

(2013) 113 CLA 188

Madras High Court

Case No: OSA No. 92 of 2009 and MP No. 1 of 2009

P.V.R.S. Manikumar

APPELLANT

Vs

Official Liquidator, High
Court and Others

RESPONDENT

Date of Decision: Jan. 18, 2013

Acts Referred:

Companies Act, 1956 " Section 454, 454(5), 633#Customs Act, 1962 " Section 123#Hindu
Marriage Act, 1955 " Section 9#Prevention of Corruption Act, 1988 " Section 20

Citation: (2013) 113 CLA 188

Hon'ble Judges: R. Banumathi, J; K.K. Sasidharan, J

Bench: Division Bench

Advocate: V. Ramakrishnan, for the Appellant; S.R. Sundar, Aryaraj and M. Devaraj, for the
Respondent

Final Decision: Allowed

Judgement

K.K. Sasidharan, J.

This appeal at the instance of the ex-director of a company in liquidation raises a moot
question, that in spite of

entertaining a doubt as to whether the official liquidator discharged his obligation of
proving that the failure to submit the statement of affairs of the

company in the statutory format was without reasonable excuse as provided under
sub-section (2) of section 454 of the Companies Act, 1956

("the Act") the court was justified in punishing the accused.

The facts in nutshell

The liquidator appointed by the company court for Indag Products Ltd. filed a complaint against the appellant and others alleging commission of

offence under sub-section (5) of section 454 of the Act on account of their failure to file the statement of affairs within the statutory period.

2. An order of winding up was passed by the company court on 25th February, 1997 in C.P. No. 101 of 1994 in respect of Indag Products Ltd.

and the official liquidator attached to the High Court was appointed as the provisional liquidator. The appellant and the other ex-directors were

expected to submit the statement of affairs in Form 57 of the Companies (Court) Rules, 1959 within twenty-one days from the date of winding up

or from the date of appointment of the provisional liquidator. However, the ex-directors failed to file the statement of affairs in spite of receipt of

notice from the official liquidator on 19th April, 1997. This made the official liquidator to file an application in A. No. 1081 of 2004 in C.P. No.

101 of 1994 along with a report u/s 454 of the Act before the company court. The prayer in the application was to take the complaint on file and

to punish the ex-directors for their failure to submit the statement of affairs within the statutory period.

3. The wife of the appellant was arrayed as fourth respondent in the application in C.A. No. 1081 of 2004 in C.P. No. 101 of 1994. The

appellant was arrayed as fifth respondent. Mr. Samuel James Fredrick, former managing director was arrayed as first respondent.

4. Before the learned Single Judge, the appellant filed a detailed counter affidavit contending that he was not given possession of the accounts and

other relevant documents by the second respondent and that was the reason for his failure to file the statement of affairs within the statutory period

of twenty-one days. The appellant admitted that he contacted the secured creditors and others to whom the company owed money. The said

attempt was made with a view to revive the company. However, he has not participated in the management of the company. In short, the failure on

the part of the second respondent to hand over the entire documents was projected as the reason for the failure to submit the statement of affairs

before the official liquidator. Accordingly the appellant prayed for absolving him from liability.

5. The second respondent filed a separate counter affidavit accusing the appellant. According to the second respondent, he has already handed

over all the documents in respect of the company to the appellant and as such it was his responsibility to furnish the statement of affairs to the

official liquidator. The second respondent while concluding his defence stated that pursuant to the order dated 25th August, 2006, he has filed the

statement of affairs in the prescribed form and as such he was not liable for prosecution.

6. The Junior Technical Assistant attached to the office of the official liquidator was examined as PW 1. The second respondent in the present

appeal, was examined as RW 1. The appellant was examined as RW 2. The appellant in his evidence, very clearly stated that except the

documents indicated in Exts. R4 and R5, no other documents were given to him by the erstwhile managing director (second respondent) during the

time of execution of agreement to take over the industry and that was the reason for his failure to submit the statement of affairs.

7. The learned Single Judge considered the counter affidavits filed on behalf of the appellant and the second respondent herein in the light of the

evidence adduced by the respective parties, and observed that there is substance in the contention raised by the appellant and his wife that they

have no access to the records in spite of the fact that the management of the company has already been taken over by them. The learned Judge

observed that it is doubtful as to whether the official liquidator has discharged his obligation of proving the offence. However, taking into account

the admission made by the appellant during the course of his examination as RW 2 that he has taken over the management of the company and

negotiated the matter with the employees and the creditors, concluded that there was no reasonable cause for the failure to submit the statement of

affairs within the statutory period. Accordingly, the appellant was convicted and sentenced to pay a fine of Rs. 25,000, failing which, he was

directed to undergo simple imprisonment for a period of two months. The wife of the appellant as well as the second respondent were acquitted of

all the charges framed against them. Feeling aggrieved, the appellant is before us.

