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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision : 17th November, 2015

+ **CO.APP. 20/2015**

KARUN RAJ NARANG, EX. DIRECTOR, M/S. EASTERN
MEDIKIT LTD. Appellant

Through: Mr.Darpan Wadhwa, Mr.Manik
Dogra and Mr.Santosh Pandey,
Advocates.

versus

EASTERN MEDIKIT LTD., THROUGH THE OFFICIAL
LIQUIDATOR Respondent

Through: Mr.Rajiv Bahl, Advocate for O.L.

+ **CO.APP. 23/2015**

MANOJ KUMAR SINHA, EX. DIRECTOR Appellant

Through: Mr.Darpan Wadhwa, Mr.Manik
Dogra and Mr.Santosh Pandey,
Advocates.

versus

EASTERN MEDIKIT LTD., THROUGH THE OFFICIAL
LIQUIDATOR Respondent

Through: Mr.Rajiv Bahl, Advocate for O.L.

+ **CO.APP. 24/2015**

MAHESH CHAND SHARMA, EX. DIRECTOR..... Appellant

Through: Mr.Darpan Wadhwa, Mr.Manik
Dogra and Mr.Santosh Pandey,
Advocates.

versus

EASTERN MEDIKIT LTD., THROUGH THE OFFICIAL
LIQUIDATOR Respondent

Through: Mr.Rajiv Bahl, Advocate for O.L.

+ **CO.APP. 25/2015**

LOKESH KUMAR TIWARI, EX. DIRECTOR Appellant

Through: Mr.Darpan Wadhwa, Mr.Manik
Dogra and Mr.Santosh Pandey,
Advocates.

versus
EASTERN MEDIKIT LTD., THROUGH THE OFFICIAL
LIQUIDATOR Respondent
Through: Mr.Rajiv Bahl, Advocate for O.L.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J (ORAL)

1. The appellants have challenged the order dated 15th May, 2015 passed in CrI.O (CO) 9/2015 (page-34). By this order, the learned Company Judge took cognizance of an offence punishable under Section 454 (5) & (5A) of the Companies Act, 1956 and summoned the appellants for commission of the alleged offence. Inasmuch the impugned order has been challenged by all the appellants on identical grounds and also the appeals arise from same facts, we have taken up these appeals for consideration together and propose to dispose of all of them by this common order.
2. An order dated 10th May, 2013 was passed in CP No.516/2012 under Section 433 of the Companies Act, whereby the learned Single Judge appointed an official liquidator with regard to the affairs of the Eastern Medikit Ltd. The appellants before us were all ex-directors in this company. Pursuant to the order of appointment in these proceedings, the official liquidator took over the premises of the company and sealed the same. On the 23rd May, 2014 (page-39), a grievance was made on behalf of the ex-directors/appellants that records of the company are lying in the premises sealed by the official liquidator whereby they were prevented from inspecting the same. As a result, it was not possible for the ex-directors to

file complete statement of affairs. The learned Single Judge in these circumstances permitted the official liquidator to de-seal the premises where the records of the company were lying and permitted inspection thereof by the ex-directors. The learned Single Judge also directed the official liquidator to make available copies of such records as were required by the ex-directors upon request being made to him along with the requisite charges. Time-bound directions were issued to the official liquidator to supply the desired records within a period of one week of the inspection of the records. In these circumstances, so far as filing of statement of affairs was concerned, the learned Single Judge directed that they would be filed within two weeks of the inspection of the records.

3. The above set of directions clearly manifest that in fact the learned Single Judge by the order dated 23rd May, 2014 granted extension of time within which the ex-directors were to file their statement of affairs in accordance with Section 454 of the Companies Act.

4. The learned Company Judge separately considered the application being C.A.No.1612/2014 filed by the official liquidator seeking permission for appointment of a Valuer to prepare the inventory and to value the moveable and immovable assets of the company. On the same date, i.e. the 23rd of May, 2014, a Chartered Accountant was appointed to prepare the inventory of the records of the company and to scrutinise the same. In order to enable compliance with these directions, the learned Company Judge again permitted the official liquidator to de-seal the premises for the Chartered Accountant and the Valuer.

5. So far as the inspection of records is concerned, the appellants have placed before us copies of letters dated 4th July, 2014, 9th July, 2014 and

19th July, 2014 sent by the appellants to the OL. Since the record of the company was voluminous which had been stored in 15 steel boxes as well as in one small almirah apart from two computers, also had been made grievance that the records had been kept in open space.

6. Our attention is drawn by Mr.Darpan Wadhwa, learned counsel for the appellants to the notice dated 16th July, 2014 received from the official liquidator, fixing 19th July, 2014 for joint inspection of the premises at the registered office of the company. It is manifest from the above that the inspection of the records by the ex-directors was pending even in July, 2014.

