
(2002) 05 CAL CK 0004
In the Calcutta High Court

Case No : ACO No. 35 of 2002, C.P. No. 41 of 2001 and APOT No. 123 of 2002

Shree Balaji Steels

APPELLANT

Vs

Gontermann-Peipers (India) Ltd.

RESPONDENT

Date of Decision : 15-05-2002

Acts Referred:

Companies Act, 1956 — Section 425, 433, 439
Partnership Act, 1932 — Section 69, 69(2)

Citation : (2003) 114 CompCas 193 : (2003) 47 SCL 821

Hon'ble Judges : Tarun Chatterjee, J; Jayanta Kumar Biswas, J

Bench : Division Bench

Advocate : L.P. Tiwari, for the Appellant; B. Basak, for the Respondent

Final Decision : Dismissed

Judgement

Tarun Chatterjee, J.—When some argument was advanced by learned counsel for the parties on the question of grant of interim relief, learned counsel for the parties suggested to us that instead of disposing of the application for grant of interim relief, the appeal itself could be taken up for hearing by treating the appeal on the date the application for grant of interim relief was taken up for hearing. Accordingly the appeal was taken up for hearing along with the application for grant of interim relief.

2. This is an appeal from an order passed by a learned company judge of this court on February 6, 2002 in C. P. No. 41 of 2002 whereby and whereunder the petition for winding up filed at the instance of the petitioning creditor/appellant was admitted for a sum of Rs. 47,74,242. It appears from the impugned order also that the learned company judge gave liberty to the petitioning creditor/appellant to institute such proceedings as it may be advised to realise its alleged dues against the company, if any, either by way of interest or otherwise. Liberty was also given to the respondent-company to pay a sum of Rs. 5,00,000 on or before February 28, 2002. It was further directed that the balance sum shall be paid by the company in monthly instalments of Rs. 5,00,000 and the first of such

instalment shall commence on and from March 15, 2002, and thereafter on the 15th of each month till the entire dues were paid. In default of any of the payments, as directed, the petitioning creditor/appellant shall be at liberty to publish advertisements once in The Statesman and once in Bartaman and however publication in the Official Gazette was dispensed with.

3. Feeling aggrieved by the impugned order of the learned company judge refusing to grant interest at the rate of 21 per cent. per annum after expiry of 60 days from the submission of the bill in question, this appeal has been preferred by the petitioning creditor/appellant.

4. Before us, Mr. Basak, learned counsel appearing for the respondent, submitted that in view of Section 69(2) of the Partnership Act, 1932, the application for winding up of the company filed by the petitioning creditor which is an unregistered partnership firm was not maintainable in law. In support of this contention Mr. Basak relied on a single Bench decision of this court in the case of *Deb Paints P. Ltd. v. Universal Lime Industries* [2002] 110 Comp Cas 429: [2002] 1 CLT 94. Mr. Basak further contended that in view of Rule 21 of the Companies (Court) Rules, 1959, the petition for winding up was not maintainable in law as no leave was taken by the petitioning creditor for filing the winding up petition by a constituted attorney of the petitioning creditor. In support of this contention Mr. Basak relied on a single Bench decision of the Bombay High Court in the case of *Shantilal Khushaldas and Bros. Pvt. Ltd. v. Smt. Chandanbala Sughir Shah* [1993] 77 Comp Cas 253. So far as these submissions of Mr. Basak are concerned, Mr. Tiwari appearing on behalf of the petitioning creditor submitted before us that this submission cannot be permitted to be raised by the company respondent as no appeal has been preferred against the impugned order passed by the learned company judge. In the event we permit the respondent to raise the question of maintainability of the winding up petition by an unregistered partnership firm before us and in case we hold that the application for winding up of the company at the instance of the unregistered firm is not maintainable in law, in that case it would not be proper for us to deal with the merits of this appeal. Before we consider whether the winding up petition at the instance of an unregistered firm was maintainable in law or not, we may deal with another submission of Mr. Tiwari, learned advocate appearing for the appellant that the respondent cannot be permitted to raise the aforesaid question in appeal as the respondent has not challenged the finding of the learned company judge holding that the winding up petition by an unregistered firm was maintainable in law by not filing a separate appeal. According to Mr. Tiwari, since this question was not raised by way of an affidavit in the company court and also not raised before the learned company judge in detail, it would not be open to the appellate court to entertain such a plea when no appeal has been preferred against the impugned order by the respondent. Mr. Basak appearing on behalf of the respondent-company however submitted on instruction before us that the company being aggrieved by the finding of the learned company judge, was intending to file an appeal against the self-same impugned order. Be that as it may, we are unable to

