Narang, said that he was on the board of the company but for the last about two years he had not received any notice calling the board meeting and as such he had not attended any meeting of the board held during that period. It was also mentioned that he was out of India for about 11 months and that when he came back in March, '978, he could not find any trace of the office of the company. He further said that he was not in possession of any money, property, books of accounts or any other paper or document of the company. He said he understood that all the books of account and other documents were in the possession of A. P. Sehgal, a director of the company who had since expired. Narang, Therefore, said that he was not in a position to submit the statement of affairs as required in the notice of the complainant. Narang was summoned to appear before the complainant and his statement under rule 130 of the Companies (Court) Rules, 1959 (for short "the Rules"), was recorded. This statement, however, did not advance matters as far as the complainant was concerned. Narang was unable to say where the records were or who were the former employees or the auditors of the company or in which bank the company had an account. It is further mentioned in the complaint that it appeared that some time in 1975, accused T. P. S. Randhawa, A. P. Sehgal and Mogan Singh, were inducted into the board of directors of the company. A. P. Sehgal is stated to have died and the notices sent to the other two accused, Randhawa and Mogan Singh, were returned respectively with the postal remarks "left India" and "out of station". The complainant also issued a show-cause notice to the directors before filing the complaint and only Narang acknowledged the same but failed to comply with that. The complainant, Therefore, says that the accused failed, without reasonable excuse, to file a statement of affairs as required and that the complainant is unable to carry on the liquidation proceeding. He says it was the duty of the former directors to file the statement of affairs and having failed to do so, they are guilty of an offence punishable u/s 454(5) of the Act.

4. The court took cognizance of an offence and summoned the accused. On notice being issued to them on May 16, 1983, u/s 251 of the Code of Criminal Procedure, 1973, the accused pleaded not guilty. Thereafter, evidence of the complainant was recorded. Meanwhile and prior to the issue of the aforesaid notice, an opportunity was granted to the accused to file a statement of affairs. In this connection, reference may be made to the order dated April 15, 1981. It

appears that a statement of affairs was in fact filed by the accused Narang on or about September 6, 1982, but it was defective in many ways and did not fulfill the requirements of the section or rule 127 of the Rules. It did not give the names of the creditors or the auditors of the company. The complainant took time to send a formal requisition to the accused for further particulars. The matter rested at that.

5. In support of his case, the complainant examined three witnesses, The first witness is S. M. Talwar, an upper division clerk from the office of the Registrar of Companies, New Delhi. He said that the latest annual return of the company was for the period ending September 30, 1976, but this could not be registered because of certain objections raised by the office. He said that as per this return, there were four directors of the company, namely, the three accused and A. P. Sehgal. The last annual return which was taken on records was for the year ending May 25, 1974, and that showed three directors, namely, Kuldeep Raj Narang, A. P. Sehgal and Vijay Lal. A form No. 32 dated May 22, 1975, filed on record by the company showed that accused, T. P. S. Randhawa, and Mookan Singh were taken as additional directors of the company. The record brought by this witness, however, did not show whether Mookan Singh was elected as director by the general body of the shareholders or whether he was co-opted. The witness was unable to say if Mookan Singh had signed any balance-sheet, profit and loss account or any other document in the record brought by him. A copy of form No. 32 which is dated December 20, 1971, was brought on record. It showed that the accused, Narang, was appointed director (organisation) and A. P. Sehgal was appointed director (finance) and they were both so appointed as per the articles of association of the company. There were directors since the inception of the company. There was no balance sheet of the company in the records of the Registrar of Companies after 1073. The annual return which was made up to May 25, 1974, was delivered for filing by A. P. Sehgal. The annual return made up to September 30, 1976, which was lying under objections was also delivered for filing by A. P. Sehgal. Another annual return made up to June 30, 1975, was delivered for filing by one J. K. Lal secretary of the company. It was also lying under objection. The profit and loss account for the year 1975-76 was lying under objection along with the balance-sheet and it was signed by the accused T. P. S. Randhawa. The name of the other person who had also signed could not be deciphered by the witness. The profit and loss account for the year 1974-75 was not filed. The witness, S. M. Talwar, denied that it was A. P. Sehgal who was responsible for the day-to-day affairs of the company. I may also note here that the winding-up petition (O. P> No. 74 of 1977) was filed on October 18, 1977, and the affidavit in answer to show cause why the petition be not admitted was filed by T. P. S. Randhawa on behalf of the company.