Rival contentions

8. The learned counsel for the appellant made extensive submissions both on facts and on law. The following are his principal submissions:

(i) The appellant, though took over the management of the company, was not aware of the pending liquidation proceedings. The appellant received

only few documents from second respondent as per Exts. R4 and R5. Those documents were not sufficient to submit a comprehensive statement

of affairs before the official liquidator.

(ii) The official liquidator was bound to prove that the appellant defaulted in complying with the mandatory provisions of the Act without

reasonable excuse"". However, no such contention was taken by the official liquidator and as such, the learned Judge erred in punishing the

appellant.

(iii) The learned Judge arrived at a factual finding that the official liquidator failed to discharge his obligation of proving the offence. Even after

saying so, the appellant was punished. Therefore, the punishment is liable to be set aside.

(iv) The evidence adduced on the side of the official liquidator does not contain even a suggestion that the appellant failed to submit the statement

without any reasonable excuse.

(v) The fact that the appellant has taken up the management of the affairs of the company would not go to show that he was in possession of the

entire documents and as such, he was bound to submit the statement within the statutory period.

(vi) The second respondent was in possession of all the documents. The fact that immediately after the issuance of warrant against the second

respondent, he submitted the statement of affairs along with the documents clearly indicates that he was in possession of the entire documents and

as such, it was not possible for the appellant to submit the comprehensive statement before the official liquidator.

9. The learned counsel for the official liquidator while supporting the order passed by the learned Single Judge made the following submissions:

(i) The appellant was the managing director of the company during the material time. Therefore, he was bound to submit the statement within the statutory period.

(ii) The appellant after taking over, the company initiated steps to settle the matter with the secured creditors and other creditors and also to

resolve the labour dispute. Therefore, it is clear that he was in the helm of affairs of the company and as such, responsibility was on him to submit

the statement of affairs.

(iii) The appellant took a contradictory stand throughout the proceedings and the same would prove that he was not consistent in his case.

Discussion

10. The appellant entered into an agreement with the second respondent to take over the company by name Indag Products Ltd. The appellant

was taken as a director of the company so as to complete the transfer process. The agreement entered into between the appellant and the second

respondent or the memorandum evidencing handing over of documents, does not contain any indication that liquidation proceedings were pending

before the court. Therefore, the contention taken by the appellant that he was not aware of the liquidation proceedings, prima facie appears to be

correct. The second respondent handed over certain documents to the appellant as per memorandums dated 23rd April, 1996 and 29th April,

1996 marked as Exts. R4 and R5. While the appellant claimed that he was not given the entire documents and has no access to records, the

second respondent maintained that all the relevant records were handed over and he was in actual control of the affairs of the company and as

such, the liability was on him to submit the statutory statement.

11. The materials on record would show that Company Petition No. 101 of 1994 was filed by Wacker Chemie against Indag Products Ltd., on

the ground that the company failed to pay the amount due to them and, therefore, prayed that the company should be wound up under the

provisions of the Act. The company court was pleased to pass an order on 25th February, 1997 directing that the company should be wound up

and the official liquidator attached to the High Court was appointed as provisional liquidator. The liquidator was directed to take charge of all the

assets of the company in liquidation forthwith. The official liquidator after taking charge, called upon the appellant and the other directors to submit

the statement of affairs u/s 454 of the Act before him.

12. The appellant received a letter from the official liquidator on 8th October, 1997 intimating the pendency of C.P. No. 101 of 1994. Immediately

he sent a telegram on 18th October, 1997 as per Ext. R. 13 informing the official liquidator that a detailed reply would be sent in due course.

Thereafter a letter dated 25th October, 1997 was sent marked as Ext. R. 14. In the said letter, the appellant explained the circumstances under

which he was appointed as an additional director and pleaded that he was not in actual management of the company and he had only made a

genuine attempt to settle the secured creditors. Even before the learned Single Judge, the appellant re-iterated the said contention and pleaded that

the documents were all in the possession of the second respondent.

