



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPLAINT NO.3 OF 2013
IN
COMPANY PETITION NO. 628 OF 2008

Mr. Dinesh Chandra Maingi.

...Petitioner.

AND

The Official Liquidator and the
Liquidator of M/s. Geeta Marine
Services P. Ltd (In Liqn), having
his office at Bank of India Building,
5th floor, M. G. road,
Fort, Mumbai 400023.

...Complainant.

Versus

1] Shivkant V. Chaudhary.
302, Nikita Apartments,
Amrut Nagar, Ghatkopar (West),
Bombay 400086.

2] Sudhir S. Chaudhary,
B/1104, Presidential Tower,
L.B.S. Marg, Mumbai – 400086.

3] Geeta S. Chaudhary
w/o Shivkant Chaudhary,
B/1104, Presidential Tower,
L.B.S. Marg, Mumbai – 86.

4] Seema Menon,
3/D, Century, Tower Six,
Barnbi Road, Kilpak,
Chennai – 600 010.

...Accused.

*Mr. Shanay Shah, Hamza Lakhani and Tejas Popat for the Official Liquidator.
Mr. Akshay Patil i/b Jayesh Gawde for accused nos. 1, 3 and 4.
Mr. Pradeep Bakhru, Piyush Kranti i/b Wadia Ghandy & Co., for accused no.2.*

Coram : Sharmila U. Deshmukh, J.

Reserved on : August 7, 2025

Pronounced on : October 1, 2025.

Judgment :

1. The Accused are charged with offence punishable under Section 454(5) of Companies Act, 1956 [for short ***"Companies Act"***] with imprisonment for term which may extend to two years, or with fine, which may extend to one thousand rupees for every day during which the default continues, or with both. By order of 8th August 2013, process was issued against the Accused.

2. Section 454 of the Companies Act provides for the statement of affairs to be made to the Official Liquidator and Sub-Section (5) of Section 454 reads as under:

"If any person, without reasonable excuse, makes default in complying with any requirements of section, he shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to Rs.1,000/- for every day during which the default continues or with both"

3. The complaint has been filed by the Official Liquidator of M/s. Geeta Marine Services Pvt. Limited. against the Accused. It is stated in the complaint that the Company was ordered to be wound up by order of 19th March 2009 passed by this Court and the Official Liquidator was

appointed as Liquidator. The Accused Nos.1 to 4 are the Directors of the Company at the date of winding up order and as such under a statutory obligation under Section 454(1) and (3) of Companies Act to make out and submit to the official liquidator a statement as to the affairs of the Company (in liqn) in the prescribed form duly verified by an affidavit and containing the particulars specified in Sub-Section (1) of Section 454 of the Companies Act, within 21 days from the relevant date or within the time extended by the Court or by the Official Liquidator.

4. The complaint states that notices calling for the meeting and to file the statement of affairs under Section 454 of the Companies Act were issued to the Ex-Directors on 18th June 2009 and 21st July 2009. By order of 15th July 2010, this Court directed the secured creditor and Ex-Directors to furnish the required information in respect of the assets and affairs of company in liquidation. By order of 12th March 2012, this Court had directed the Ex-Directors to file the statement of affairs of the Company and to hand over the books of accounts and records of the company within one week from the date of order to enable the Official Liquidator to proceed further in the winding up proceedings and to inform about the whereabouts of three barges, failing which action be taken under Section 454(5A) of the Companies Act.

5. On 20th March 2012, the Official Liquidator called upon the accused to file the statement of affairs and to inform the whereabouts of three barges taken on hire by the Company from the Petitioning Creditor. The complaint states that by their covering letters dated 22nd March 2012 and 5th April 2012, the Accused submitted copies of balance sheet for the period 2001–2009, vouchers, bank statements of the Company, Central Excise Stock Register, Correspondence and delivery challan.

6. The complaint states that the original documents, the statement of affairs and the required affidavit giving details of whereabouts of three barges have not been filed by the Accused and they have not handed over the books of accounts or records of the company. The copies of documents/records provided do not constitute books of accounts.

7. The complaint in paragraph 8 states that the ex-directors of the company (in liqn) have neither filed Statement of Affairs and the required Affidavit giving the details of whereabouts of the subject three vessels nor did they hand over the Books of Accounts and records of the Company (in liqn) in terms of the order dated 12th March, 2012 of this Hon'ble Court without any reasonable cause and the default in filing the Statement of Affairs has rendered themselves liable for punishment as per provisions of Section 454(5) of Companies

Act, 1956.

8. The Accused pleaded not guilty and the complaint proceeded to trial. On behalf of the prosecution, one Kajal Murlidhar Barve, Junior Technical Assistant working in the office of Official Liquidator led evidence on 16th January, 2019 by tendering the Affidavit in lieu of examination in chief, which was taken on record along with the documents, which were marked as Exhibit P-1 to P-17. In further examination in chief, PW-1 has stated that the complaint is filed for non filing of the statement of affairs within the time prescribed under Section 454 of the Companies Act and she has knowledge about the matter being section in-charge and is giving evidence on the basis of documents that are maintained in the office of Official Liquidator.