7. In the rejoinder dated 18th February, 2015 filed by the official liquidator in the status report No.958/2013 it had pointed out that the inventory of the records was still under preparation by the Chartered Accountant.

8. Despite the above position, it appears that on the 1st May, 2015, the official liquidator proceeded to file a complaint under Section 454 (5) & (5A) of the Companies Act, 1956 contending that the statement of affairs was required to be filed by the ex-directors within 21 days from the date of winding up order, and that the accused persons have failed to do so “without any cause” and had also failed to specify any reason” and that the appellants had failed to hand over the books of accounts, assets and records of the company (in liquidation) to the official liquidator”. It was complained that the appellant have committed an offence punishable under Section 454 (5) & (5A) of the Companies Act.

9. This complaint came to be considered by the Court resulting in passing of the order dated 15th May, 2015 (page 32) whereby the appellants were summoned. This order dated 15th May, 2015 has been assailed by way

of the present appeals. Mr. Darpan Wadhwa, learned counsel, would contend that the complaint had no basis and further that the appellants were prevented by sufficient cause from filing the statement of affairs. Learned counsel relies on the order dated 23rd May, 2014 submitting that inspection of the records. We may first and foremost usefully extract the relevant portion of Section 454 of the Companies Act, as under:

“454. Statement of affairs to be made to Official Liquidator.

(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 and 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.

10. So far as Sub Sections (5) and (5A) of Section 454 are concerned, the same read as follows:

(5)¹ 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 .)² for the trial of summons cases by magistrates.]] ”

11. We may note that Sub Section 8 defines “relevant date” as made in case of provisional liquidator is appointed the date of appointment and in case where no such appointment is made the date of the winding up order.

12. A bare reading of the above statutory provisions would show that if every default is not necessarily an offence, it is only when a person makes a default in compliance with the statutory provision without reasonable cause that he could be held guilty for commission of the offence under Sub Sections (5) & (5A) of Section 454 of the said Act. The submission pressed before us is that in the circumstances noted above, there was no wilful default on the part of the appellants and that they were prevented by reasonable cause and bona fide grounds from filing their statement of affairs.

13. We find that even on 15th May, 2015, the Court has still fixed a schedule for inspection of the records of the company at the following nine different locations. The same is extracted hereunder:

S.NO.	DATE	ADDRESS OF PREMISES
1.	22.05.2015 to 02.06.2015	Registered office of the respondent company.
2.	01.07.2015 to 10.07.2015	195, Phase-I, Udyog Vihar, Gurgaon.
3.	11.07.2015 to 20.07.2015	196, Phase-I, Udyog Vihar, Gurgaon.
4.	21.07.2015 to 30.07.2015	205, Phase-I, Udyog Vihar, Gurgaon.
5.	31.07.2015 to 10.08.2015	206, Phase-I, Udyog Vihar, Gurgaon.
6.	11.08.2015 to 20.08.2015	292, Phase-II, Udyog Vihar, Gurgaon.
7.	21.08.2015 to 30.08.2015	549 B, Sector 47, Pace City, Gurgaon.

8.	31.08.2015 to 09.09.2015	547 L, Sector 47, Pace City, Gurgaon.
9.	10.09.2015 to 21.09.2015	3, Dr.G.C.Narang Marg, New Delhi.

14. It is evident from the above that the Court found that inspection at any of these places could not be completed on a single date and, therefore, has permitted 10-11 days time at each location for inspection of the records. The directions by the learned Single Judge to file statement of affairs within two weeks of the completion of inspection was made on 23rd May, 2014 and hence occasion for compliance cannot arise till 23rd September, 2015 which is the last date for inspection of the records. In these circumstances, till such time it could not have been held that there is a default without reasonable excuse in filing the statement of affairs by the appellants, yet the Court proceeded to summon the appellants for commission of the alleged offence

15. It is trite that a complaint under Section 454 (5) & (5A) of the Companies Act cannot be made mechanically. The Court is required to carefully consider whether the alleged default was there and if it is there the same should be without reasonable excuse. On this aspect, the observations of the Full Bench of this Court in the judgment reported as ***ILR 1974 (Delhi), O.L. of Security and Finance Pvt. Ltd. Vs. K.K.Bedi*** are usefully extracted and read as follows:

“It will be seen that a mere making of default in complying with any of the requirements of Section 454, does not constitute an offence because if that were so, the words "without reasonable excuse would be redundant. It is apparent that qualification of default being without reasonable excuse is a necessary constituent of an offence. So far there was not much of difference between two opposite counsel. The dispute arises in the interpretation as to on whom is the onus to prove that a director has made a default without reasonable excuse. Mr Luthra, the learned counsel for the accused, maintains

that it is on the prosecution, while Mr. Andley, appearing for the Official Liquidator maintains that this onus on the accused to show that he had a reasonable excuse for making default. Rangarajan J. in his referring order has accepted the contention of Mr. Andley and expressed his view that the burden of proving reasonable excuse for not submitting the statement of affairs will be on the person concerned.