6. The second witness of the complainant is V. N. Sharma, a technical assistant in the office of the official liquidator. He referred to the issue of notices requiring the directors of the company to file the statement of affairs and for handing over the records and assets of the company. Since notices remained uncompleted

with, the present complaint came to be filed. He said that during the pendency of these proceedings, a statement of affairs was filed but that was defective and it was prepared from the bank accounts of the company and not from the account books. The witness said that the account books were with the directors and they had not surrendered the same to the complainant. He said in the statement of affairs that the names of the banks, account numbers, etc., had not been mentioned and that other details were also incomplete. He said that in one of the columns of the statement of affairs, it was mentioned that an amount of Rs. 5,55,645.68 was due to the creditors but the names and particulars of the debts due were not given. Similarly, no details of trade debtors, loans and advances were given. According to the witness, the official liquidator thus had no details of the creditors, loans advances, etc., of the bank and it was not possible to trace them from the statement of affairs. He said a letter dated February 26, 1983, was written by the official liquidator requiring the directors to file a revised statement of affairs and to remove the defects. Though a list of creditors was attached with the statement of affairs, their addresses were not mentioned. He said that as per the record of the Registrar of Companies, accused, Narang, was a director of the date of the winding-up order, but he said he could not say as to what were the functions of the accused Narang. He also could not say what were the functions performed by A. P. Sehgal. The letter dated February 26, 1983, which the official liquidator sent was exhibit R-1. This letter was not addressed to the accused Mokan Singh, as the statement of affairs was filed only by the accused, Narang. This witness could not say whether the accused, Mokan Singh, was co-opted as alternate director of the company in 1975 or whether he did not participate in the management as well as other affairs of the company.

7. The third witness of the complainant is V. P. Verma, assistant official liquidator. He stated that the accused, Narang, was summoned to the office of the official liquidator for examination under rule 130 of the Rules, but the accused Narang, however, wanted questions in writing which were given to him and he later replied to them in writing. This witness referred to notices being issued to the directors of the company requiring them to file the statement of affairs and also about the filing of a defective statement of affairs by the accused Narang. When cross-examined by accused No. 1, the witness said that the official liquidator was not in possession of the account books, bills, vouchers and minute books of the company as these were not filed with him. He said that as such there was no question of the official liquidator asking Narang to inspect those documents. The witness said that he could not say whether the accused, Narang, was not in-charge of the day-to-day affairs of the company or whether he was not in possession of the account books, vouchers, minute books, etc. He said that he did not know in whose possession the entire record of the company was kept and he also could not say if A. P. Sehgal was the finance director. He said that the accused Narang was a director of the company on the date of its winding up. This, he said, was on the basis of the records of the Registrar of Companies.

8. Statements of the accused Narang and Mokan Singh were recorded u/s 313 of

the Code of Criminal Procedure. In this statement, Narang said that he was not a director of the company on October 20, 1978, the date of its winding up. He said he remained a director from the inception of the company until he left India for Berkeley in the year 1977. He said he did not file the statement of affairs within the time prescribed because he was not in charge of the conduct of the affairs of the company at the material time and he remained out of India from 1977 to 1978 and could not have, Therefore, submitted the statement of affairs, He said he did submit a statement of affairs after the institution of the present proceedings. The accused, Moka Singh, said that he was not a director of the company on the date of its winding up and, Therefore, the question of his submitting the statement of affairs did not arise.

9. The accused also appeared as witnesses in their defense. In his statement recorded as DW-1, the accused Narang said that he left for Berkeley United States, in the end of March, 1977, on a teaching assignment and returned in the first week of February, 1978. He said A. P. Sehgal was the managing director of the company and he left the country while the accused Narang was abroad and that A. P. Sehgal died in Nairobi. The accused said that he was director (organization) of the company in terms of its articles. In this connection, he referred to form No. 32 filed by the company which was registered in the office of the Registrar of Companies on January 14, 1972. A "certified copy" of this form No. 32 has been brought on record. The accused Narang deposed that he did not look after the financial matters or the maintenance of books of account at any material time and these were being looked after by A. P. Sehgal who, he said, was a chartered accountant. He said he did not know to whom Sehgal handed over charge when he left for Nairobi. He also said that A. P. Sehgal and T. P. S. Randhawa were the two active directors of the company at that time and the accused Narang said that he presumed that Sehgal had handed over charge to T. P. S. Randhawa. He narrated the circumstances under which he got the statements of affairs prepared in the absence of the records. He said he got the accounts reconstructed from the bank records. He said the official liquidator did not inform him that the books of account and other records of the company were available with the official liquidator. In his cross-examination, he said that he was not ousted from the management of the company "in the sense that I was free to participate in the conduct of its affairs, if I chose to do so."