9. On the adjourned date for cross examination, an objection was taken to the evidence being recorded by way of affidavit in lieu of examination in chief as the trial was summons trial. By order of 12th June 2019, this Court overruled the objection proceeding on the basis that accused no.1 has consented to the fact that the Court need not waste its time in recording evidence but accepts the affidavit in lieu of examination in chief and for convenience, the affidavit of examination in chief was marked as Exhibit P-18.

10. In cross examination, PW1 has admitted that she is not personally aware about what happened in the meeting held on 4th

August 2009. She has stated that no statement of affairs was sent separately and only documents mentioned in paragraph 2 of P-14 was received. She has further admitted that accused no.1 has submitted the statement of affairs but it was the opinion of Official Liquidator that the statement of affairs was not in the prescribed form. She has further stated that statement of affairs was submitted after filing of complaint and produced two sets of documents which were marked as Exhibit P-18 and P-19. She has stated that Exhibit P-18 and P-19 are not in the prescribed form as every page has not been signed by the Ex-directors, all columns have not been filled and there are no supporting documents provided.

11. In cross examination by the Advocate for accused no.2, PW1 was confronted with the certified copy of Form No.32 issued by the Registrar of Companies of 5th September 2018 which was marked as "Exhibit A-1". It was put to PW-1 that accused no.2 had resigned on 1st February 2005. Insofar as other accused are concerned, the cross examination on behalf of accused no.1 was adopted.

12. By order of 26th July 2019, the submission of Mr. Patil, learned Counsel for accused was recorded that accused nos.3 and 4 are women, one of whom is paralysed and one of them had been discharged from the ICU of Hospital and that examination of accused nos. 3 and 4 under the provisions of Section 313 of the Code of Criminal Procedure, 1973

[for short "**CrPC**"] be dispensed with. Accordingly, the examination of accused nos. 3 and 4 under Section 313 of CrPC was dispensed with and the statement of accused nos. 1 and 2 under Section 313 of CrPC was recorded.

SUBMISSIONS:

13. Mr. Shah, learned Counsel for the Official Liquidator submits that upon taking inspection of the record in the office of ROC, the Official Liquidator learnt about the Directors of company and the assets which were hypothecated with the financial institutions. He would submit that petitioning creditor has filed an affidavit stating that Company in liquidation was holding three vessels belonging to the petitioning creditor, which has not been disclosed by the Accused. He points out the order dated 12th June 2019, passed by this Court rejecting the objection taken by Mr. Patil about the evidence being recorded by way of affidavit in lieu of examination in chief. He submits that on 18th June 2009 and 21st July 2009, notices were issued to the Ex-Directors to file statement of affairs and meeting was held on 4th August 2009. He has taken this Court through various orders passed by this Court in the Company Petition and submits that by order of 12th March 2012, the Ex-Directors were directed to file three statements of affairs and affidavit setting out the whereabouts of three barges. He submits that on 20th March 2012, the Official Liquidator addressed a

letter to the accused calling upon them to file the statement of affairs under Section 454 of the Companies Act. He further points out Exhibit P-14 which is the response by the advocate for accused no.1 to the Official Liquidator and submits that the communication does not set out any reasonable excuse for not having filed the statement of affairs or handing over the books of accounts or records to the Official Liquidator. He submits that after the complaint was filed, Exhibit P-18 and Exhibit P-19 were furnished by the accused. He points out to the evidence of PW-1 and submits that PW-1 has specifically deposed that the statement of affairs is not in prescribed form and has given reasons for the same. He would further take this Court to Exhibit P-19 and would submit that Form No.57 which was submitted by the accused purporting to be the statement of affairs was incomplete and did not contain necessary information. He would further submit that in the Director's Report, the secured and unsecured loans were set out whereas in the statement of affairs tendered on 11th February 2015, the liabilities are stated as NIL. He submits that the books of accounts for the period 2010-2014 were not filed. He submits that the statutory provisions do not mandate any notice to be issued to the Directors to submit the statement of affairs. He submits that accused have failed to submit the statement of affairs without any reasonable excuse. He submits that there was no evidence led by the accused and the

evidence led by the prosecution established the offence punishable under Section 454(5) of the Companies Act. In support he relies upon following decisions :

- ***Official Liquidator of Security and Finance P. Ltd. v. B. K. Bedi*¹**
- ***Ashwani Suri v. Ganga Automobiles Ltd.*²**
- ***Prabha P. Shenai v. Official Liquidator of Crown Maritime Co. Ltd.*³**
- ***Official Liquidator, Trimurthy Agro-Chemical Ltd. v. Niranjan Jayantilal Tolia*⁴**
- ***State of Bihar v. Deokaran Nenshi*⁵**
- ***Gajanan Manikrao Mandekar v. Deepashri Gajanan Mandekar*⁶**
- ***Virender Pal v. State of Haryana*⁷**
- ***Atma Ram v State of Rajasthan*⁸**
- ***S C Garg v. State of UP*⁹**
- ***State of Punjab v. Naib Din*¹⁰.**
- ***Official Liquidator v. Ravindra Kumar Saxena*¹¹**

14. Mr. Patil, learned Counsel for accused no.1, 3 and 4 submits that the complaint is barred by limitation. He submits that in the present case, the winding up order was passed on 19th March 2009 and Section 454(3) of the Companies Act provides that the statement shall be

1 1974 SCC OnLine Del 10.

