
(2001) 11 CAL CK 0008

In the Calcutta High Court

Case No : C.A. No. 322 of 2001 and C.P. No. 435 of 2000

Deb Paints Pvt. Ltd.

APPELLANT

Vs

Universal Lime Industries

RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:

Arbitration Act, 1940 — Section 34, 8(2)
Companies Act, 1956 — Section 433, 434
Partnership Act, 1932 — Section 2, 69, 69(1), 69(2), 69(3)

Citation : (2002) 1 CALLT 94 : (2002) 110 CompCas 429

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : M.C. Ghosh and D. Mitra, for the Appellant; S. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This winding up petition has been filed by the petitioning creditor, a partnership firm, against M/s. Deb Paints Pvt. Ltd. (hereinafter called the said company) for recovery of its debt arising out of price of goods sold and delivered to the said Company from time to time.

2. The said company was Incorporated under the Companies Act 1913 and the authorized share capital of the company is Rs. 5,00,000/-divided into 50,000 equity share of Rs. 100/- each. The principal amount claimed by the petitioner is Rs. 77,299/- along with Interest @ 21% from the date of payment till the payment thereof. Thus the total claim was for Rs. 1,05,292.27 p,

3. On such petition being filed, the learned company Judge on 6th November 2000 gave directions for affidavits. It is stated on behalf of the said company that the affidavit was affirmed on behalf of the said company. But the affidavit was not accepted by the learned counsel for the petitioner on the ground of delay. The matter appeared before the learned Company Judge on 22nd May 2001 and on that date no one represented the company and the affidavit of the

said company was not on record and the learned company passed an order admitting the company petition and also passed an order for insertion of advertisement. The said order was served on the company by the petitioner. Thereafter a further affidavit was filed by the said company praying for recalling of the order dated 22nd May 2001 passed in this proceeding.

4. At the hearing of that prayer for recalling, the learned counsel for the company, apart from pointing out its defence to the claim of the petitioning creditor, also raised a preliminary objection on the maintainability of the company petition. Since the question of maintainability is a fundamental one, this Court heard both the company petition and the company application together.

5. The preliminary objection is that the winding up petition has been filed by M/s. Universal Lime Industries which is an unregistered partnership firm and cannot, in the absence of its partners, file a proceeding for realization of its dues and even the filing of a suit is barred by such an unregistered partnership firm.

6. The learned counsel for the petitioner did not dispute that the petitioner is an unregistered partnership firm nor did it seek any liberty from the Court to implead the partners of the firm to the proceeding. On the other hand, the learned counsel maintained that the instant company petition, at the instance of an unregistered partnership firm alone and without its partners being impleaded, is maintainable and the learned counsel cited a few decisions to that effect.

7. Therefore, the Court has to consider this aspect of the matter as a preliminary point as a decision on this point is vital on the outcome of this proceeding.

8. In support of his contention the learned counsel for the petitioner relied very much on the Judgment of a learned single judge of a Delhi High Court in the case of Kalra Iron Stores v. Faridabad Fabricators Pvt. Ltd., reported in 73 Company Cases 330.

9. In that case it appears that after the filing of a petition for winding up a preliminary objection was taken by the company that the constitution of the petitioner firm had not been stated in the petition and that the verification of the petition was not acceptable. Then the firm sought for amendment of the petition. The said prayer for amendment was opposed by the company mainly on two grounds and of which one of the ground was based on Section 69 of the Indian Partnership Act (hereinafter called IPA). The learned Judge allowed the amendment Inter alia holding that too narrow and hyper technical approach about verification should not be encouraged. So far as the ground taken u/s 69 was concerned, the learned Judge held that the proceeding of winding up was not a suit and while filing a proceeding of winding up the petitioner is exercising a statutory right under the Companies Act and not a right arising from a contract between the parties. On these reasoning the learned judge held that Section 69 of IPA has no application to proceedings under the Companies Act. This part of the reasoning given by the learned Judge will appear from page 335 of the report and which is set out below:

"Reverting to the second objection, it has to be borne in mind that Section 69 of the Indian Partnership Act contains only a prohibition on an unregistered firm filing a suit to enforce a right arising from a contract or conferred by the said Act. The firm has to be registered and the person suing has to be a registered partner. The suit to attract Section 69 has to be one to enforce a right arising from a contract or a right conferred by the Act. Mr. Khanna has not been able to cite any judgment holding that Section 69 would be applicable to winding up proceedings under the Companies Act. In the winding up petition primarily the Court is required to adjudicate whether the respondent is commercially solvent or Insolvent and is not to enforce any right arising from a contract. The proceedings are not a "suit". No decree like a suit is passed. The petitioner in this case is only exercising a statutory right under the Companies Act. That right is not arising from a contract between the petitioner and the company. In my view, the provisions of Section 69 have no applicability to proceedings under the Companies Act."