10. The accused, Moka Singh, in his statement said that he was elected as an alternate director of the company some time in 1975 and that that election was, however, not confirmed in any general meeting of the company. He said he did not take any part in the conduct of the affairs of the company and that he was elected director only because his tenanted premises were being used by the company. He said that as far as he knew the relevant record of the company was in the possession of the other two directors, Sehgal and Randhawa. In his cross-examination, he denied the suggestion that his appointment as a director of the company was in fact confirmed in the board meeting of the company. He said he became aware of form No. 32 filed by the company showing him as an alternate

director only during the pendency of these proceedings. He said he was never aware of any such form No. 32 having been filed earlier.

11. That is all the evidence in the case.

12. During the course of arguments, a copy of the memorandum of association and articles of association of the company were also placed on record which was admitted by both the parties. It is mentioned in the articles of association that where no specific provisions have been made, provisions of Schedule I, Table A of the Act, shall apply. This would also be, to an extent, the effect of section 28(2) of the Act. Article 21 gives the names of the first directors who are seven in number. The accused, Narang, is described as organisation director and A. P. Sehgal as director (finance). Other directors have been described as technical director, director (banking), director (marketing), director (accounts and law), and director (company law). Under article 23, the powers and responsibilities of the directors of the company are those as given in the Act and in Table A except in so far as these stood modified by the provisions of the articles of association. Under Article 22, each director is to be paid out of the funds of the company by way of remuneration for services rendered to the company such amount as may be decided by the board from time to time and each director is also to be paid such fee as may be decided by the board for every meeting attended by him. Under Article 26, the directors may appoint one or more of them to the office of the managing director for such period and on such terms as they think fit. Then article 27 and 28 prescribe the remuneration to be paid to the managing director and also the powers to be conferred upon him.

13. Sub-section (1) of section 454 of the Act prescribes that where the court has made a winding up order, there shall be made out and submitted to the official liquidator a statement as to the affairs of the company in the form prescribed. The particulars to be given in the statement of affairs are also mentioned in the sub-section. These are :

(a) the assets of the company, stating separately the cash balance in hand and at the bank if any, and negotiable securities, if any, held by the company;

(b) its debts and liabilities;

(c) the names, residences and occupation 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 amounts likely to be realised on account thereof;

(e) such further or other information as may be prescribed, or as the official liquidator may require.

14. Sub-section (2) prescribes that such a 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. The sub-section (3) says that the statement shall be submitted within 21 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 the special reasons appoint. The relevant date of course would be the date of the winding up order. Sub- section (5) which prescribes punishment for the default has already been set out above. I have set out sub-sections (1) and (2) above so far as these are relevant to this case. At this stage, some of the provisions of the Act which have a bearing on the case may also be referred to. Section 163 requires that register of members, copies of all annual returns, etc., are to be kept at the registered office of the company. Then, u/s 209, the requirement is that every company shall keep at its registered office proper books of account with details as mentioned therein and the persons responsible for securing compliance with the provisions of this section are liable to be punished for default. Under sub-s. (6) of s. 209, these persons would be the managing directors, or a manager, if there is one, and otherwise every director of the company. Section 291 refers to the powers of the board of directors and says that the board of directors shall be entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do. Thus, the board of directors is responsible for the overall conduct and management of the affairs of the company and to comply with the statutory requirements under the Act and other laws, u/s 260, the board of directors is entitled to appoint additional directors but these additional directors are to hold office only up to the date of the annual general meeting of the company. Then article 72 of Table A in Schedule I would be relevant as this article would be applicable in the present case. Under this article, the board had again power to appoint a person as additional director and that person is to hold office only up to the date of the annual general meeting but shall be eligible for appointment by the company as a director at that meeting subject to the provisions of the Act. u/s 283, the office of a director becomes 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 [clause (g) of sub-section (1)]. u/s 285, a meeting of the board of directors is to be held at least once in every three months and at least four such meetings shall be held every year. Then u/s 286, notice of every meeting of the board of directors of a company is to be given in writing to every director for the time being in India and at his usual address in India to every other director. Sections 540 and 545 contain provisions regarding liability of certain persons for fraudulent conduct of the business of the company, etc. u/s 541, where a company is being wound up and if it is shown that proper books of account were not kept by the company during a particular period, every officer of the company is liable to be punished unless he shows that he acted honestly. u/s 2(26), "managing director". means a director who, either by virtue of an