accept this submission of Mr. Tiwari, appearing on behalf of the appellant. It is well settled that an appellate court shall make any order which ought to have been passed or made to pass or make such further order as the case may require, and this power may be exercised by the court notwithstanding that the appeal was as to part only of the order and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties might not have filed any appeal or objection, (see Order 41, Rule 33 of the Code of Civil Procedure). Therefore when we find that the jurisdiction of the company court to entertain an application for winding up of the company at the instance of an unregistered partnership firm was an issue, we must keep in mind the provisions of Order 41, Rule 33 of the Code of Civil Procedure, as noted herein earlier. Therefore, keeping the provisions made in Order 41, Rule 33 of the CPC in our mind, we must permit the respondent to raise such a question before the appellate court. Accordingly we are unable to accept the contention of Mr. Tiwari that since the respondent has not filed against that part of the impugned order which had held that the application for winding up was maintainable at the instance of the unregistered firm, the respondent shall not be permitted to raise such question without filing an appeal from the impugned order.

5. Let us now revert to the main question, which is to be decided in this appeal. The question is whether the winding up petition at the instance of an unregistered firm was maintainable in law or not. Before we proceed further we note the description of the petitioning creditor/appellant as would be evident from the cause title of the petition for winding up which is as under : "Shree Balaji Steels, a partnership firm carrying on business at 23A Netaji Subhash Road, 1st floor, Room No. 27, Calcutta 700 001."

6. From the aforesaid description of the partnership firm it is not possible for us to say that the appellant is either a registered or an unregistered firm. But Mr. Tiwari, appearing on behalf of the petitioning creditor/appellant did not dispute that the petitioning creditor/appellant is an unregistered firm. Such being the position we proceed to consider the case by keeping in our mind that the petitioning creditor is an unregistered firm. As noted herein earlier, this appeal has been filed by the petitioning creditor only against the refusal of the learned company judge to grant interest to the petitioning creditor. Since the question of entertaining the winding up petition by the learned company judge at the instance of an unregistered firm will go to the root of the matter, we are of the view that such a question ought to have been decided by the learned company judge by going into that question in detail. Chapter I of Part VII of the Companies Act deals with modes of winding up. Section 425 says that the winding up of a company may be :

- (a) by the court; or
- (b) voluntary ; or
- (c) subject to the supervision of the court.

7. Sub-section (2) of Section 425 clearly says that provisions of the Companies Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of the aforesaid modes. From a plain reading of the aforesaid provisions as made in Section 425 of the Companies Act, winding up is a means by which the dissolution of a company is brought about and its assets realised and applied in payment of its debts and after satisfaction of the debts the balance if any, is paid back to the members in proportion to the contribution made by them to the capital of the company. Chapter II deals with winding up by the court and cases in which company may be wound up by the court. Section 433 of the Companies Act deals with circumstances in which company may be wound up by court. They are as follows :

- (a) if the company has, by special resolution, resolved that the company may be wound up by the court;
- (b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;
- (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two ;
- (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.