The statute

13. Section 454 of the Act provides that in case the court has made a winding up order or appointed the official liquidator as provisional liquidator,

the statement as to the affairs of the company in the prescribed form verified by an affidavit, and containing certain details, should be submitted to

the liquidator by one or more of the persons, who were at the relevant date, the directors of the company and by the person, who was at that date

the manager, secretary or other chief officer of the company. Sub-section (3) of section 454 contains the time limit for filing such statement. The

statement shall be filed within twenty-one days from the relevant date or within such extended time not exceeding three months. Sub-section (5) of

section 454 contains a penalty clause. As per the said provision if any person, without reasonable excuse, makes default in complying with any of

the requirements of the provision, 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.

14. Section 633 of the Act conferred certain powers on the court in respect of legal proceedings initiated under the provisions of the Act. This

provision empowers the court to excuse a person from criminal liability having regard to all the circumstances of the case, in case he has acted

honestly and reasonably.

Whether default was without reasonable excuse

15. The order passed by the learned Judge has to be tested in the light of sections 454(5) and 633 of the Act.

16. There is no dispute that section 454 of the Act cast a duty on ex-directors, who were directors at the relevant period to submit a statement of

affairs of the company in liquidation in the prescribed form within a period of twenty-one days. The said provision was inserted with a definite

purpose of helping the official liquidator to verify the factual position of the company including its financial background. The official liquidator would

not be in a position to assess the factual situation in the absence of records. The entire records would be in the possession of the erstwhile

directors. The ex-directors would not be interested to disclose the material facts to the official liquidator. In case, there is no statutory provision

regarding submission of the statement of affairs, the liquidator would be at the mercy of the ex-directors or by others, who were in-charge of the

affairs of the company. It is only for this purpose, Legislature has incorporated a specific provision casting duty on the officials of the company

including the ex-directors to submit the statement of affairs of the company, before the official liquidator. The Legislature has also given a mandate

that such statement should be filed within a period of twenty-one days and with an outer time limit not exceeding three months. Sub-section (5) of

section 454 would come into play in case a person in-charge of the assets of the company including the directors, who were functioning as such at

the relevant date makes default in complying with the requirements regarding submission of the statement of affairs to the liquidator. It is not every

default which is made punishable. The default should be without reasonable excuse. In case, the person against whom action is taken under sub-

section (5) of section 454 has got a reasonable excuse for his failure to submit the statement of affairs of the company in the prescribed form, no

liability can be fastened on him.

17. The question is as to whom the burden of proof lies to prove that the default was without "reasonable excuse".

18. The Companies (Court) Rules, 1959 contains detailed provisions as to how statement of affairs of the company has to be submitted by the

concerned persons to the liquidator. Rule 125 permits the official liquidator to apply for summons to the court for an order directing the person, in

his opinion, is liable to furnish the statement of affairs to prepare and submit such statement. Rule 127 provides that the statement as to the affairs

of the company shall be in Form 57. The statutory format (Form 57) shows that the person responsible to submit the statement has to furnish

several vital informations, which cannot be prepared so easily, without the benefit of records and documents. The preparation of statement of

affairs in Form No. 57 is, therefore, not an easy task. Rule 132 provides for filing a report by the official liquidator to the court in case of default to

submit the statement by the concerned person, and the further steps to be taken by the court.

19. The term ""reasonable excuse"" is not defined in the Act. Similar expression is found in section 9 of the Hindu Marriage Act. This expression

cannot be reduced into a straightjacket formula. The ""reasonable excuse"" has to be considered in the facts and circumstances of a given case.

20. Sub-section (5) of section 454 gives jurisdiction to the court to punish only a person who makes default in complying with the requirements of

section 454 without reasonable excuse. There is nothing in the Act, more particularly in sub-section (5) of section 454 indicating that the entire

burden is on the accused to plead and prove the reasonable excuse.

21. Sub-section (5A) of section 454 mandates that a complaint preferred by the provisional liquidator u/s 454(5) shall be tried in accordance with

the procedure laid down in the Code of Criminal Procedure as if it is a trial of summons case by a Magistrate.

22. Since the requirement of absence of reasonable excuse is an essential ingredient of an offence punishable under sub-section (5) of 454 of the

Act, the initial burden is on the official liquidator to prove the said fact. The burden of proof would shift to the accused only; in case the

complainant discharges the primary requirement of the provision regarding absence of reasonable excuse. The liability being one of criminal in

nature, the onus is on the complainant to prove the case. Therefore, it is the duty of the prosecution to prove that in spite of the availability of

relevant records, the accused failed to submit the statement of affairs and there was no reasonable excuse for the default.