agreement with the company or of a resolution passed by the company in general meeting or by its board of directors or by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him; and it would also include a director occupying the position of managing director by whatever name called. A managing director is, however, to exercise his powers subject to the superintendence, control and direction of the board of directors. Certain powers of routine nature as given in the proviso to this sub-section would not be deemed to be substantial powers of management. u/s 303, every company is to keep at its registered office a register of its directors, managing director etc. containing particulars as given in the section. Under sub-section (2) of this section, a company is to send to the Registrar of Companies a return in the form prescribed containing particulars as specified in the register of its directors mentioned above and is also to send a notification, again in the form prescribed (Form No. 32), of any change among its directors, managing directors, managers or secretaries, etc., specifying the date of the change. These returns are to be filed within the specified period as given in the sub-section.

15. Reference to two decisions may also be made. In a Full Bench decision of this court in *O. L. of Security and Finance P. Ltd. v. B. K. Bedi* [1974] 44 Comp Cas 499 (Delhi); 2nd [1974] 1 Delhi 809 [FB], the court held that it would be for the official liquidator to prove that the default u/s 454(5) of the Act was committed without reasonable excuse and as to how that was to be proved, the court observed as under (p. 506):

"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 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 requirement 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."

16. In *In re, Beejay Engineering Pvt. Ltd.* [1983] 53 Comp Case 918, the court was examining the question whether relief could be given u/s 633 of the Act in respect of liability under Acts other than the Companies Act and one of the questions was whether a director could be exonerated merely on the ground of being a technical director. The court was of the view that no distinction could be drawn amongst the directors for fastening liability or granting relief from liability on the consideration that a person was on the board purely by virtue of his technical skill or because he represented certain special interests and there were other directors who were in effective control of the management and affairs of the company.

17. Prof. Ved Vyas, learned counsel for accused Narang, submitted that in view of the provisions of sections 283(1)(g) and 285, Narang ceased to be director of the company and he could not be fastened with liability u/s 454. It was also submitted that the whole of the working of the company was in the hands of A. P. Sehgal who was a chartered accountant by profession and was shown as director (finance) and it was he who was to maintain the account books and other statutory records of the company. It was also stated that the accused Narang was unaware of the affairs of the company and inspire of that he tried his best to submit a statement of affairs and which he did though it was not in the form prescribed and did not contain the relevant particulars. It was also submitted that the court should exercise discretion and dispense with the filing of the statement of affairs in the circumstances of the present case. It was submitted that though the petition was advertised, no creditor was forthcoming. Strong reliance was placed on the decision of this court in B. K. Bedi's case [1974] 44 CompCas 499 (Delhi) [FB].

18. Mr. B. K. Seth, learned counsel Moka Singh, adopted the arguments of Prof. Ved Vyas but stated that Moka Singh was appointed as additional director and that there was nothing on the record to show that his appointment was approved in the annual general meeting of the company. He also said that it was A. P. Sehgal who was looking after the affairs of the company and that after the death of Sehgal, accused Randhawa was looking after the affairs of the company.

19. Mr. S. V. Shastri, learned counsel appearing for the complainant, however, stated that there was nothing in the Act to describe a director as active, dormant or nominal and that the act imposed statutory duty on the whole body of directors to comply with the provisions of section 454 of the Act.

20. Books of account, statutory books or any other record or asset of the company were not found at its registered office and not were these handed over to the official liquidator. Where in then the question of the official liquidator making available to the accused the necessary books of the company for inspection by them so as to enable them to file the statement of affairs? The official liquidator made the accused aware of their statutory duty and under the circumstances, he could do no more. The Full Bench decision of this court in B. K. Bedi's case [1974] 44 Comp Cas 499 (Delhi) [FB] is inapplicable in the present case. As will be seen, the accused are trying to plead in their defense default committed by them in their statutory body. This cannot be permitted : The state of Bombay v. Bhandhan Ram Bhandani [1961] 31 Comp Cas 1 SR 801.