10. The learned judge however held at page 335-36 of the report that for applicability of Section 69, "other proceedings" have to be for enforcement of any right arising from a contract.

11. The next judgment on which the learned counsel relied was rendered in the case of *Kajaria Traders (India) Ltd. Vs. Foreign Import and Export Association*, .

12. In the said case there was a difference of opinion two learned judges and the matter was referred to a third judge. The learned third judge held that right to make application u/s 8 of the Arbitration Act, 1940 is not a right arising from a contract within the meaning of Section 69 of IPA.

13. The learned counsel for the petitioner also relied on the decision in the case of *M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another*, .

14. In that case the learned Judges of Supreme Court held that a suit by an unregistered firm is not barred by Section 69(2) if a statutory right or common law right is enforced. As such, the learned Judges held that a suit for perpetual injunction to restrain defendant from passing off the defendants' goods as those of plaintiffs' by using the plaintiffs' Trade Mark Act is an action at common law and is not barred by Section 69(2). As such the Supreme Court held that the suit for permanent injunction or damages on the basis of a registered trade mark and its infringement, is to be treated as one based on statutory right under the Trade Mark Act and is not barred by Section 69(2) of the Act.

15. The learned counsel submitted that following the said Judgment, in the instant case also, the winding up petition should be treated as maintainable even though it was filed by an unregistered firm. This proceeding has not been filed not for enforcing any right arising under a contract but for the purpose of enforcing a statutory right given to the firm under the Companies Act.

16. The next Judgment on which reliance was placed by the learned counsel was in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, . In that judgment the learned Judges observed that Section 69(2) of IPA ts a penal provision and this deprived the plaintiff of its right to get its case examined on merits by the Courts. Therefore. It has to be strictly construed.

17. In that case a suit was filed by an unregistered firm claiming possession from erstwhile lessees. The learned judges found that the averment of the plaint showed that the claim is not based only on the breach of covenant to recover possession on the basis of the lease deed but it was based on a right of the lessor to get possession under the law of the land. As such, the suit was held not barred, in view of the cause of action namely the right of the lessor to get possession under the law of the land. It was held that a suit on this right is outside the sweep of Section 69(2) of IPA.

18. The learned counsel also relied on an unreported judgment in the case of M/ s. S.W. Bagla & Company v. Hanuman Sugar & Industries Ltd. delivered by Hon"ble Justice Bhaskar Bhattacharya. In that case a suit was filed Inter alia on the ground that the plaintiff firm advanced a sum of Rs. 2,00,000/- to the defendant on the condition that the sum would be repaid by the plaintiff with the interest calculated @ 18% per annum. The further ground of the plaintiff is that they forwarded two cheques of Rs. 1 lakh each which were encased by the defendant and the monies were appropriated for its benefit. As the defendant failed and neglected to pay the amount, the suit was filed claiming a sum of Rs. 20,32,900/-. The learned Judge also noted that there is an alternative case made out by the plaintiff to the effect that the plaintiff did not want to advance the same money to the defendant gratuitously and the plaintiff was entitled to compensation in respect thereof and which the plaintiff reasonably assessed at Rs. 20,32,900/-. In the said case, an objection was raised on behalf of the defendant that the plaintiff company is an unregistered firm so the suit is not maintainable. Under those circumstances, the learned Judge relying on the Judgment of Supreme Court in the case of Raptakos Brett (supra) held that even though the claim of the plaintiff on the basis of the contract is barred for non-compliance with the requirement of the Section 69(2) of 1PA, but the plaintiff is entitled to get recovery of the amount advanced along with compensation for enjoying the money in terms of Section 70 of the Contract Act which is a law of the land.

19. The learned counsel also relied on a decision in the case of Hind Mercantile Corporation Pvt. Ltd. v. J.H. Rayner Company Ltd., reported in 41 Company Cases 548. In that case the question which cropped up was in respect of certain money due under the contract and the respondent filed a petition for winding up of the applicant company u/s 433(e) of the Companies Act. In the application filed by the applicant company u/s 34 of the Arbitration Act for stay of the winding up petition, the High Court held that the relief claimed in the winding up petition couldn't be said to arise out of or under the contract to be referred to

arbitration. The Court held that u/s 34 of the Arbitration Act only proceedings in respect of any matter agreed to be referred can be stayed and winding up petition cannot be stayed.