23. There are certain statutes like Prevention of Corruption Act and Customs Act, the provisions of which casts a duty on the accused to prove his

case rather than the prosecution to discharge the burden. Section 20 of the Prevention of Corruption Act, 1988 contains a statutory presumption

that if it is proved that the accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other

person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved,

that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or

reward. Similarly section 123 of the Customs Act, 1962 mandates that where any goods are seized under the Act in the reasonable belief that they

are smuggled goods, the burden of proof that they are not smuggled goods shall be on the person from whom the goods were seized. That is not

the case here.

24. The proper test in a case of this nature is to see as to who would fail in case no evidence is let in to prove the absence of reasonable excuse.

Since the default is qualified and the essential condition is that the default must be without reasonable excuse, the burden of proof is very much on

the official liquidator and he should demonstrate that the accused failed to submit the statement of affairs without reasonable excuse.

25. There is no statutory presumption under sub-section (5) of section 454 of the Act that the default in complying with the requirements of the Act

and more particularly, in submitting the statement of affairs of the company, would be treated as willful default unless reasonable excuse is pleaded

and proved by the accused. In case the entire burden is on the accused to prove that he is innocent, necessarily, it is for the defence to prove the

innocence and not for the prosecution to prove the guilt. Here, mere default in complying with sub-section (5) of section 454 is not made

punishable. The default without reasonable excuse alone is made punishable. In case, the facts and circumstances are indicative of the reasonable

excuse for not filing the statement within the statutory period, necessarily the benefit of doubt should be given to the accused.

26. Sub-section (5) of section 454 has to be read in the light of section 633 of the Act. Section 633 of the Act permits the court to consider over

all circumstances of the case and to arrive at a conclusion as to whether the accused has acted honestly and reasonably and the default was

beyond his control. In case the court is satisfied that the accused acted reasonably and there was no dishonesty on his part, necessarily, he should

be relieved of the liability subject to reasonable terms. Sub-section (2) of section 633 also makes the position very clear that the High Court shall

have the power to relieve him, as if it had been a court before which a proceeding against that officer for negligence, default, breach of duty,

misfeasance or breach of trust had been brought under sub-section (1) of section 633 of the Act.

27. We have been referred to a number of authorities by the learned counsel on either side.

28. The learned counsel for the appellant has placed reliance on the following judgments of various High Courts indicating the scope of

proceedings under sub-section (5) of section 454 of the Act.

(i) The judgment of a Division Bench of Punjab and Haryana High Court in K.S. Mathura Dass Vs. State of Punjab and Another, was cited to

substantiate the contention that in a prosecution u/s 454(5) of the Companies Act, the burden is on the complainant in the first instance to prove the

absence of reasonable excuse.

(ii) The judgment of Andhra Pradesh High Court in Indla Satya Raju Vs. Sramika Agro Farm (P) Limited (in liquidation), Hyd. and Another, was

referred to contend that prosecution is possible only where failure was without reasonable excuse.

(iii) In K.R. Subramanian Vs. Official Liquidator, High Court of Kerala, a Division Bench of Kerala High Court held that mere fault in complying

with the requirement of section 454(5) is not enough to punish a person. The onus is on the prosecution to show that the default was without

reasonable excuse.

29. The learned counsel appearing on behalf of the official liquidator placed reliance on the following decisions in support of his contention.

(i) The decision of the Kerala High Court in Poomuli Manakkal Anujan Nambudiripad Vs. Official Liquidator, was cited to explain the position

that an obligation to file the statement arises from the relevant date without any requisition by the official liquidator.

(ii) The judgment of a Division Bench of Punjab and Haryana High Court in Mrs. Mukta Devi Vs. The Official Liquidator, was referred to in

support of the contention that proof that the accused without reasonable excuse had made default is on the prosecution at the first instance and the

same if accepted by the court, shift on the accused to satisfy that he had a reasonable excuse for making the default.

30. The jurisprudence of criminal law casts burden on the prosecution to prove the case and not on the accused to prove his innocence. The

default without reasonable excuse is in effect the essential ingredient of an offence under sub-section (5) of section 454 of the Act. The

prosecution, therefore, has to prove that the directors or the officers of the company have defaulted to submit the statement without reasonable

excuse. Though the burden would shift depending upon the stages, the ultimate burden is on the prosecution to prove that the default was without

reasonable excuse.