2 2012 SCC OnLine Del 3649.

3 2018 SCC OnLine Bom 4898.

4 1984 SCC OnLine Guj 271.

5 (1972) 2 SCC 890.

6 Judgment of this court in CRA No. 91 of 2018 dated 12th April 2023 (Nagpur).

7 2025 SCC OnLine SC 1118.

8 (2019) 20 SCC 481.

9 2025 SCC OnLine SC 791.

10 (2001) 8 SCC 578.

11 2010 SCC OnLine Raj 964.

submitted within 21 days from the relevant date or within such extended time not exceeding 3 months as the Official Liquidator or Tribunal may for special reasons appoint. He submits that even taking into account the extended period of 3 months, the offence took place in the month of July / August 2009 and the present complaint has been filed in the year 2013. Drawing support from the provisions of Section 468 of CrPC, he submits that in case of summons triable case, the limitation is 3 years.

15. On merits, he submits that the complaint does not state that there is default without a reasonable excuse but the averment is that the default is without reasonable cause. He submits that the evidence by way of affidavit in lieu of examination in chief cannot be accepted as evidence as the procedure prescribed under Section 273 of CrPC has not been followed. He would further submit that under Section 296 of the CrPC, the evidence of formal character is permitted to be recorded by way of affidavit of evidence. Without prejudice to the said argument, he submits that PW-1 had no personal knowledge as she had joined on 4th July 2016. He submits that in order to establish that the accused without reasonable excuse had committed default, personal knowledge was required. He would further submit that under Section 454(1) of the Companies Act r/w Rule 124 of the Company Court Rules, extension of time was granted for filing statement of affairs.

16. He has taken this Court through various orders passed in the Company Petition and submits that in accordance with the communication dated 20th March 2012-Exhibit P13, the documents were furnished along with covering letter of 22nd March 2012. He submits that in the order of issuance of process, this Court has recorded that 3 barges were taken on hire and were not owned by the Company. He submits that there is no evidence that notices in Form 55, as mandated by Rule 124, were issued and as purported notices of 18th June 2009 and 21st July 2009 were not produced, adverse inference is required to be drawn. He submits that the burden of proof is upon the Official Liquidator to prove the default without reasonable cause or reasonable excuse by showing the circumstances that everything was available and despite thereof, default has occurred which the evidence on record fails to establish. He submits that in the examination under Section 313 of CrPC, the adverse circumstance is required to be put to the Accused for explanation and that in the examination there is no question put to the accused as regards the reasonable excuse for default. In support he relies upon following decisions :

- ***Official Liquidator of M/S. R.S. Motors (P) Ltd. V. Jagjit Singh Sawhney***¹²
- ***Official Liquidator of Security and Finance P. Ltd. V. B. K.***

12 1973 SCC OnLine Del 208.

***Bedi*¹³**

- ***O L of La-Bel Laminates Pvt Ltd. v. Ramniklal Chhaganlal Patel*¹⁴**
- ***P.V.R.S. Manikumar v. The Official Liquidator High Court, Madras*¹⁵**
- ***Vertex Stock & Shares Pvt. Ltd. V. Vemuri Venkatewara Rao*¹⁶**
- ***Anil Ambashankar Joshi v. Reena Anil Joshi*¹⁷**

17. Mr. Pradeep Bakhru, learned Counsel appearing for accused no.2 adopts the submissions of Mr. Patil and would supplement the same by submitting that the accused no.2 has resigned in the year 2005 and was therefore not a Ex-Director at the relevant time.

18. In rejoinder, as far as the issue of limitation is concerned, pointing out Section 472 of CrPC, Mr. Shah submits that the offence under Section 454 of the Companies Act is a continuing offence considering that the punishment of fine extends for every day during which the default continues. He submits that permission was taken by way of Official Liquidator's Report in the year 2012, pursuant to which the complaint came to be filed and therefore complaint is within limitation.

19. He would further submit that insofar as the aspect of recording of evidence by way of affidavit in lieu of examination in chief is

13 1974 SCC OnLine Del 12.

14 2010 SCC OnLine Guj 1765.

15 2013 SCC OnLine Mad 320.

16 2018 SCC OnLine Hyd 316.

17 2016 SCC Online Bom 9872.

concerned, the decision in **Anil Ambashankar Joshi v. Reena Anil Joshi** (supra) relied upon by Mr. Patil is *per incuriam*. He would further submit that the objection raised at the initial stages by Mr. Patil was rejected by this Court. He submits that as the objection has been rejected, the principle of *res judicata* will apply. He submits that recording of evidence by way of an affidavit would at the most constitute an irregularity and drawing support from the provisions of Sections 460 and 461 of the CrPC, he submits that the same is not irregularity which would vitiate the proceedings. He would further submit that under Section 283 of CrPC, every High Court is empowered to prescribe the manner in which the evidence of witness and examination of accused shall be taken down in cases before the Court and points out to the provisions of Bombay High Court Appellate Side Rules, 1960 and draws attention of this Court to Chapter XXVI of the said Appellate Side Rules and the Bombay High Court (Original Side) Rules, 1980 Rule No.976. He further submits that the initial burden was upon the Official Liquidator to prove the default was without reasonable excuse, which burden has been discharged.