20. It is obvious from what is narrated above that the present question with which the Court is concerned here did not fall for consideration in that case. In that case It was clearly observed that the question was "whether the institution of the petition u/s 433(e) of the Companies Act is a proceeding that would come under the Arbitration Clause" and the Court held that so far as the relief claimed in the company petition is concerned the same does arise out of or under the contract. The Court held "the point for decision in the company petition is whether the applicant company is unable to pay the debt".

21. This Court is not concerned with those questions in this case.

22. The learned counsel for the company on the other hand, relied on a few decisions which may be now a considered by this Court.

23. The first of such judgment was delivered in the case of Dabholkar Enterprises V. Padma Alloy Castings Pvt. Ltd.. reported in 1994(15) Corporate Law Advisor 299.

24. In that judgment a learned Judge of the Bombay High Court held that in a case where a petition was made by an unregistered partnership firm for the winding up of a company on the ground of the failure of the company to pay debts despite a statutory notice u/s 434 of the Companies Act. such a proceeding is liable to be dismissed in view of the bar of Section 69 of IPA. The learned Judge upon considering the facts of that case, held that unless partnership firm is a registered one on the date of filing of the petition, the alleged debt is not recoverable prima facie from the said company in view of the bar of Section 69 of IPA.

25. The learned counsel also relied on a decision of the Supreme Court in the case of Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala, .

26. The learned counsel relied on the said Judgment for the purpose of showing that a partnership firm under partnership Act has no distinct legal entity apart from the partners constituting it. Therefore, a firm has no separate rights of Its own in the partnership assets and properties. Whenever it is said about partnership assets or properties what is meant is the property or assets in which all the partners have a joint or common interest. Relying on the said Judgment the learned counsel submitted that in the Instant case only the unregistered partnership firm is the petitioner, no partner of the said firm has been Impleaded. Therefore, this petition is at the Instance of someone who is a non-entity in the eye of law and as such the instant winding up petition is not maintainable. The learned counsel has also sought to distinguish the Supreme Court decisions cited by the learned counsel of the petitioner on facts. The learned counsel for the company also relied on in the case of Bhawarjit Chettri v.

Kedarmal Bansilal, reported in AIR 1954 Ass 111. It was held in the said case that an unregistered partnership firm is not a legal entity. As such it is essential that all partners of the business should have been Jointed as party defendants to the action before it can be said that the so called partnership or the assets, if any, of partnership, would be liable. The learned Judges held that the decree which was granted in favour of the plaintiff and against such a partnership does not exit in the eye of law and is clearly Illegal.

27. These are the rival contentions of the parties.

28. A partnership is a relationship which subsists between the parties. But a partnership firm which is not registered is not an entity in the eye of law and it is not a person. It is merely a collective name for the individuals who are members of the partnership. This position is well settled and it would appear from the decision of Calcutta High Court in the case of Seodoyal Khemka and Another Vs. Joharmull Manmull and Others, . This decision was followed in the cases of Brojo Lal Saha Banikya Vs. Budh Nath-Pyari Lal Das, . It is thus clear that a non-registered firm is not a person and not a legal entity. In truth, it is nothing more than merely a description if Individuals who compose the firm. The position under English law is also the same. Under the partnership Act, 1890, a partnership has been defined as the relation which subsists between persons carrying on business in common with a view of making profit.

29. From Pollock's Digest of Law of Partnership, it appears "partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them". In the Instant case, admittedly only the unregistered partnership firm has been impleaded as the petitioner and not its partners.

30. In order to decide the controversy on the maintainability of a winding up petition which has been filed by an unregistered partnership firm, the Court has to consider the Import of Section 69 of IPA. As such for proper appreciation of the dispute involved it would be appropriate to set out Section 69 of the said Act as follows :

"Section 69. Effect of non-registration.--(1) No suit to enforce a right arising from a contract or conferred by this Act shall be Instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be Instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of Sub-sections (1) and (2) shall apply also to a claim of set-

off or other proceeding to enforce a right arising from a contract, but shall not affect--

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realize the property of an insolvent partner."