21. The board of directors of a company is to exercise such powers and to do all such acts and things as the company is authorised to exercise and do. The general management and conduct of the affairs of the company are vested in the board of directors. This board is collectively responsible for the management and conduct of the business of the company. Each and every act which a company is required to do under the provisions of the Act including the maintenance of books of account, minute books etc., is the collective responsibility of the board

of directors as the general administration of the company vests in the board. Sometimes, it is usual to appoint one or more of the directors as whole-time working directors including the managing director of the company to look after the day-to-day administration of the company. This is so as may not be possible for the board of directors to collectively act and conduct each act or thing on behalf of the company. In the case of private limited company, mostly all the directors exercise some function in the day-to-day working or affairs of the company. In the case of public limited company, however, the day-to-day administration is usually left to one or two directors who are termed as managing director or a whole-time director. Again, a managing director or a whole-time director delegates various functions to the officers of the company when it is not possible for him to attend to the same. The board of directors is duty-bound in the management of the affairs of the company to ensure that statutory records and other records of the company are maintained in accordance with the provisions of law. If, however, the directors are in a position to explain that the responsibility for the maintenance of the minutes books etc. were delegated or otherwise entrusted to any particular director or officer of the company and that they bona fide believed that the said minute books, etc., were being kept in a proper and safe manner by the said director or officer of the company, then in that case, they might not be held responsible for the loss or non-maintenance of the minutes books. It is the duty of each and every director to explain as to why he should not be held responsible for the loss, non-maintenance and non-availability of the minutes books in the facts and circumstances of each case. A director cannot escape liability merely by pleading that he was not directly responsible for the loss of the minutes books and other records. He has to show that he had in the usual circumstances responded with confidence in the directors and/or officers of the company who were entrusted with the responsibility of maintaining the minutes books and that there was no occasion for him to warrant any inquiry into the fact that the minutes books were not properly kept or were in danger of being lost and that he acted in a bona fide manner and in the interests of the company. The following paragraph from Palmer's Company Law, 23rd edition would be relevant -

"On principle, the management of the company is vested in the board of directors collectively and the directors must, as a general rule, act at board meetings, but the articles, or rules made by the directors under powers vested in them by the articles, may otherwise provide. This principle ensures that the collective wisdom of the board discussion to take place before a decision is taken." (Paragraph 62-01, page 823)

22. All this discussion has been necessary to show the liability of the directors constituting the board in the conduct of the affairs of the company under certain provisions relevant to the case and to examine the various pleas of the accused in the background of these provisions.

23. In the present case, the accused have stated that the responsibility for

maintaining the statutory records of the company was on A. P. Sehgal and after him on Randhawa. Accused Narang even went to the extent of saying that A. P. Sehgal was the managing director of the company. No document has been brought on record to show that the board of directors had entrusted the management of the affairs of the company to A. P. Sehgal or that he was the managing director of the company. In the absence of any records, I am unable to accept this contention. Accused Narang relied on Form No. 32 registered with the Registrar of Companies on January 14, 1972, in which he has been shown as director (organisation) and A. P. Sehgal as director (Finance). As mentioned above, other directors have also been given various designations as director (technical, banking, marketing, accounts and law, and Company law). No advantage can be derived by the accused Narang from the fact that A. P. Sehgal had been shown as director (finance) and as such he was required to keep the minutes books and other statutory records of the company. These descriptions of the directors do not explain or define the functions of the directors. Accused Narang has been unable to show as to what were his functions when he was shown as director (organisation). Again, I would reject this argument that merely because A. P. Sehgal was described as director (finance), it was he who was solely responsible for the conduct of the affairs of the company.

24. The accused also said that they were not the directors on the date of the making of the winding up order. Accused Narang said that he did not attend any board meeting for about two years and that he received no notice of any such board meeting and also that he was out of India for a certain period. There is nothing on the record to show that any board meeting was held during this period or that any notice of any such meeting was at all issued or that accused Narang did not obtain any leave of absence to attend any such board meeting. For all that matter, there might have been default in holding the meetings of the board of directors. As per the records of the Registrar of Companies, the accused Narang was a director of the company. He contended that the last available record was for the period 1976 which showed him as director and that while the winding up order was made on October 20, 1978, there was nothing on the record of the Registrar of Companies to show that accused Narang was a director on that day. This argument is again, to my mind, misconceived. It is on record that though the annual returns of the company filed for the period ending September 30, 1975 and September 30, 1976, were with the Registrar of Companies; but these annual return or Form No. 32 was filed when there was any change in the board. Thus again, the accused is trying to plead in his defense his own default in not complying with the provisions of law regarding filing of annual returns and Form No. 32 and other documents with the Registrar of Companies.

