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**(1984) 03 GUJ CK 0001**  
**In the Gujarat High Court**  
**Case No : Company Petition No. 48 of 1983**

Anil Vassudev Salgaocar

APPELLANT

Vs

Kermeen Foods Pvt. Ltd.

RESPONDENT

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**Date of Decision :** 14-03-1984

**Acts Referred:**

Companies Act, 1956 — Section 433, 434(1)

**Citation :** (1984) 03 GUJ CK 0001

**Hon'ble Judges :** S.L. Talati, J

**Bench :** Single Bench

**Advocate :** J.M. Thakore, for the Appellant; B.J. Shelat, for the Respondent

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## Judgement

Talati, J.—Anil Vassudev Salgaocar has filed this petition under the provisions of s. 434(1)(c) of the Companies Act, 1956. The petitioner desires that Kermeen Foods Pvt. Ltd., be wound up by the order of this court. According to the petitioner, he stood as a guarantor when the company borrowed an amount of Rs. 50,00,000 from the Central Bank of India, Rs. 50,00,000 from the State Bank of India and Rs. 16,35,000 from the Gujarat State Financial Corporation, Ahmedabad. According to the petitioner, he being a guarantor, has a right to file this petition. The case of the petitioner is that the company was not in a position to repay the debts. Eventually, the Central Bank of India filed Suit No. 1887 of 1979 and Suit No. 598 of 1980, against the company in the Bombay High Court. The suit was against the company and also against the petitioner and others for the recovery of the amount of Rs. 29,78,011.15 and Rs. 12,73,017.52 respectively. The receiver was appointed and the receiver took possession of the stocks on January 29, 1980, and sold the entire stock of 104.17 tonnes at Veraval for Rs. 49,064.05 on June 5, 1980. According to the petitioner, the State Bank of India filed a suit in the Bombay High Court being Suit No. 779 of 1981 against the company and the petitioner and others for the recovery of the amount of Rs. 34,10,034.42. So far as the Gujarat State Financial Corporation is concerned, it exercised the powers conferred on it under the State Financial

Corporation Act, 1951; and took possession of the available assets at Veraval on June 21, 1982. The petitioner understands that the Corporation also filed a suit in the City Civil Court at Ahmedabad against three guarantors, one of whom is the petitioner. According to the petitioner, the company has liability of over 100 lakhs to the Central Bank of India, the Gujarat State Financial Corporation Ltd., and the State Bank of India and other creditors. The say of the petitioner is that the security for the repayment of the advances to the said banks and the said Corporation is wholly inadequate. Further, the case of the petitioner is that the company has ceased to carry on any business for the three years. Various other small grievances are made stating that the company neglected to maintain the company property and the company has also not paid a number of its sundry creditors with one of the creditors, M/s. MODPACK, by consent terms, one plate freezer of the company without anybody's permission was disposed of though, according to the petitioner, there was overall charge of the Gujarat State Financial Corporation. According to the petitioner, the company is running in loss and, after the year 1977, the company has not filed any balance-sheet before the Registrar of Companies. Further, according to the petitioner, the company was unable to pay electricity charges and, therefore, the electricity company was compelled to cut off their electric connection and, therefore, the company is not able to carry on its usual business activities. Under these circumstances, according to the petitioner, this petition for winding up was presented to the court.

2. Vassudev Venkatesh Keshkamat, Chairman and Managing Director of the company filed a reply to the petition and opposed the petition. According to him, the petitioner was a director in several companies and he has to pay substantial amounts to the company as well as to him personally in respect to the various transactions with the company. Further, according to him, the company was sick unit when it was under the old management in or about June, 1977. The management of the company was taken over by him and members of his family and other shareholders at the specific request of the petitioner and his company, VMSB. According to the reply filed, the said VMSB was one of the companies affected by the provisions of the MRTP Act, 1969, and, hence, the petitioner could not take over this particular company and, therefore, the petitioner requested him and the shareholders of the company to take over the management of the company so that through the said company the petitioner and the said VMSB could undertake processing and export of fisheries/marine products, which business then was reserved for small scale industries and other sectors. According to the reply filed, the company has one of the best modern and giant plants for cold storage and ice plant and other facilities to undertake export of frozen food products which include fish, meat, vegetables, fruits, etc. and the value of the said plant of the company is over Rs. 1.50 crores. According to Shri Keshkamat, the company was taken over by the management to serve the business purposes of the petitioner and the said VMSB and the petitioner and the said VMSB had agreed to give all support and financial resources to the