8. There is yet another section in the Companies Act which is an important section for the purpose of deciding the question in hand. This is Section 439 of the Companies Act which runs as under :

"439. Provisions as to applications for winding up.--(1) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section,--

- (a) by the company ; or
- (b) by any creditor or creditors, including any contingent or prospective creditor or creditors ; or
- (c) by any contributory or contributories ; or
- (d) by all or any of the parties specified in Clauses (a), (b) and (c) whether together or separately ; or
- (e) by the Registrar ; or
- (f) in a case falling u/s 243, by any person authorised by the Central Government in that behalf.

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holder of debentures, shall be deemed to be creditors within the meaning of Clause (b) of Sub-section (1).

(3) A contributory shall be entitled to present a petition for winding up a company, notwithstanding that he may be the holder of fully paid up shares, or that the company may have no assets at all, or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities.

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder.

Except in the case where he is authorised in pursuance of Clause (f) of Sub-section (1), the Registrar shall be entitled to present a petition for winding up a company only on the grounds specified in (Clauses (b), (c), (d), (e) and (f)) of Section 433 :

Provided"

9. From a plain reading of the circumstances as enumerated in Section 433 and its sub-sections of the Companies Act, it is clear to us that Section 433 only empowers the court to pass an order of winding up of a company in appropriate cases. It is also clear from the provisions made in Section 433 of the Companies Act that the principle to be followed in a winding up petition by the court is that there is no right to a party to claim winding up on the basis of any agreement between the company and the said party. The power to winding up a company is only conferred on the court if the court is satisfied that the circumstances mentioned in Section 433 of the Companies Act were available to a person to obtain an order of winding up from the court. At this stage we may also deal with Section 439 of the Companies Act as quoted herein-earlier. From a plain reading of the aforesaid provision made in Section 439 of the Companies Act, we are of the view that there is no restriction for an unregistered partnership firm for presenting a winding up petition as the only restriction made in that section is stated in Clauses (a) to (f) of Section 439 of the Companies Act which conditions in our view, cannot be made applicable to an unregistered partnership firm. That apart Clause (b) of Section 439(1) of the Companies Act confers wide power to any creditor or creditors to file a winding up petition of a company. It cannot be disputed that an unregistered partnership firm can be a creditor of a company.

Therefore, no bar has been made to present a petition for winding up by an unregistered partnership firm ; as such an unregistered partnership firm is also a creditor of the company sought to be wound up. Before we proceed further, we now consider Section 69 of the Indian Partnership Act, 1932 (in short "the Partnership Act"), which is by far the most important section in the whole of Chapter VII of the Partnership Act, which deals with the registration of firms. Chapter VII of the Partnership Act deals with registration of a firm, which contains 16 sections namely, Sections 56 to 71 of the Partnership Act. Section 69 of the Partnership Act deals with the necessity of a firm to be registered and effect of non-registration. Section 69 of the Partnership Act runs as follows :

"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 effect-

(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 realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or court under the Presidency Towns Insolvency Act, 1909 (2 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realise the property of an insolvent partner."

10. From a plain reading of Sub-section (1) of Section 69 of the Partnership Act it cannot be doubted that Section 69(1) clearly prohibits a suit to be instituted to enforce a right arising from a contract or conferred by the Partnership Act, 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 partnership 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. Therefore, it can be safely concluded that Section 69(1) of the Partnership Act prohibits a suit to be instituted to enforce a right arising from a contract or conferred by the Partnership Act by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to have been partners of the firm unless the firm is registered and the persons suing are or have been shown in the register of firms as a partner in the firm. So far as the present case is concerned, it is an admitted position that a winding up petition was filed by an unregistered firm against a third party. Therefore, in our view,