25. It was also contended by Prof. Ved Vyas that after the winding up petition was advertised, no creditor of the company had come forward and that the court should dispense with the filing of the statement of affairs. I cannot accept this submission. To my mind, the statement of affairs is a basic document from which

proceedings after the winding up order start. It is an important document. It must not be forgotten that the winding up order was made on a petition filed by a creditor. The official liquidator has not filed any application seeking dispensing with the requirement of section 454 of the Act. Rather, he is prosecuting the accused for their default. No ground exists to dispense with the filing of the statement of affairs.

26. The statement of affairs filed during the pendency of these proceedings by accused Narang obviously does not meet the requirements of law as it does not contain the particulars as required and as above mentioned. The default Therefore continues.

27. The case of the accused Moka Singh appears to be different. It has come on record that as per Form No. 32 filed with the Registrar Companies, he was shown as an additional director. His appointment as an additional director was to continue till the date of the next annual general meeting of the company. Nothing has been brought on record to show that in the annual general meeting of the company, he was appointed as a director. It, Therefore, cannot be said that he was a director of the company on the date of the passing of the winding up order. He has, Therefore, to be acquitted.

28. As far as accused Narang is concerned, he was aware of the winding up order and of his duty to file the statement of affairs within the prescribed period. This he failed to do. Notices were sent by the official liquidator requiring him to file the statement of affairs. This again was not done by him. Statutory books and other books of the company were not handed over to the official liquidator, and in fact I would say he was prevented from taking these into possession as these were not found at the registered office of the company for which default the directors could also be liable under the Act. It is correct that in the present case, it is not enough for the complainant to prove merely the prohibited act and then must the defendant bring himself within the statutory defense (sic). The prosecution must bring home to the accused either by direct or circumstantial evidence showing liability of a guilty mind based in the form of actual knowledge or connivance because of the use of the words "without reasonable excuse" in section 454(5) of the Act. To my mind, in the present case, the prosecution has clearly proved what the accused had to do and that he deliberately refrained from complying with the provisions of section 454 containing obligations to be performed by him as a director in spite of notices from the official liquidator on a pretext which, as noted above, cannot bear scrutiny. The suggestion that the accused was merely a figurehead not taking any active part in the control of the company is, in my option, not worth any serious consideration. He was a director throughout the relevant period and was responsible, along with other directors, for the management of the company. He was not there merely for a chromatic effect. There is nothing on the record to show whether A. P. Sehgal was the managing director of the company. Further, in the absence of any other evidence to corroborate the version of accused Narang, I am not prepared to accept his

statement that he was unconnected or unconcerned with the affairs of the company. He has no defense. As noted above, the provisions of section 209 which relate to keeping of proper books of account of the company at its registered office are quite explicit. Non-compliance with these provisions would make every director of the company liable to penal action (sub-section (6)(d) of section 209). Accused Narang cannot escape his liability by contending that the books of account were not made available to him by the official liquidator, the complainant.

29. The prosecution had brought home the charge to the accused. Narang has to be held guilty of an offence punishable u/s 454(5) of the Act, and I convict him accordingly. Accused Moka Singh is acquitted.

30. The question that now remains is as to what punishment is to be awarded to accused Narang. Before I pass any order in that respect, I would grant the accused Narang an opportunity of being heard on the question of sentence.