20. In sur-rejoinder, Mr. Patil submits that Section 454 of Companies Act does not state that offence is continuing offence and Sections 460 and 461 of CrPC deal with the irregularity and not illegality. He points out to Sections 59, 69 and 135 of the Indian Evidence Act, 1872 [for

short ***"Evidence Act"***] to substantiate his contention as regards the manner in which the evidence is required to be taken. He submits that under Section 454(3) of the Companies Act, default is complete upon expiry of the period within which statement of affairs is required to be submitted and offence is not a continuing offence. He submits that Rule 132 and 134 of the Company Court Rules, 1959 provides for the Official Liquidator to report the default to the Court and provisions of Section 454 of the Companies Act cannot be construed to mean that report could not have been filed by the Official Liquidator. He submits that by virtue of substantive provisions of law, liability can be dispensed with which will not hamper the progress of the winding up proceedings. He submits that the interpretation which would support the accused should be accepted.

REASONS AND ANALYSIS :

21. Dealing first with the submission on limitation, the Accused is charged with the offence of committing default in complying with the requirements of Section 454 of the Companies Act as the Statement of Affairs has not been filed with the official liquidator. The time prescribed by Sub-Section (3) of Section 454 is 21 days from the relevant date or within such extended time not exceeding three months from that date. "Relevant date" means in case where the provisional liquidator is appointed, the date of his appointment and in

case where no such appointment is made, the date of winding up order.

22. The complaint does not mention whether provisional liquidator was appointed and states that by an order dated 19th March, 2009, the Company was ordered to be wound up. The relevant date as per the complaint would be the date of winding up order in the absence of any submission to the contrary by Mr. Patil. Considering the relevant date as 19th March, 2009, the extended period of three months would end in June, 2009. The complaint has been filed in the year 2013. Section 468 of Cr.PC bars taking of cognizance after lapse of period of limitation and provides for limitation of three years where offence is punishable with imprisonment exceeding one year but not exceeding three years. The offence in the present case is punishable with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees for every day during which the default continues, or with both. The offence under Section 454 of Companies Act is summons triable case.

23. It would be relevant to note the provisions of Section 472 of CrPC which provide that in case of a continuing offence, a fresh period of limitation shall begin to run at every moment of time during which the offence continues. The issue to be considered is whether an offence under Section 454 of Companies Act constitutes “continuing offence”.

24. In the case of *State of Bihar v. Deokaran Nenshi* (supra), the Hon'ble Apex Court was considering the issue of limitation in case of offence under Sections 66 and 79 of the Mines Act, 1952. Section 66 of Mines Act, 1952 provided that upon any person omitting *inter alia* to furnish return in the prescribed form or manner or at or within the prescribed time required under the Act shall be punishable with fine which may extend to Rs.1,000/-. Section 79 of the Mines Act, 1952 provided for the complaint to be made within 6 months of which the offence was alleged to have been committed or comes to the knowledge of inspector whichever is later. The Hon'ble Apex Court held in paragraph no. 5 as under :

"5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

25. In *Globe Associates P. Ltd v. F. C. Mehra*¹⁸ the Delhi High Court

¹⁸ (1987) 61 Comp Cas 814.

while considering an identical issue of limitation, observed that the object of requiring the filing of statement of affairs within 21 days or within 3 months is to facilitate speedy action in winding up and to enable the Official liquidator to get himself immediately acquainted with all the relevant facts relating to the affairs of company. It held that reading of the provisions of Section 454 of the Companies Act would make it abundantly clear that non filing of statement of affairs in time is a continuing offence and it terminates only upon the filing of statement of affairs. It further held that the same is the reason why punishment of fine is extended for every day during which the default continued.

26. In the case of *Maya Rani Punj v. Commissioner of Income Tax Delhi*¹⁹ one of the issues for consideration of the Hon'ble Apex Court was whether the default of non-filing of return within the time stipulated by law is a continuing offence under Section 271 of Income Tax Act, 1961. Sub-Section (1)(b)(ii) of Section 271 of the Income Tax Act, 1961 provides for payment of penalty of sum equal to 2% of the assessed tax for every month during which the default continued. The Hon'ble Apex Court held:

"17..... and in view of the language used in Section 271(1)(a) of 1961 Act, the position is beyond dispute that the legislature intended to deem the non-filing of the return to be a continuing default-the wrong for which penalty is to be

19 (1986) 1 SCC 445.

visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of de die in diem is applicable not on daily but on monthly basis.

“19. The imposition of penalty not confined to the first default but with reference to the continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. Without sanction of law no penalty is imposable with reference to the defaulting conduct. The position that penalty is imposable not only for the first default but as long as the default continues and such penalty is to be calculated at a prescribed rate on monthly basis is indicative of the legislative intention in unmistakable terms that as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law.”