Section 69(1) cannot be applied to the facts and circumstances of this case as it is an admitted position that the petitioning creditor being an unregistered partnership firm had not instituted a winding up petition against the firm or any partner of the said firm but the same was instituted against the company which is a third party. Therefore let us consider whether Section 69(2) of the Partnership Act bars a winding up petition to be instituted by an unregistered firm against a 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. From a plain reading of Section 69(2) of the Partnership Act, it is clear to us that the object of Sub-section (2) of Section 69 of the Partnership Act, is to make sure that the general policy of the Legislature that all partnership firms should be registered. It is also gathered from a close examination of the provisions u/s 69(2) of the Partnership Act that Section 69(2) clearly bars institution of a suit to enforce a right arising from a contract by 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. So far as the applicability of Section 69(2) of the Partnership Act is concerned in the present case, we find that in this case admittedly an unregistered partnership firm instituted the winding up petition against the third party viz., the defendant/respondent. Therefore, the question now arises is whether in a winding up petition, the cause of action for filing or instituting the winding up petition would be for enforcement of a right arising from a contract. In our view, in order to bring the winding up petition within the bar as contemplated in Section 69(2) of the Partnership Act, two things are to be considered. The first one is whether the winding up petition can be construed to be a "suit" within the meaning of Section 69(2) of the Partnership Act and the other is whether a winding up petition has been filed on a cause of action to enforce a right arising from a contract or conferred by the Partnership Act. So far as the first condition is concerned in this case, it is an admitted position that petition for winding up filed by the unregistered firm cannot be construed to be a "suit" within the meaning of Section 69(2) of the Partnership Act, As we have already noted herein earlier, Section 69(2) of the Partnership Act refers to institution of a "suit". Therefore, there cannot be any doubt that if the winding up petition is construed to be a "suit", in that case a decree shall follow but it is an admitted position that no decree is passed against an order passed by a learned company judge in a winding up petition u/s 433 of the Companies Act. Therefore, there is no question of treating the winding up proceeding as a suit as that question cannot arise at all. Even assuming that the winding up petition can be treated to be a suit, whether such a winding up petition could be instituted to enforce a right arising from a contract or conferred by the Partnership Act. Let us, therefore, consider whether in a winding up petition the unregistered partnership firm is seeking enforcement of a right arising from a contract or conferred by the Partnership Act. In our view, Section 69(2) of the Partnership Act cannot stand in the way of an unregistered partnership firm to make an application for winding up of the company because in our view such a winding up petition was not filed to enforce a right arising from a contract. It is now well

settled that in a winding up petition, the court is only required to decide whether the company is commercially solvent or insolvent. Whatever right has been conferred on the court to wind up a company under the Companies Act would only be exercised as a statutory right conferred under the Companies Act. In our view in a winding up petition the lis is not merely between the petitioning creditor and the company sought to be wound up. Once the petition is admitted, creditors contributories, shareholders etc. seek redress in the proceedings and even oppose the winding up of the company. The company can be directed to be wound up by the court depending upon a case made out whereupon the assets of the company had been taken over and distributed in accordance with the provisions of the Act and the rules. Therefore, in our view, the proceedings under the Companies Act for winding up are entirely different and a special remedy has been provided for in the Companies Act which is a complete code by itself and the idea is not to restrict the proceedings in respect of a winding up petition to the parties alone and its power is widened and all steps taken in winding up proceedings are in public interest. That being the position, in our view, this right cannot be construed to be a right arising from a contract between the appellant and the company. In the case of Kottamasu Sreemannarayanamurthy v. Chakka Arjanadu AIR 1939 Mad 145, a Division Bench of the Madras High Court observed that the creditor which was an unregistered partnership firm was entitled to seek for adjudication of a debtor as insolvent as such adjudication cannot be said to seek for enforcement of a right arising from a contract and, therefore, such a petition could be filed by an unregistered firm as a creditor. In a single Bench decision of the Madras High Court in the case of Hind Mercantile Corporation P. Ltd. v. J. H. Rayner and Co. Ltd. [1971] 41 Comp Cas 548 , a question arose whether filing of an application u/s 433(e) of the Companies Act is a proceeding that would come under the arbitration clause. In paragraph 13 of the said decision, Palaniswamy J., as His Lordship then was, held that the winding up petition was not a matter which arose out of or under the contract and no relief could be said to have been sought for in a winding up petition as regards any matter that arose out of or under the contract. In a very recent decision of the Supreme court in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, the Supreme Court dealt with this aspect of the matter, though in that decision the Supreme Court was not considering a petition for winding up by an unregistered partnership firm but in our view, the principles laid down in the said decision for filing a suit for recovery of possession based on a statutory right of the plaintiff could be squarely applicable to the facts and circumstances of this case. In that decision the plaintiff in the clearest terms had based its cause of action also on the law of the land and also the cause of action emanating from the alleged breach of the covenant on the part of the defendant. So far as the second part is concerned that is to say cause of action emanating from the alleged breach of the covenant on the part of the defendant, the Supreme Court held that no suit for recovery of possession could be held to be maintainable in law in view of the bar u/s 69(2) of the Partnership Act. But the Supreme Court in that decision at the same time also laid down the principle that a suit filed at the

