

(1984) 12 GUJ CK 0023
In the Gujarat High Court

Case No : Appeal No. 9 of 1984 in Company Petition No. 48 of 1983

Anil Vasudev Salgaonkar

APPELLANT

Vs

Kermeen Foods P. Ltd.

RESPONDENT

Date of Decision : 04-12-1984

Acts Referred:

Companies (Court) Rules, 1959 — Rule 96, 97

Companies Act, 1956 — Section 433, 434(1), 439, 439(1), 439(8)

Citation : (1984) 58 CompCas 156

Hon'ble Judges : P.S. Poti, C.J.; I.C. Bhatt, J

Bench : Division Bench

Advocate : Atul M. Setalvad, for the Appellant; B.J. Shelat, for the Respondent

Judgement

Poti, C.J.—Our learned brother, Talati J., has, by the order under appeal (Kermeen Foods P. Ltd., In re : Anil Vassudev Salgaonkar v.

Kermeen Foods P. Ltd. [1984] 56 Comp Cas 445 (Guj), summarily dismissed a petition for winding up the respondent-company, Kermeen

Foods P. Ltd. The winding up was sought on the ground that the company was unable to pay its debts and also on the ground that it would be just

and equitable that the company be wound up, grounds falling within s. 433(e) and (f) of the Companies Act, 1956. The Companies (Court) Rules,

1959, provide for the form in which a petition for winding up has to be filed and the procedure to be adopted thereupon. Rule 96 in Part III of the

Companies (Court) Rules, 1959, provides for admission of petition and that rule reads :

96. Admission of petition and Directions as to advertisement. - Upon the filing of the petition, it shall be posted before the Judge in Chambers for

admission of the petition and fixing a date for the hearing thereof and for

directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The judge may, if he thinks fit, direct notice to be given to the Company before giving directions as to the advertisement of the petition.

2. Evidently, the posting of the petition for admission is contemplated by sub-s. (8) of s. 439 of the Companies Act which provides that before a

petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the court shall be obtained for the

admission of the petition and further that such leave shall not be granted unless the conditions specified therein are satisfied. It is evident from r. 96

that admission is contemplated for every petition for winding up whether it be by a prospective or contingent creditor or by any one else eligible to

apply for winding up. In the case of a prospective or by any one else eligible to apply for winding up. In the case of a prospective or contingent

creditor before the admission is made, leave also has to be obtained and the guidelines for grant of such leave are indicated in s. 439(8) of the Act.

3. The learned judge, before whom the case came to be posted, felt it not necessary to admit the petition for the reason that the petitioner had

nothing to recover from the company in praesenti and, therefore, it cannot be said that the company is ""unable to pay"" its debts. The learned judge

also found that it cannot be said that it was ""just and equitable"" that the company should be wound up. At the same time, it was found, negating

the contention of the respondent company, that the petitioner, as a guarantor, had locus standi to file the petition.

4. The petitioner's case is that in 1977, the petitioner, at the request of Shri V. V. Keshkamat, the chairman and the managing director of the

respondent company, gave certain guarantees to the Central Bank of India, the State Bank India and the Gujarat State Financial Corporation, on

behalf of the respondent company, in connection with certain advances made by these institutions and as a result of this the petitioner has

committed himself to a contingent liability of about Rs. 50 lakhs. It is said that the company has ceased to function by or about the year 1979. The

respondent company had been formed to carry on business in sea foods at Veraval and due to various reasons the business had to be closed. It is

the agreed case that for about five years past, the respondent company has not

carried on any business. It is also the agreed case that most of the creditors of the company, namely, the banks and the financing institutions, have taken proceedings for recovery of money and the respondent company has not yet paid such dues. It is the petitioner's case that he may be ultimately held liable for the debts of the respondent company in view of the guarantees given by him despite the fact that in the litigations, the petitioner has taken up the stand that due to the subsequent creditor, the petitioner claims to be entitled to move for winding up under s. 439(1)(b) which contemplates any creditor or creditors moving a winding up petition and the term "creditor" includes any contingent or prospective creditor under s. 439(1)(b).

5. That the petitioner may ultimately become liable to answer the liabilities of the respondent company is evident. In that event, the company will become a debtor to the petitioner and that is the reason why the petitioner claims to be a contingent creditor. The contingency is that of the principal debtor not discharging his obligations to the creditor. Equally well there is a contingency of the petitioner succeeding in avoiding liability in the event the petitioner is able to show that the subsequent conduct of the creditor has prejudiced the guarantor with the consequence that the guarantee stands discharged. The petitioner may or may not succeed in such a contention and in the event the petitioner does not succeed, the petitioner will necessarily have to answer the respondent's liability. Under these circumstances, what could be said is that the petitioner's liability is contingent. As a contingent creditor he can move a petition under s. 439.

6. The real controversy, as presented by the appellant's counsel, concerns the correctness of the finding of the learned judge that since, at the moment, the petitioner is not answerable for any debt of the company, it could not be said that the case will fall within s. 433(e) read with s. 434(1) (c) of the Companies Act.