27. Guided by the principles enunciated by the Hon’ble Apex Court, if the provisions of Section 454 of Companies Act are considered, the provision imposes an obligation on the Directors and Officers of the Company to submit the statement of affairs of the company in prescribed format. The Section casts an obligation to make over the statement of affairs in order to enable the official liquidator to get all information about the assets, debts and liabilities etc of the Company (in liquidation), which information is crucial to enable the Official Liquidator to proceed further towards the winding up of the Company. Each day that default in filing of statement of affairs continues results in commission of fresh offence. The use of the expression “for every day during which the default continues” is indicative of the legislative intent to make the default a continuing wrong for as long as the default continues. Accepting the contention of Mr. Patil would result in

releasing the Directors from their obligation of furnishing the statement of affairs upon expiry of period of three months and face criminal prosecution, stultifying the process of winding up, which runs contrary to the legislative intent. Considering the legislative scheme of winding up, the non fulfillment of obligation by the Ex-Director is continuing breach and the provision of penalty co-terminus with the default indicates that offence is a continuing wrong. In my view, the failure to file the statement of affairs is a continuing offence and terminates only upon the filing of the statement. The complaint cannot be said to be barred by limitation.

28. In support of its case, the prosecution has examined the Junior Technical Assistant working in the office of Official Liquidator who has filed her affidavit in lieu of examination in chief. Mr. Patil would contend that the evidence led by way of Affidavit is no evidence in law in case of summons trial. The permissibility of leading evidence by way of Affidavit in summons triable case is to be determined by considering the relevant provisions of the Evidence Act, CrPC and the Companies Act. Section 4 of CrPC provides for offences under the Indian Penal Code to be tried according to the provisions contained in CrPC and Sub-Section (2) provides that all offences under any other law shall be dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating,

inquiring into, trying or otherwise dealing with such offences. In the present case, Sub-Section (5A) of Section 454 of Companies Act provides that the Court may take cognizance of the offence under Sub-Section (5) upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 for the trial of summons cases by Magistrate. The procedure governing the trial of summons case will therefore govern the trial of offence under Section 454 of the Companies Act.

29. Chapter XXIII of CrPC providing for mode of taking and recording evidence contains Section 273 which reads as under:

273. Evidence to be taken in presence of accused. - Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

30. Section 273 of CrPC, therefore, mandates for evidence to be recorded in the presence of Accused. The exceptions to Section 273 of CrPC can be found in Section 205, Section 317 and Section 299 of CrPC providing for eventualities when the evidence can be recorded in

absence of accused. None of these eventualities exist in the present case. Under CrPC, the Affidavit of evidence is permitted to be given in terms of Section 295 and 296 which reads as follows:-

"295. Affidavit in proof of conduct of public servants. - When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

296. Evidence of formal character on affidavit. - (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit."

31. The prosecution evidence is in respect of facts of the case to prove the commission of offence under Section 454 of Companies Act and not in respect of any matter covered by Section 295 and 296 of CrPC. In this context, it would also be apposite to refer to the Evidence Act which defines "Evidence" under Section 3 as under:

"Evidence". - "Evidence" means and includes -

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court;

such documents are called documentary evidence.

32. The Evidence Act categorises the evidence into (a) oral evidence that is statement of witnesses made before the Court and (b) documentary evidence including electronic records which are produced before the Court for its inspection. In order to constitute oral evidence, the statement of witnesses is required to be made before the Court. The Affidavit of a witness with regard to the facts in issue cannot be treated as a statement of the deponent made before the Court, unless the law permits otherwise, such as in the case of Section 145 of Negotiable Instruments Act, 1888, which permits the complainant to adduce evidence by filing affidavit.

33. Upon conjoint reading of the above noted statutory provisions, the legal position emerging is that while trying an offence under Section 454 of Companies Act, which is summons triable case, the evidence is required to be taken in the presence of Accused, which requirement is not satisfied by filing of an Affidavit in lieu of examination in chief. It will be worthwhile to note that the Hon'ble Apex Court in ***State of Maharashtra v. Dr. Praful B Desai***²⁰ and ***Sujay Mitra v. State of W.B.***²¹ permitted the examination of witness via video conferencing by prescribing the procedure to be followed.

20 (2003) 4 SCC 601.

21 (2015) 16 SCC 615.

34. In ***A. T. Mydeen v. Assistant Commissioner of Customs Department***²² the Hon'ble Apex Court in paragraph 42 held as under :

"42. The provisions of law and the essence of case laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e. firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above."

35. The Hon'ble Apex Court has held that the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in the presence of Accused unless the case falls within the exceptions of law. The Hon'ble Apex Court thus reiterated and re-emphasized the accused's right to fair trial. The Hon'ble Apex Court noted the opinion recorded in ***Jayendra Vishnu Thakur v. State of Maharashtra***²³ which had held that right of the accused to watch the prosecution witness deposing before a Court of law, indisputably, is a valuable right.

36. Section 283 of CrPC provides for record in High Court and states that every High Court may by general rule prescribe the manner in which the evidence of witnesses and examination of accused shall be

²² (2022) 14 SCC 392.

²³ 2009 (7) SCC 104.

taken. Accordingly, Rule 976 of the Bombay High Court (Original Side) Rules, 1980 provides for mode of recording evidence and states that the evidence of each witness, as his examination proceeds, shall be taken in writing by the presiding judge or in his presence and hearing and under his personal direction and superintendence.