instance of an unregistered partnership firm which was based on a statutory right under the provisions of Transfer of Property Act under which the erstwhile tenant on the expiry of lease in respect of a premises was to hand over vacant possession to his landlord was maintainable in law. According to the Supreme Court, the said obligation on the part of the erstwhile tenant is statutorily recognised by Section 108(q) read with Section 111(a) of the Transfer of Property Act. The Supreme Court clearly opined in the said decision that it is this statutory right of the lessor and the corresponding statutory obligation of the lessee that could be said to have been relied upon by the plaintiff for getting possession from the defendant as per the recitals made in the plaint of that suit. In that decision the Supreme Court also opined that the statutory obligation of the erstwhile tenant did not get obliterated and repealed merely because such implied terms could be culled out from the contract itself. The Supreme Court further opined in that decision that such an implied obligation or term in the contract could not in any way reduce the legal efficacy of the statutory obligation foisted upon such a lessee by the express provisions of Section 108(q) read with Section 111(a) of the Transfer of Property Act. On the basis of the aforesaid opinion the Supreme Court finally concluded in that decision that non-compliance with the statutory obligation by the defendant when made the subject matter of a corresponding legal right of the erstwhile landlord cannot be said to be giving rise to enforcement of any contractual right of the plaintiff arising from the expired contract of tenancy. In paragraph 22, the Supreme Court made the following observations and we reproduce the same as we find that would be relevant for our purpose (pp. 206, 207 of [1998] 7 SCC) :

"22. The net effect of this discussion, therefore, is that the plaint as framed by the plaintiff-respondent is based on a composite cause of action consisting of two parts. One part refers to the breach of the covenant on the part of the defendant when it failed to deliver vacant possession to the plaintiff-lessor on the expiry of the lease after March 15, 1985, and thereafter, all throughout, and thus it was guilty of breach of covenants 14 and 17 of the lease. The second part of the cause of action, however, is based on the statutory obligation of the defendant-lessee when it failed to comply with its statutory obligation u/s 108(q) read with Section 111(a) of the Property Act. So far as this second part of the cause of action is concerned, it cannot certainly be said that it is arising out of the erstwhile contract,"

11. Relying on and following the principles laid down by the Supreme Court in the aforesaid decision viz., in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, , we are of the view that in a winding up petition by an unregistered partnership firm against the respondent who was a third party was not barred by Section 69(2) of the Partnership Act. In our view, the application for winding up filed by an unregistered partnership firm was based on the statutory right u/s 433 read with Section 439 of the Companies Act. In view of our discussions made herein earlier, and applying the principles laid down in the aforesaid decision of the Supreme Court and other decisions as discussed