company which was to operate the project of export of fisheries which was undertaken by the petitioner and the said VMBS. Further, it is stated in the reply that the borrowings of the company are all insured by the Export Credit and Guarantee Corporation Ltd., which is a Government of India undertaking, and, therefore, the banks and there are bound to look to the ECGC alone for their dues and/or to recover the said dues from the ECGC Ltd. According to Shri Keshkamat, 75 per cent. of the amount borrowed from the banks, if any, will be substantially lower than what has been allegedly stated by the petitioner in the petition. According to him, the suits filed by the Central Bank of India were still pending and the company is contesting those suits and the matter is sub-judice. According to the company, the petitioner and the company, VMBS owe to the company substantial amounts aggregating to several lakhs of rupees and the exact amount could not be ascertained since the relevant books of account, registers, papers, documents, etc., with regard to the liability have been taken away by the petitioner and/or his nominees. According to the company, there were several counter-claims against the said M/s. MODPACK and, under the circumstances, the proceedings with M/s. MODPACK were settled and consent terms were filed. According to the company, the company had four plate freezers out of which only two plate freezers had been charged to the Gujarat State Financial Corporation and out of the remaining two unencumbered plate freezers one was given as a security to the said M/s. Modpack in terms of the settlement arrived in the said proceedings filed in the court by M/s. MODPACK. In regard to electricity bills, the company in the affidavit stated that the Gujarat Electricity Board had made gross errors in charging excessive charges for electricity and had issued highly inflated bills of electricity to the company which were challenged by the company and subsequently on realising the mistakes, the said GEB had rectified their bills. According to the company, the said matter was under correspondence. According to the company, the GSFC unauthorisedly sold after taking possession illegally all the assets of the company at Veraval and the matter was being contested according to law. It appears that, thereafter, a rejoinder was filed by Anil Vassudev Salgaocar and he produced certain correspondence with rejoinder. Thereafter, Keshkamat again filed a sub-rejoinder. Again, thereafter, Anil Vassudev Salgaocar filed another reply.

3. The matter was argued at length and the learned Advocate-General for the petitioner submitted that a good case was made out for winding up. According to him, the company was required to be wound up because the company was unable to pay its debts and it was just and equitable to do so. He relied upon s. 433 of the Companies Act, 1956, which reads as under :

"433. Circumstances in which company may be wound up by court. - A company may be wound up by the court - .....

(e) if the company is unable to pay its debts;

(f) if the court is of opinion that it is just and equitable that the company should be wound up."

4. The first question which was argued was as to whether the present petitioner had a right to file the petition. This was raised because the learned advocate, Shri Shelat, appearing on behalf of the company, had taken up the contention that a guarantor had no right to file the petition. Considering, therefore, everything on record, the following points are required to be determined :

(1) Whether the petitioner had a right to file to petition;

(2) Whether the company is unable to repay its debts;

(3) Whether in the opinion of this court it is just and equitable that the company should be wound up.

5. The learned Advocate-General submitted that the petitioner is a contingent creditor. He referred to Palmer's Company Law, volume I, 1982 Edition, particularly paragraphs 85-13 and 85-15. Those paragraphs refer to s. 224 of the English Companies Act and it is stated that according to s. 224, the creditor includes any contingent or prospective creditor. It is stated that a contingent creditor means a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date. The learned advocate, Shri Shelat, relied upon the case of Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., . Now, it was a case where the liability was to crystallize in future. It was held that if the liability on which the petition is based is a contingent liability, it cannot be said that it would amount to a debt which is payable in present. The liability of the company to repay the subscription is clearly a contingent liability and that liability will not be a debt in present.

6. The learned Advocate-General referred to two cases : (1) Winter v. IRC [1961] 3 All ER 855; [1963] AC 235 . The important passage to which reference was made occurs at page 262 of [1963] AC and at p. 867 of [1961] 3 All ER, which is as under :

"If this be the correct interpretation of these sections, the only question is whether the liability to pay balancing charges was a "contingent liability" under s. 50(1). If the question were untrammelled by authority, I have little difficulty in holding that the liability for these balancing charges was a contingent liability. It is plain from the terms of s. 50(1) that the liability contemplated is different from a debt or incumbrance, because the ordinary provisions of s. 7(1) of the Act 1894 regarding debts and incumbrances are not to apply. Section 50(1) refers both to liabilities which have not matured at the date of death and to contingent liabilities. Contingent liabilities must, therefore, be something different from future liabilities which are binding on the company, but are not payable until a future date. I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence on an event which may or may not happen."

7. Another case to which reference was made was the case of Maharashtra State

Electricity Board v. Official Liquidator, High Court, Ernakulam [1983] 53 Comp Cas 248. In that case, it was decided that by virtue of s. 128 of the Contract Act, the surety bank's liability is co-extensive with that of the principal debtor, i.e., the company. Though under s. 134 of that Act the bank is discharged by release or discharge of the principal debtor, but a discharge which the principal debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a company does not absolve the security of his liability. It was held that the bank's liability under the guarantee in question was absolute and unconditional and did not depend upon prior of any default on the part of the company. Now that, therefore, what I have to consider is whether the present petitioner has got the present liability to pay to the banks because of the guarantee that he gave to the company. It does not depend upon any future event. The liability of the guarantor is co-extensive with that of the principal debtor. That proposition cannot be disputed either factually or legally. The liability of the present petitioner would not arise only if the company decided not to pay. As soon as the guarantee was given, the principal debtor was liable, so also the guarantor. So the liability was not to arise in future but the liability was a present liability. It did not depend upon any future event which may or which may not happen. Now that, therefore, there could not be any difficulty in coming to the conclusion that the present petitioner had right to file the petition, that question is required to be answered in the affirmative.