(8) That an offence under subsection (5) entails penal consequence is clear because that sub-section provides that a person can be punished with imprisonment for a term which may extend to two years or with fine which may extend to one hundred rupees for every day during which the default continues or with both. We were referred to Section 5 of the Act which provides that where the Act enacts that any officer of the company who is in default shall be liable to any punishment or penalty the expression "officer who is in default" means any officer who is knowingly guilty of the default, non-compliance, failure or who knowingly and willfully makes such default for the argument that means read is not excluded for contraventions of the provisions of the Act. That the use of the words "Knowingly" or ' willfully" are usually used when the legislature wants to introduce the consideration of means read was accepted in Indo-China Steam Navigation Co, Ltd v. Jasjit Singh It may also be taken to well settled that :

" UNLESS the statute, either clearly or by necessary implication rules out means read as a constituent part of a crime an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. .Absolute liability is not to be lightly presumed but has to be clearly established". MANU/SC/0194/1964 : [1965]1SCR123 .

We do not think that the question about means read has any relevance to the matter before us. No guilty mind is involved under Section 454(5).this is because a reference to Section 454(5) itself shows that mere making of default has not been made penal but one which is with- out reasonable excuse. So the controversy in the present case is not whether even if a person had a reasonable excuse in making the default in complying with the requirement of Section 454, he would be held guilty on the reasoning that there is an absolute liability under the sub-section. The very language of sub-section (5) militates against such a contention. The language being

plain it is unnecessary to consider the various circumstances in which means read was held applicable even when the word "Knowingly or willfully" were not mentioned or means read was held excluded because of the absence of the use of the word "knowingly or willfully" and also because the object of the statute was such that legislature must have intended to rule out means read and to have created absolute liability. The present is a case where the finding of default being "without reasonable excuse" would have to be given by the court before holding a person guilty; the real question being as to on whom does the onus lie ?

(9) It was not suggested nor indeed could it be that there is any statutory presumption under the Act, nor has the Act in so many words placed burden of proof on the accused to show that he had reasonable excuse to make a default. The language of Section 454(5) also does not make a mere default an offence. Now when sub-section 5A requires the court to take cognizance of an offence under sub-section (5) it is obvious that the court will have to consider whether the various ingredients of offence under sub-section (5) of Section 454 of the Act have been made out or not. The court cannot come to a finding of guilt unless comes to the conclusion that a person has made the default without a reasonable excuse."

16. We find that the order dated 23rd May, 2014 in itself has considered the requirement by the appellants of inspection of the records as an essentiality in order to make it possible for them to comply with the requirement of Section 454 of the Act. On that date, the Court specifically permitted the appellants to inspect all the records and directed that they would file their statement of affairs within two weeks of the completion of such inspection.

17. Given the liberty granted on 23rd May, 2014 to submit the statement of affairs within two weeks after the completion of the inspection, it was incumbent upon the official liquidator to satisfy that despite the inspection having been completed and two weeks having been elapsed, the appellants

had failed to file the statement of affairs. There was no such averment in the complaint.

18. In these circumstances, the complaint made on 15th May, 2015 was completely unwarranted.

19. The above narration would show that the order dated 23rd May, 2014 specifically permitting the appellants to file their statement of affairs within two weeks of the inspection of the records was not considered by the Court while summoning the appellants for commission of the offence under Section 454 (5) & (5A) of the Companies Act. This appears to be for the reason that the official liquidator had made the complaint mechanically without application of mind. No reference is made to the orders of the learned Company Judge dated 23rd May, 2014 or 25th July, 2014 anywhere in the complaint.

20. In view of the above discussion, the order dated 15th May, 2015 to the extent it has taken cognizance of the complaint dated 1st May, 2015 and issuing summons to the appellants for commission of the alleged offence under Section 454 (5) & (5A) of the Companies Act is contrary to law and is not sustainable. The order dated 15th May, 2015 is hereby to this extent set aside. In case, the inspection has been completed and two weeks thereafter are over without filing of statement of affairs by the appellants, it shall be open for the official liquidator to proceed in the matter in accordance with law.

21. We are informed by Mr.Darpan Wadhwa, learned counsel for the appellants that after completion of the inspection the appellants have filed their statement of affairs in terms of our order dated 5th October, 2015. We are also informed by Mr.Rajiv Bahl, learned counsel for the official

liquidator that the documents submitted by the appellants on 8th October, 2015 are under scrutiny. Needless to state, it would be open for the official liquidator to proceed in the matter in accordance with law after completion of its scrutiny.

22. These appeals and applications are allowed in the above terms.

GITA MITTAL
(JUDGE)

I.S.MEHTA
(JUDGE)

NOVEMBER 17, 2015
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