31. The case pleaded by the appellant necessarily has to be considered in the light of the statutory framework.

32. The complaint preferred by the official liquidator in Application No. 1081 of 2004 in C.P. No. 101 of 1994 and the supporting affidavit

proceeds that in spite of the direction to produce accounts, the appellant has failed to submit the statement of affairs to him and as such he was not

in a position to proceed with the winding up of the affairs of the company. The official liquidator was not before the court. The junior technical

assistant attached to the office of the official liquidator was examined on his side as PW 1. The said witness was not in the know of things. He has

given evidence on the basis of records. PW 1 has no case in his evidence that the appellant and other directors failed to submit the statement

without reasonable excuse. The witness only stated that there was a delay in filing the statement of affairs and as such the appellant is liable to be

prosecuted u/s 454(5) of the Act. There are no materials either in the complaint or in the evidence of PW 1 to indicate that the appellant has failed

to submit the returns without any reasonable excuse. The question of discharging the burden by the appellant by producing materials to prove that

there were reasons which actually stood in the way of submitting the statement and as such it was not a case of default without reasonable excuse

would arise, only in case the official liquidator has discharged the initial burden. The fact remains that even the official liquidator has no case that the

default was willful. In fact, the learned Judge also entertained a doubt as to whether the materials produced by the complainant would be sufficient

to convict the accused.

33. The appellant at all point of time maintained that he was not given the entire records of the company by the second respondent. Even though

the second respondent contended that the entire documents were furnished to the appellant simultaneously with the transfer of management, the

fact remains that the documents mentioned in Exts. R4 and R5 alone were given to him. The evidence of second respondent as RW 2 clearly

proves this factual position. The fact that the appellant negotiated with the secured creditors and tried for one time settlement and his conciliation

talks with the employees, would not go to show that he was in possession of all the records. The official liquidator has no case that the appellant

managed the affairs of the company during the material time and he was found in possession of all the documents and that he could have filed the

statement of affairs on the basis of such documents. Even the official liquidator has no such case with respect to the possession of documents by

the appellant.

34. The learned Judge appears to have ignored the vital fact in arriving at a conclusion of guilt against the accused. The company court issued a

warrant of arrest against the second respondent. The second respondent filed an application to recall the warrant and assured to submit the

statement of affairs in the prescribed format. Accordingly, the statement of affairs was filed by him before the official liquidator. The official

liquidator originally returned the records with a direction to re-submit it after compliance. It is also a matter of record that the second respondent

thereafter complied with the defects and the statement was accepted by the official liquidator. It was only in such circumstances and more

particularly, taking into account the submission of statement of affairs of the company, the second respondent was acquitted by the learned Judge.

The fact that the second respondent, immediately after issuance of warrant, submitted the statement of affairs is a clear pointer to show that he was

in possession of documents. The said fact would also prove the correctness of the statement made by the appellant that he was not in possession

of the material records and all the books of accounts were only in the possession of second respondent. This material fact would go to the root of

the matter.

35. The learned Single Judge found merit in the contention taken by the appellant that he had actually no access to the records. The learned Judge

also indicated a doubt as to whether the official liquidator has discharged his obligation of proving the offence. When it is made out, that the official

liquidator himself has not discharged his obligation, the question of convicting the appellant does not arise. Since the learned Judge has found merit

in the contention raised by the appellant that he has no access to the records and entertained a doubt with regard to the discharge of obligation by

the official liquidator, necessarily the benefit of doubt should have been given to the appellant. Section 633 gives wide powers to the court to grant

relief in appropriate cases, provided the court is convinced that the accused acted honestly and reasonably.

36. The appellant has produced all the available materials before the court in his attempt to prove that there was no default on his part in complying

with the statutory requirements. Though the appellant entered into an agreement with the second respondent to take over the affairs of the

company, the fact remains that the liquidation proceedings were pending. Subsequently the company was ordered to be wound up. The available

materials would give an idea that the appellant was not benefited by negotiating with the secured creditors or employees. The materials on record

are also sufficient to arrive at a finding that the default was not one without reasonable excuse. The observation made by the learned Single Judge

with respect to the failure on the part of the official liquidator to prove the case itself is sufficient to acquit the appellant.

Conclusion

37. Therefore, on a careful consideration of the entire factual matrix, we are of the considered view that the failure on the part of the appellant to

submit the statement of affairs of the company was not willful and the official liquidator miserably failed to prove that the default was without

reasonable excuse.

38. In the result, the order dated 6th February, 2009 in C.A. No. 1081 of 2004 in C.P. No. 101 of 1994 is set aside and the appellant is

acquitted of the offence. The official liquidator is directed to refund the fine amount paid by the appellant forthwith. In the upshot, we allow the

intra-court appeal. Consequently, the connected MP is closed. No costs.