8. The real controversy is in regard to the two other question on which the whole petition would depend. It is tried to be made that the company is not in a position to pay its debts. It is required to be remembered that the company took over a sick unit. It appears from the record that perhaps the company took over the management of the sick unit at the instance of the petitioner who stood as surety and provided all help initially because of certain business facilities or advantages which he was likely to get. It was not the obligation of relative or a friend. It was a business obligation for mutual and it was a pure business transaction which he was entering into with open eyes considering it to be for mutual benefit. He had several companies doing similar business. This company which was a sick unit perhaps had several advantages being in small scale sector. The petitioner was connected with joint stock companies and his company was perhaps not in a position to take over the sick unit and therefore, he thought it best in business interest that the present company may take over the sick unit for mutual benefit. I say so because there are other disputes on record for which though no opinion is required to be expressed at this stage, it may be stated that several directors and executives were appointed in the present company by the petitioner and, ultimately, there was a dispute as to whether Maratha or this man or that man belonged to the petitioner or to the company. The fact remained that some directors did belong to the petitioner and, ultimately, the situation did arise when some of the account books were taken possession of easily by the petitioner. It, therefore, clearly appears that at some stage the parties fell through and perhaps the company which has taken over the sick unit on the sole

support of the petitioner came into trouble. It is true that the banks filed suits, but they are contested. No one could today say to what be the result of those suits. It is not that the company alone is fighting those suits and claiming that, in any case, as the ECGC had liability of 75 per cent. because of the insurance, the liability of the company would be reduced to a great extent. But it appears that the guarantor who is also the petitioner before the court is fighting the litigation and it is stated in the petition itself by the petitioner as under :

"Having regard to certain acts and omissions on the part of the said banks and the Gujarat State Financial Corporation, the petitioner is contending or will contend that he is discharged from the liability as guarantor."

9. Now, that, therefore, the liability to the banks and GSFC is not only disputed by the present company but the guarantor is also disputing the ability of his own and, under these circumstances, it would be difficult to come to the conclusion that the company is unable to repay its debts to the GSFC or the banks. The present petitioner has not to recover anything from the company in praesenti though as a guarantor he may be liable to the banks and the financial institutions depending upon what the court decided in regard to his contention which he is going to raise or has raised. In this view of the matter, the second issue is required to be answered in the negative.

10. With regard to the third issue, the argument advanced is that the company is not doing its business and has not filed any balance-sheet after the year 1977 and that the electric bills are not paid and the connections are cut, and, therefore, it is impossible for the company to start or do any work. It appears that so far as the electricity company is concerned, there is a dispute which could be solved. The electricity company has itself admitted that the bills were not correctly prepared and the matter was under correspondence and it was quite likely that the company may get electric current. In any case the company is also alleging that the petitioner is a debtor to the company, so also the company of the petitioner, viz., VMSB. The exact amount, according to the company, is not stated because the books of account are in the possession of the petitioner. Now, these are the rival contentions which are required to be decided and these facts are disputed vehemently on both the sides. In a situation of this nature it cannot be suggested that the orders are required to be passed to wind up the company at the instance of the petitioner. It may here be mentioned that the company is making allegations that the petitioner after helping the company to take over the sick unit for reasons which are apparent in the business world, is trying to get control over the company for his own benefit or for the benefit of his other companies. This allegation may or may not be correct. But it appears that there is an allegation which has some force in the sense that I have already stated above that the petitioner would not stand as a guarantor for a very huge amount to enable the present company to take over the sick unit unless it was found for the mutual business interest and, thereafter, if any difficulties arise between the

two businessmen who become rivals, such petitions are bound to come up before the court.

11. It is significant to note that the company has stated though not in very clear terms that it had been reliably learnt that the petitioner has also filed another petition against V. M. Salgaocar & Brother P. Ltd. under the provisions of ss. 397 and 398 of the Companies Act in the High Court of Bombay in which he has once again alleged serious manipulation of accounts, misappropriations, mismanagement, etc., against his own father who is the chairman and the managing director and his brothers who are the directors of the said VNSB with a view to gaining control over the said VMSB. According to the company, the petitioner is habituated in going to any length for the purpose of resort to illegal means and false and frivolous allegations against the management of the company. Now, these are allegations which may or may not be true. But what is required to be stated is that it is more than clear that at one point of time the petitioner was all out to help the company and now is all out perhaps to take over the company or to see that it is wound up and it does not exist. There are several disputes between the parties and these disputes could be decided not by winding up proceedings but by some other process. I, therefore, do not find this to be a good case in equity to order winding up of the company and I, therefore, answer issue No. 3 in the negative.

12. Under the circumstances, the petition is summarily dismissed.