37. Mr. Shah would press in service the provisions of Sections 460 and 461 of CrPC to contend that the filing of Affidavit in lieu of examination in chief does not constitute an irregularity envisaged under Section 461 of CrPC. The issue is not about irregularity vitiating the trial but whether the Affidavit of prosecution witness would constitute evidence for the purpose of deciding the culpability of Accused. The recording of evidence by way of affidavit falls foul of the statutory provisions and the rule framed by the High Court.

38. The decision of ***Gajanan Manikrao Mandekar v. Deepashree Gajanan Mandekar*** (supra) arose out of judgment passed by the Family Court, Akola in the context of Section 127 of CrPC. One of the submissions canvassed was that the proceedings were vitiated as the evidence was led by way of Affidavit which was not permissible under Section 10 of Family Courts Act. The Learned Single Judge noted the decision of Hon'ble Division Bench in ***Mr. K.V. More 3rd Joint Civil Judge and JMFC, Baramati v. The State of Maharashtra (Criminal Reference No 3/2007)*** holding that in matters which go to trial under Chapter IX

of Cr.Pc, the evidence shall be taken by affidavit considering that the applications under Chapter IX of CrPC are of civil nature and consequently applied the provisions of Civil Procedure Code. Similarly, the decision of **Anil Ambashankar Joshi vs Reena Anil Joshi** (supra) arose out of identical provision that is Section 125 of CrPC. The decisions are clearly distinguishable.

39. Despite the above discussion, in the present case, the failure on part of the Accused to object to the mode of taking evidence at the time of filing of Affidavit in lieu of evidence changes the complexion of the issue. The objection of Mr. Patil is directed towards the mode of proof of tendering evidence. The Affidavit of PW-1 was tendered by the prosecution as evidence. In the context of considering the objection to the admissibility of evidence, the Hon'ble Apex Court in **R.V.E Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple²⁴** held as under:

"20..... Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the

24 2003(8) SCC 752.

document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

40. The Affidavit in lieu of examination in chief was tendered on 16th January, 2019 without any objection being raised by the Accused and further examination in chief was recorded. On the adjourned date of cross examination, objection was raised by Accused, which objection came to be overruled. It is nobody's case that the contents of the Affidavit are inherently inadmissible but the objection is directed towards the mode and manner of recording evidence. The objection was, thus, required to be taken when the affidavit was tendered and not subsequently. There was no challenge and the Accused proceeded

to cross examine the PW-1 based on evidence recorded. In that view of the matter, as the Affidavit in lieu of examination in chief was received as evidence and further examination conducted, the objection as to its admissibility cannot be permitted to be raised at the later stage. The reason is obvious that if the objection would have been raised at the time of tendering of affidavit, the prosecution would have had an opportunity of leading oral evidence. Having failed to raise objection at the time of tendering the affidavit and the objection having been subsequently overruled, there is no prejudice demonstrated to vitiate the trial.

41. There was considerable debate as to upon whom the burden of proof lies to prove that the default in filing the statement of affairs was without reasonable excuse. Section 101 of Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists. Illustration (a) to the Section 101 states that if "A" desires a Court to give judgment that "B" shall be punished for a crime which "A" says "B" has committed, "A" must prove that "B" has committed the crime. Section 105 of Evidence Act provides that burden of proving that case of Accused comes within exception is upon the Accused. Section 106 of Evidence Act provides that when any fact is

especially within the knowledge of any person, the burden of proving that fact is upon him. Considering the provisions of Section 101 of Evidence Act, the burden of proof is upon the prosecution to prove the ingredient of wilful default in filing the statement of affairs. The wordings of Section 454(5) of Companies Act does not make existence of reasonable excuse an exception to the offence, in which case the burden would have been upon the Accused to prove that his case falls within the exception.

42. Section 106 of Evidence Act which is an exception to Section 101 of Evidence Act, places the burden of proving the fact which is especially within the knowledge of that person upon that person. It will have to be considered whether the fact of existence of reasonable excuse is a fact which can be said to be especially within the knowledge of the Accused placing the burden of proof upon the Accused by applying Section 106 of Evidence Act. In ***P.V.R.S Manikumar v. The Official Liquidator High Court*** (supra), the Hon'ble Division Bench of Madras High Court held that it is the initial burden of prosecution to prove that in spite of availability of relevant records, the accused failed to submit the statement of affairs without reasonable excuse and burden would shift to the accused only in case the complainant discharges the primary requirement of the provision regarding absence of reasonable excuse. In ***Vertex Stock and Shares Pvt Ltd v. Vemuri***

Venkatewara Road (supra), the Full Bench of Telangana High Court took a view that initial onus to prove absence of reasonable excuse is on the prosecution and it is only after it has adduced *prima facie* proof of relevant facts which, if unrebutted, by the accused would raise a presumption of existence of such fact in issue i.e. absence of reasonable excuse, would the onus then shift to the accused to show proof of reasonable excuse. In **Official Liquidator of Security and Finance Ltd v. B.K. Bedi** (supra), the Full Bench of Delhi High Court held that the Official Liquidator need only prove that notice was sent to the concerned Director to submit the statement of affairs, that prescribed time has lapsed and that no extension has been sought for from him or the court and that the necessary books of the company were available for inspection by the concerned director. It held that if these facts are shown *prima facie* he would have proved that the default is without reasonable excuse and then it would be for the concerned director to prove the circumstances to justify his conduct and to show reasonable excuse for the default. The Full Bench noted the decision of the Hon'ble Apex Court in **Shambu Nath Mehra v. The State of Ajmer**²⁵ cautioning against invoking Section 106 of Evidence Act so as to place burden of proof on the accused. The Hon'ble Apex Court has held as under:

25 (1956) 1 SCC 337.