31. From the perusal of the said section, it is clear that it deals with the effect of non-registration of a partnership firm. Even though under the provision of IPA registration of a firm is not compulsory, nor does it impose any penalties for non-registration like the ones which are imposed under the English Law under the Registration of Business Names Act, 1916, but the effect of the Section is practically such as to make the registration of a firm, a necessary requirement in most of the cases. It is well settled that the prohibition contained in Section 69 is mandatory in nature and the Court has virtually no discretion in the matter.

32. A proper perusal of various Sub-sections of Section 69 make it clear that Sub-section 1 deals with a suit by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in it. So far as Sub-section 2 is concerned, it speaks of a suit to be Instituted by or on behalf of a firm against any third party. The operation of sub-section 1 is however restricted to a suit to enforce a right arising from a contract or conferred by IAP. The bar under Sub-section 2 also is confined to a suit for enforcement of a right arising from a contract. So far as Sub-section 3 is concerned, it makes it clear that all the provisions of Sub-sections 1 and 2 shall apply also to a claim of set off or "other proceedings" to enforce a right arising from a contract with certain exceptions mentioned in Clauses (a) and (b).

33. The expressions "other proceedings" occurring under Sub-section 3 of Section 69 have been construed by Supreme Court in the case of Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., . The said decision of the Supreme Court overturns the decision of Bombay High Court in Kajaria Traders (India) Ltd. Vs. Foreign Import and Export Association, which was relied on by the learned counsel for the petitioner.

34. Overruling the decision of Bombay High Court, the Hon''ble Supreme Court held that the words "other proceedings" occurring in Section 69(3) of IPA must be given its full meaning untrammelled by the words a claim of set off. After giving the said Interpretation, the learned Judges of the Supreme Court held that when a partner of an unregistered firm applied u/s 8(2) of the Arbitration Act to enforce a right arising from a contract between the partners, the proceedings are barred u/s 69(3) of IPA

35. Following the said Supreme Court Judgment on the Interpretation of "other proceedings" this Court finds that a winding up proceeding is also covered within the expression "other proceedings" mentioned in Sub-section 3 of Section 69 of IPA.

36. The only contrary opinion has been expressed in the judgment of Delhi High Court in Kalra Iron Stores (supra). But the said Judgment is clearly distinguishable as it would appear from the discussion hereunder.

37. In Kalra Iron Stores (supra) the objection was that the constitution of firm had not been stated in the petition and as such amendment was sought for by the petitioner which was opposed by the company. In that context, the learned Judge said that Section 69 of IPA does not require the plaintiff state in the plaint that the plaintiff firm is a registered one. There is no dispute with the aforesaid proposition. To my mind, the learned judge delivering the Judgment in Kalra Iron Stores (supra) was absolutely right in holding that the Court should not adopt hypertechnical approach towards verification of petition. It further appears that the said judgment was passed on the amendment petition and that the same was mostly concerned with the question of allowing the amendment which was prayed for and the amendment was allowed showing that the firm is registered and thus the objection relating to non-registration was taken care of. But the question whether Section 69 of IPA applies to proceedings under Companies Act or not, did not really fall for consideration in the case since the firm was a registered one as It appears from the amendment petition which was allowed.

38. Apart from that it is difficult for this Court to accept the proposition that Section 69 of IPA has no applicability to the proceedings for winding up under the Companies Act. Such a broad proposition, with great respect, does not emerge either on a perusal of Section 69 of IPA or the provision of the Companies Act.

39. One thing has been made clear by Supreme Court in Jagadish Chandra Gupta (supra) that the word "other proceedings" must be given its full meaning. The only qualifying clauses are that the other proceedings must be one for enforcing "a right arising from a contract". In the Instant case, from the pleading in the winding up petition itself, it appears that materials were alleged sold and supplied by the petitioner to the said company and bills were raised pursuant to such supply made on the order of the company. The same would appear from a plain reading of paragraphs 8, 9 and 10 read with annexure "A" to the winding up petition. This also appears from the statutory notice dated 20th July 2000 sent by the petitioner to the said company and it is clear from the statutory notice that the goods which were supplied were manufactured and delivered by the petitioner to the company on the basis of the verbal order of the said company.

40. It is obvious that but for the said of the verbal order or agreement between the company and the petitioner the goods would have not been supplied. Therefore, the right which the petitioner is seeking to enforce in this case is a

right arising from a contract There is no reason for this Court to give the said expression namely "right arising from a contract" occurring u/s 69(3) of IPA any restricted meaning. It may be true that the specific remedy which was provided under Companies Act namely the remedy of winding up is a statutory remedy and such a remedy might have been provided in public Interest. But the right on the basis of which the said remedy is sought for in this case is arising out of contract.