7. It is not as if the sustainability of the winding up petition depends on whether the company, whose winding up is sought, is able to pay the debt due to the person who moves the petition. The company must be unable to pay "its debts" which means that the inability is not one to pay the debt of the person moving for winding up, but the debts as a whole due from the company. Section 434(1) (c) indicates that this is to be, taking into

account the contingent and prospective liabilities of the company also. That in this case the respondent company is highly indebted is not a matter in doubt. It has borrowed heavily from banks. Banks have filed suits. The company has borrowed from the Gujarat State Financial Corporation. The admitted loans which have not been repaid are not likely to be repaid by the company as matters stand now. It is not as if the company is functioning. It has ceased its operations long ago. The amount due would repaidly increase in due course with interest and interest on interest being added on to the principal. There is no reasonable prospect, as it is, of the company coming back to life again, though the respondent would say that they have attempted to secure collaborations from foreign firms and but for the intervention of the petitioner with a view to see that such collaborations do not bear any fruit, possibly someone or other of the foreign firms would have assisted the company. The averment in this regard is absolutely vague. It is not as if there is any specific mention of any person or any company having come forward with a helping hand by way of collaboration and financial assistance. It is not as if there is any material for the court to be convinced that the prospect of a resuscitation of the company is real. Even now it is not as if the company could present to us any picture which could even indicate the remote possibility of the company resuming its normal operations. The question would primarily be one of finance. Even assuming that the creditors keep away for some time without pressing for their claims to enable recommencing of the functioning, considerable working capital would be called for. It is said that even the plant has been taken possession of by one of the creditors. This is admitted in the affidavit-in-reply filed by the company. In these circumstances, it is evident that the company has considerable debts and that it is unable to pay such debts with the result that the creditors have to seek their remedies through court. Our attention has not been drawn to any source to which the creditors could hopefully look forward for satisfying their claims. In these circumstances, that the respondent is unable to pay its debts is prima facie evident. We are at this stage examining this only with a view to consider whether the case deserved admission. We feel that there is more than sufficient material to reasonably convince the court that prima facie the respondent is unable to pay its debts. The question is not whether the respondent is unable to pay the petitioner's

debt. If so posed and it is further noticed that the petitioner's debt is contingent and hence no question of inability to pay arises for which reason

the petition is dismissed, the approach would be wrong.

8. We have pointed out that we are not now at the question of any final order in winding up. Even in finally deciding the question of winding up, the

court exercises a sound discretion. Winding up may quite often be the most effective way of settlement, realising for the creditors, and even for the

shareholders, whatever assets could be salvaged. The question in each case would be whether continuance of the company would be commercially

viable. The court will have to take into account the financial condition of the company, its resources, the working capital requirement to start the

functioning of the company if it has ceased to function, the possible sources for such working capital requirements which may be required to restart

the company, the preparedness of new creditors to advance funds which, to a great extent, will depend upon the degree of solvency of the

company and similar matters. The assessment of these factors would be directly relevant to the determination whether the company will be able to

pay its debts, given a little breathing time. If the circumstances do not indicate that there is any reasonable prospect of the company functioning

again, to decline to wind up will only put off the evil day, in the process increasing the burden on the company, such as by way of accumulating

interest on the debts already due and other commitments such as overheads of the company. In such a situation, continuance of the company will

only result in reduction of its distributable assets. That will be one of the considerations relevant when the court decides whether a winding up order

should be passed or not.

9. In the case before us, there is no material, as the matter now is, to show that if the matters are allowed to stand as they are, there would be any

improvement in the situation. The only result would be that the entire assets of the company may become insufficient perhaps to pay the creditors

and they may not even get any substantial part of what is due to them. We must remember that in between the admission of the petition and the

final order of winding up, there are opportunities for the court to extend its helping hand to the company to revive its functioning. At that stage, the

court could properly play a constructive role in giving positive assistance to any

scheme of revival if the court finds that such a scheme is real as well as feasible. In the circumstances of the case, the question whether the company will be able to get any collaboration and if so, whether any practical suggestion as to such collaboration would be worthwhile for the court to consider are matters which must necessarily be relegated to the final stage. As it is, we feel that the order of the learned company judge has to be vacated. Even so, we are not directing that the petition should be admitted since that calls for fresh consideration for the reason we will presently indicate.

10. Though the question has not been raised before the learned company judge and in fact even here, we notice that the petitioner has not moved

for leave of the court under r. 97 of the Companies (Court) Rules, 1959. Such leave is to be sought for when the motion is made by a prospective

of contingent creditor. That the petitioner is. Therefore, such a motion should have been made under s. 439(8) of the Companies Act read with r.

97 of the Companies (Court) Rules. The question of admitting or not admitting the petition is to be decided only after leave is granted. Therefore,

though we have said that the grounds on which admission was refused are not sustainable in law, we are not proceeding to admit the petition, for,

the condition precedent for such admission has to depend on a motion made by the petitioner for the purpose of seeking leave. Inasmuch as such a

motion has not been made, we leave the matter to be finally disposed of by the learned company judge taking into account what we have said in

this judgment. In other words, having found that the approach by the learned company judge on the question before the learned judge was not in

accordance with law, we set aside that order and remit the case back to the company judge to pass appropriate orders taking also into account

the fact that, as it is, there is no application for leave before the court under r. 97 of the Companies (Court) Rules.

11. The appeal is disposed of as above. No costs.

12. At the request of the counsel for the respondent-company, the operation of this order is stayed for a period of four weeks.