“That Section 106 of the Evidence Act does not abrogate the well established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and Section 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available with the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply.”

43. The decision of the Hon’ble Apex Court as noted above clinches the issue. Section 106 of Evidence Act does not relieve the burden upon the prosecution in criminal case to prove its case and in exceptional cases where it is impossible to prove the facts, Section 106 of Evidence Act comes into play. The view taken by the Hon’ble Madras High Court, the Hon’ble Full Bench of Delhi High Court and Hon’ble Telangana High Court is consistent that absence of reasonable excuse can very well be proved by prosecution by leading evidence to demonstrate that the Accused inspite of availability of relevant records to facilitate the submission of statement of affairs, have failed to submit the same. I find no reason to take a different view. The essential constituent of the offence under Section 454(5) of Companies Act is the absence of reasonable excuse for default in filing the statement of affairs, the initial burden being upon the prosecution. Once the primary facts are proved by prosecution, the onus shifts upon the

defence to show that there was reasonable cause for not complying with the requirements of Section 454 of Companies Act. [***See Official Liquidator, Trimurthy Agro-Chemical v. Niranjan Jayantilal Tolia*** (supra)].

44. One of the defences taken by Mr. Patil is that in absence of any notice under Rule 124 of The Companies (Court) Rules, 1959, the liability of Accused to submit the statement of affairs does not arise. Rule 124 provides for notice in Form No.55 by the Official Liquidator to the persons mentioned in Section 454(2) as soon as may be after the order of winding up or order appointing the Official Liquidator as Provisional Liquidator is made to submit and verify statement of affairs. The substantive provision is Section 454 of Companies Act which provides for statement of affairs to be submitted by the Official Liquidator and prescribes the period of twenty one days from the relevant date with maximum cap of three months. Conjoint reading of Section 454 with Rule 124 does not indicate that issuance of notice in Form No.55 is *sine qua non* for filing of statement of affairs. The Directors are statutorily obliged to submit the statement of affairs within the period prescribed under sub section (3) of Section 454, which period commences from the relevant date i.e. date of appointment of provisional liquidator and where there is no such appointment from the date of winding up order. The absence of issuance of notice in Form No.55, in my view, is irrelevant for

determining the culpability of Accused under Section 454(5) of Companies Act.

45. Dealing now with the issue of whether the prosecution has proved the offence beyond reasonable doubt. The initial burden was upon the Official Liquidator to prove the relevant facts to establish the wilful default in filing the statement of affairs. The prosecution was, therefore, required to lead evidence to demonstrate that all the records necessary for filing the statement of affairs were available with the accused and despite thereof there is default. The Official Liquidator examined the Junior Technical Officer who deposed on the basis of official records. PW-1 has deposed about the meeting held by the Official Liquidator in which the Accused No.1 was present directing the Ex-Directors to furnish the statement of affairs, the orders passed by this Court in the Official Liquidator's Reports filed directing the Accused to file the statement of affairs, the notices issued by Official Liquidator calling upon the Ex-Directors to submit the statement of affairs. PW-1 has produced the notices, the orders passed in the winding up proceedings and the communications from the Accused submitting certain documents. P-14 is communication dated 22nd March, 2012 by the Accused to the Official Liquidator stating that the statement of affairs has been forwarded as well as the books of account and the records available with the Accused i.e. balance sheets

for the financial year 2001 to 2009, vouchers, bank statements, central excise stock register, correspondence, delivery challan. P-15 is communication by the Official Liquidator to the Accused in response to P-14 informing the Accused that the statement of affairs is not submitted in prescribed format duly verified by an Affidavit containing the particulars required as per provisions of the section. The communication states that the books of accounts and statutory records including the minutes book, statutory books were not handed over except a few documents even though paragraph 2 of the letter dated 22nd March, 2012 states that the statement of affairs and books of accounts have been forwarded. It was stated in the communication that the Affidavit informing about the whereabouts of three barges of the Petitioner has not been submitted.

46. In response to questions put up in cross examination, PW-1 produced two documents P-18 and P-19 i.e. Statement of Affairs in Form No.57 affirmed before notary on 6th May, 2014 and Statement of Affairs affirmed on 11th February, 2015. P-18 and P-19 are the statements of affairs which were submitted after the complaint was filed on 6th February, 2013. In cross-examination, PW-1 has stated that these documents are not statement of affairs as every page of P-18 and P-19 are not signed by Directors, all columns are not filled, most of the columns are blank and no supporting documents have been filed.