31. I have heard arguments on the question of sentence. An offence u/s 454(5) of the Act is a serious offence and a deterrent punishment has been provided. The offence for not filing the statement of affairs u/s 454(1) of the Act is a continuing one and terminates only on the filing of the statement of affairs. The offence is punishable not only with imprisonment for term extending to two years but also punishable with fine extending to Rs. 100 for every day during which the default continues. I do not, Therefore, think that in such a case the provisions of section 360 of the Code of Criminal Procedure, 1983 should be invoked which provide for release on probation of good conduct or after admonition, as was contended before me. As to why sub-section (5) of section 454 of the Act was substituted in the Act as it now stands can be best found from the commendations of the Companies Act Amendment Committee. The relevant portion of the recommendations of the Committee is as under;- "It has been the complaint of official liquidators that the statement of affairs is not filed in spite of repeated reminders and warnings, and if filed at all, is filed only after considerable delay. The penal provisions is hardly ever enforced apparently because a complaint has to be made by the official liquidator to the criminal court, and that involves delay. Much of the delay in winding up is caused by the statement of affairs of the company not being filed in time to enable the Official Liquidator to take the necessary action. It would facilitate his work and speed up the winding-up of companies, if the power to punish the officers of the company who default in filing the statement of affairs, is vested in the winding-up court instead of in the ordinary criminal courts. The winding-up court, which in most cases will be the High Court, will be in a better position to judge the degree and nature of the default of the officers concerned and mete out appropriate punishment where necessary. The fear that the winding-up court would take immediate cognisance of any delay and deal adequately with those in default would be itself do much to ensure prompt filing of the statement of affairs. Section 454 of the Act should, Therefore, be amended, vesting the power of

punishment under the section in the winding-up court (Report : para. 166)."

(At p. 942, Guide to the Companies Act by A. Ramaiya, 10th Edn. 1984)

32. As noted in the judgment above, the books of account and other statutory records of the company were not handed over to the official liquidator. The directors contravened the provision of law regarding filing of the statement of affairs which is an important document to enable the official liquidator to start the process of winding up of the company. It now appears to me that the official liquidator is extremely handicapped in the present case and perhaps he has no choice except to seek an order u/s 481 of the Act for dissolution of the company without knowing who the debtors are and who the creditors are and what functions the company performed. That appears to be the unfortunate result. It was again asserted that no creditor had come forward even after the petition for the winding up order was advertised. It is not the case of the accused now advanced does not help the accused at all. I have already mentioned that the company was in fact ordered to be wound up on a creditor's petition. The official liquidator has not invited any claims so far; and it will not be possible to send individual notices to the creditors as provided and I do not know what he is going to do in the circumstances of the present case. The gravity of the offence cannot be minimised. That the offence u/s 454(5) of the Act is a continuing one cannot now be disputed in view of the decision of the Supreme Court in *Maya Rani Punj Vs. Commissioner of Income Tax, Delhi*, . By this decision, an earlier decision of the Supreme Court in *Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth*, was overruled. A question, however, arose as to whether sentence of fine which is for each day during which the default continues is to be limited up to the date of filing of the complaint or up to the date of conviction. The first impression was that perhaps it would be up to the date of conviction in the present case inasmuch as the court did take notice of the fact that during the pendency of this complaint, the statement of affairs was not filed and that which was filed was altogether not in accordance with the provisions of section 454(1) of the Act and could not be termed as a statement of affairs in the eye of law. However, in my opinion, a sentence of fine cannot be imposed for the period after filing of the complaint. Sub-section (5A) of section 454 of the Act is as follows:

"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".

33. If reference is made to the Code of Criminal Procedure, 1973 (after repeal of the earlier Code of 1898), 'complaint' has been defined to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence (section 2(d)). The court takes cognizance of the offence u/s 190 of the Code upon receiving a complaint of facts Constituting the offence. Process is

issued to the accused u/s 204 of the Code and when he appears, the substance of the accusation is to be stated to him (section 251). The provisions contained in Chapter XX of the Code relating to trial of summons cases are to be applicable inasmuch as the punishment with imprisonment is for a term up to two years. Then after the trial, the court is to record its finding, convicting or acquitting the accused. Thus, it will be seen that the accused is to meet the case as set out in the complaint and the substance of the accusation is stated to him and he is asked to plead guilty or not to the same. This substance of accusation is given in the complaint only up to the date of filing of the complaint.

34. Considering, however, the facts and circumstances of the present case, I am of the opinion that the ends of justice will be met by imposing a fine on the accused and he need not be sent to prison. I, would, Therefore, sentence the accused Kuldip Raj Narang to pay a fine of Rs. 50 per day for every day during which the default continued. The fine at the rate of Rs. 50 per day will be payable from November 11, 1978, 21 days after the date of the winding up order which is October 20, 1978, till December 19, 1980, when the complaint was filed. The amount of fine comes to Rs. 38,500. In default of payment of fine, the accused will undergo rigorous imprisonment for a period of two months. The fine, when realised, will be payable to the official liquidator, the complainant.