41. In this connection reference to be made to the observations of Supreme Court in *M/s. Haldiram Bhujawala (supra)*. In paragraphs 23, 24 and 25 of the said judgment, the expression "arising out of a contract" has been discussed. While discussing the said expression the learned judge has made it clear that the contract referred to therein must be one which has been entered by the firm with the third party. Secondly, the contract must also be one entered into by the firm in the course of the business dealings of the firm with such third party. In the instant case, a contract referred to above in paragraphs 8, 9 and 10 of the winding up petition and mentioned in the statutory notice is certainly a contract which has been entered into by the unregistered firm in the course of its business dealing with the said company which is a third party. The learned Judges in para 25 have also described what is meant by a third party. Referring to Section 2(d) of IPA, third party has been defined as persons who are not partners of the firm. It is nobody's case that the said company is one of the partners of the unregistered firm. Therefore, both the requirements mentioned in paragraphs 24 and 25 have been satisfied namely the contract between the petitioner and the said company is a contract between an unregistered firm and a third party and such a contract was in the course of business transactions. In the instant case, the petitioner is also praying for winding up the said company on its failure to pay the debt of the petition firm. In this context it is difficult to say that the petitioner has not filed winding up proceeding to enforce its rights arising from the contract. As this Court has already observed that the remedy for winding up may be statutory but the right in the instant case is based on a contract for supply of goods and the winding up petition has been filed for alleged non-payment of the price of goods sold and delivered.

42. Therefore, the broad proposition in *Kalra Iron Stores (supra)* is not acceptable to this court. On the other hand, this Court proposes to follow the judgment of the Bombay High Court in *Dabholkar Enterprises (supra)*. In *Dabholkar Enterprises* it has been held that since on the date of filing of the winding up petition the firm was not registered under the partnership firm, which facts are also admitted here, the alleged debt was not recoverable by the unregistered firm from the said company. The learned judge of Bombay High Court held, in my view rightly, that in order to succeed in winding up petition the petitioner must establish that the alleged debt against the company is a debt which is legally recoverable. The learned judge has further illustrated this point by saying that if a winding up petition is filed out of time and is barred by limitation, the alleged debt is not recoverable on the basis of such a time barred petition. Similarly, in the instant case, the recovery of the debt on a petition filed

by an unregistered partnership firm is barred in view of provision u/s 69 of IPA. In the case of Dabholkar Enterprises, the learned judge held that the case of the petitioner was directly arising out of an agreement of sale and purchase between the parties. The same is true in the case also.

43. Apart from that, in the Instant case, the proceeding has been filed by the firm only and none of the partners has come forwarded. In the unreported Judgment in the case of S.N. Bagla and Company apart from the firm the partners were also made parties. Apart from that in the winding up petition there is no alternative prayer which was there in the case of Haldiram Bhujawalla (supra) there were two plaintiffs, the first one was the firm and the second one, the son of Mulchand was also on record. In the case of M/s. Raptakos Brett (supra) it was found by the Court on a proper reading of the plaint that the case was not based on the lease deed alone which is the contract between the parties, but it was based also on the law of the land which means that an alternative case was made out. But in the Instant case, no alternative case has been made out. Since no alternative case has been made out and the case in the winding up petition rested solely on a contractual relationship between the parties, this Court is inclined to hold that the ratio in the decision of Kaptakos Brett (supra) is not applicable to the facts of this case. In fact, the learned Judges of the Supreme Court held that the suit in question was partly barred inasmuch as part of the cause of action arose out of contract. But in the Instant case, the entire cause of action in filling the present winding up petition arose out of contractual transaction between the parties.

44. Apart from that in order to maintain a winding up petition, it has to be filed by any creditor or creditors Including any contingent or prospective creditor or creditors. But a non-registered partnership firm which is a non-entity in the eye of law cannot be a good petitioning creditor. A petitioning creditor must be a person who has to present the petition. Since a non-registered partnership firm is not either natural or Juridical person it cannot present the petition for winding up and at its Instance the debt is not recoverable.

45. For the reasons given above this Court is of the view that the winding up petition solely at the instance of an unregistered firm is not maintainable in view of the provisions of Section 69(3) of IPA. The preliminary objection succeeds. The winding up petition is dismissed.

There will be no order as to costs.

46. All parties are to act on a signed copy of the operative portion of the judgment on the usual undertaking.