47. The evidence merely proves that the Accused were directed from time to time to submit the statement of affairs. However, it is not the default in filing of the statement of affairs which constitutes an offence but wilful default i.e. default without reasonable excuse that would constitute an offence under Section 454 of Companies Act. PW-1 has not even deposed about the preliminary facts to prove the availability of records with the accused sufficient to prepare the statement of affairs which would have resulted in the onus shifting upon the accused. Consequently, the initial burden has not been discharged by the prosecution.

48. The prosecution has not only failed to prove wilful default, but also failed to prove that there was default in filing statement of affairs. P-14 speaks of submission of statement of affairs alongwith the records available with the Accused. PW-1 has deposed that the letter dated 22nd March, 2012, was misplaced in the office of Official Liquidator and could not be traced and copy of the letter dated 22nd March, 2012 was placed on record. PW-1 has deposed on the basis of official records and had no personal knowledge. PW-1 had, thus, no knowledge about the documents which were submitted under P-14 and whether the statement of affairs submitted was in prescribed format or not and the evidence in that regard cannot be accepted. PW-1 has failed to prove the contents of P-15. In order to prove the

contents of P-15, the prosecution was required to produce the documents submitted alongwith P-14 to prove that the statement of affairs was not in prescribed format. As P-14 speaks of submission of statement of affairs along with records, it is doubtful whether there was default on part of accused. In the absence of personal knowledge about P-14 and absence of proof of contents of P-15, the prosecution has failed to prove beyond reasonable doubt that the statement of affairs and the documents submitted alongwith P-14 did not meet the requirements of Section 454(1) of Companies Act. P-14 would prove that the Accused based on the records available had submitted statement of affairs to the Official Liquidator.

49. PW-1 has admitted that after filing of complaint, the statement of affairs P-18 and P-19 have been furnished by the Accused in the year 2014 and 2015. The evidence of prosecution was filed on 1st November 2018 by which time, the statement of affairs was on record of Official Liquidator and despite thereof, the PW-1 has not deposed about the filing of statement of affairs and the same was required to be brought out in cross-examination. The submission of Mr. Shah is that the P-18 and P-19 are not in consonance with the books of accounts by pointing out that Director's Report referred to the liabilities which did not find place in the statement of affairs, which is not the deposition of PW-1. The said aspect was required to be deposed, which would have given

an opportunity to the Accused to cross-examine PW-1. It is not the case of prosecution that the statement of affairs filed subsequently did not satisfy the requisites of Section 454(1) of the Companies Act and the deposition by PW-1 in the cross-examination is that there are certain blanks in the statement of affairs at Exhibit P-18 and P-19 and supporting documents have not been filed.

50. Even accepting that the statement of affairs was not in prescribed format, the essential constituent of Section 454 is wilful default in filing the statement of affairs. PW-1 has merely deposed that there is default in filing the statement of affairs without any further evidence to establish wilful default. The minimum requirement was to demonstrate that books of accounts and records were still available with the Ex-Directors and therefore they were in a position to file the statement of affairs and despite thereof they have failed to do so. The prosecution evidence does not establish that the Ex-Directors were in possession of the records based on which the statement of affairs could have been filed and on the contrary P-14 states that based on the available records, the statement of affairs was filed.

51. In that context, the decision of Hon'ble Division Bench of Madras High Court in ***P.V.R.S. Manikumar v. The Official Liquidator High Court, Madras*** (supra) is relevant. In that case the Hon'ble Division Bench was considering the question as to whom the burden of proof

lies to prove that the default was without reasonable excuse. It held that proper test in a case of this nature is to see as to who would fail in case no evidence is led in order 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.

52. In so far as the statement under Section 313 of Cr.Pc is concerned, the purpose of recording the statement is to give an opportunity to the Accused to explain the facts appearing against him in the evidence. In the absence of any evidence led by the prosecution to prove that the failure to file the statement of affairs was wilful, there was no question of putting the said fact to the Accused. In any event it cannot be said that any prejudice was caused to the Accused for not putting the case of wilful default to the Accused.

53. In his statement under Section 313 of CrPC, Accused No.1 has stated that he has submitted all documents as he could. Insofar as accused No.2 is concerned, he has stated that he was not a director at the time of passing of winding up order and there are no submissions canvassed by Mr. Shah as regards the culpability of accused no.2 or accused Nos. 3 and 4.

54. In light of above discussion, in my view, the offence under Section 454 of Companies Act constitutes a continuing offence. The offence being summons triable, the evidence was required to be taken in presence of accused and in conformity with the rules framed by the High Court. As no objection was raised by the accused at the time of leading evidence by way of affidavit, the contents of Affidavit not being inherently inadmissible, its admissibility on ground of mode of proof cannot be raised subsequently. The initial burden to prove the preliminary facts to establish wilful default on part of accused is upon the prosecution, which upon being discharged, will shift the onus upon the accused.

55. Upon cumulative appreciation of the evidence on record, in my view, the prosecution has failed to prove beyond reasonable doubt that the failure to file the statement of affairs by the Accused was without reasonable excuse. The onus did not shift on the accused to show that there was sufficient explanation for the default. Consequently, all Accused are acquitted.

[Sharmila U. Deshmukh, J.]