hereinabove, we are of the view that the enforcement of that right under the Companies Act has nothing to do with the contract between the parties. The decision of the Supreme Court in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, was again noticed by the apex court of our country in the case of M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, . In the said decision also the Supreme Court held that the suit filed at the instance of an unregistered firm for permanent injunction against the defendants from infringing their trademark was not barred as institution of such a suit was not for enforcement of a right arising from a contract entered into by unregistered firm with third parties in the case of business transactions of the firm. In order to interpret the words "arising from a contract" in Section 69(2) of the Partnership Act, the Supreme Court in the aforesaid decision accepted the principles laid down by the Supreme Court in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, . Such being the position and in view of the principles laid down by the Supreme Court in the aforesaid two decisions and in view of our discussions made herein earlier that an obligation for winding up of a company, cannot be said to have been on the basis of the terms and conditions of the contract but must be said to have been based on a statutory right and not "arising from a contract" as mentioned in Section 69(2) of the Partnership Act, and in view of the fact that in a winding up petition the company court shall only consider whether the company was commercially solvent or insolvent, we are firmly of the opinion that the cause of action of a winding up petition is not based on any fact which arises from a contract. At this stage we may consider the decision of the single Bench of this court on which strong reliance was placed by Mr. Basak, appearing on behalf of the respondent. This is reported in Deb Paints Pvt. Ltd. Vs. Universal Lime Industries, . In view of our discussions made hereinabove and in view of the principles laid down by the Supreme Court in the decisions discussed herein earlier, we are unable to accept the views expressed by the learned single judge made in the aforesaid decision. In the aforesaid decision the learned judge after quoting Section 69 of the Partnership Act in paragraph 39 found that from the pleading of the winding up petition it would be evident that the materials were sold and supplied by the petitioning creditor to the company and bills were raised pursuant to such supply made on the order of the company, and, therefore, the petitioning creditor was seeking to enforce a right arising from a contract between the parties. The learned judge further held that there was no reason to give a restricted meaning to the expression "right arising from a contract" occurring u/s 69(3) of the Indian Partnership Act. But the learned judge has also found that the remedy, which is provided in the Companies Act for winding up of a company is a statutory remedy, and such a remedy has been provided in public interest. According to the learned judge, the right on the basis of which the said remedy was sought for in that case was arising out of a contract entered into by the parties. The learned judge further held that since the petitioning creditor was praying for winding up of the company on its failure to pay the debt of the firm it would be difficult to say that the petitioning creditor had not filed the winding up proceeding to

enforce its right arising from the contract. Although the learned judge found that remedy for winding up may be statutory but the right to get an order for winding up was based on a contract for supply of goods and the winding up petition was filed for the alleged nonpayment of the price of goods sold and delivered. So far as the decision of the Supreme Court in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, was concerned, the learned judge found that in the facts of that case the principles laid down in M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, could not be applied as before the Supreme Court the suit in question was partly barred inasmuch as part of the cause of action arose from the contract. But in that decision, the entire cause of action in filing the present winding up petition arose out of contractual transaction between the parties. The learned judge in that decision has also held that a partnership firm which is not registered is not an entity in the eye of law and it is not a person and, therefore, held that at the instance of the unregistered firm no petition for winding up can be said to be maintainable in law. On the question whether the winding up petition is not maintainable in law at the instance of an unregistered firm as an unregistered partnership firm is not an entity in the eye of law, we are of the view that in view of the decisions of the Supreme Court in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, and also M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, , it cannot be said now that the suit filed by an unregistered partnership firm is not at all maintainable in law in view of the bar u/s 69(2) of the Partnership Act. In view of the aforesaid two decisions, we do not find any reason to deliberate on this aspect of the matter in detail. In M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, the Supreme Court was also considering a case where a suit was filed by an unregistered partnership firm for recovery of possession. In that decision the Supreme Court clearly held that a suit filed by an unregistered partnership firm is quite maintainable in law. That being the position we are unable to agree with the learned single judge saying that an unregistered firm is not an entity in the eye of law. At the risk of repetition we may add that in the case of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, the Supreme Court in paragraph 23 of the said decision clearly held that the second part of the cause of action was based on the statutory obligation of the defendant-lessee when it failed to comply with its statutory obligation u/s 108(q) read with Section 111(a) of the Transfer of Property Act and, therefore, so far as this part of the cause of action is concerned it cannot certainly be said that it was arising out of the erstwhile contract. The Supreme Court in that decision also held that the plaintiff which was an unregistered partnership firm was seeking enforcement of its legal right to possession against the erstwhile lessee flowing from the provisions of Section 108(q) read with Section 111(a) of the Transfer of Property Act which in turn also sought to enforce the corresponding statutory obligation of the defendant under the very same statutory provisions. Applying this principle in the present case we are of the view that the appellant was seeking enforcement of its legal right to get an order of winding up of a company from the provisions of Section 433 of the Companies Act. In the case of M/s. Haldiram

Bhujiawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, of the said decision at page 1293 after discussing the decision of the Supreme Court in M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, and the law on the point came to a conclusion of law that if a suit is based on infringement of statutory rights under the Trade Marks Act, the said suit is not for enforcement of any right arising out of a contract entered into by or on behalf of the unregistered firm with third parties in the course of the firm's business transactions and accordingly the suit was not barred u/s 69(2) of the Partnership Act. In the present case the winding up petition is based on the statutory right to ask for winding up of a company u/s 433 of the Companies Act on the ground that the company is commercially solvent or insolvent to pay its debts. Therefore, following the aforesaid two decisions of the Supreme Court and in view of our discussions made herein earlier, we were therefore not in a position to accept the views expressed in the decision of Deb Paints P. Ltd. 's case [2002] 110 Comp Cas 429: [2002] 1 CLT 94, Since we have come to a conclusion in the present case that a winding up petition is not based to enforce a right arising from a contract with the third parties, the other argument of Mr. Basak that in view of Sub-section (3) of Section 69 of the Partnership Act the words used in the said sub-section, namely, "other proceeding" would also be applicable in a winding up petition, has only become academic. Accordingly, we are of the view that the winding up petition is maintainable in law and, therefore, the objection raised by Mr. Basak that no relief can be granted to the appellant in the present winding up petition as the same was filed by an unregistered firm, cannot be accepted.

12. A short submission was also made by Mr. Basak by submitting that the petition for winding up at the instance of the constituted attorney of the petitioning creditor was not maintainable in law as the constituted attorney represented the petitioning creditor without the permission of the court. In support of this contention Mr. Basak relying on a Single Bench decision of the Bombay High Court in the case of Shantilal Khushaldas and Bros. Pvt. Ltd. [1993] 77 Comp Cas 253 submitted that the petition for winding up was not maintainable at the instance of a constituted attorney of the petitioning creditor without the leave of the court. From the order impugned we do not find that such leave was not granted to the petitioning creditor but on the other hand it is found that such leave was granted to the petitioning creditor. Whether leave was granted or not by the learned company judge is certainly a question of fact and such a finding cannot be disturbed in appeal. As noted herein earlier the learned company judge clearly held that leave was granted to a constituted attorney to proceed with the application for winding up. In any view of the matter we are unable to permit the respondent to raise such question, as no appeal has been preferred by the respondent against the impugned order by which the aforesaid findings were made by the learned company judge. That apart the appeal has been preferred not by Mr. Basak's client but by the petitioning creditor against the order refusing to grant interest. Such being the position we are unable to

permit the respondent to raise this question at this stage.

13. Let us now revert back to the question, which was argued on behalf of the appellant on the merits of this appeal. According to Mr. Tiwari, appearing on behalf of the appellant, the finding of the learned company judge that there was no evidence that the interest was calculated at the agreed rate or that no particulars in respect to computation of interest were produced either by annexing the copy of the same or by producing the same before the learned company judge, was not correct in the facts and circumstances of this case. It is true that from the claim made in the winding up petition the petitioning creditor was entitled to interest at 21 per cent. per annum after expiry of 80 days from the date of submission. The learned judge however did not grant interest in the absence of any evidence to that extent. The only document that was produced in support of such claim of interest was a statement annexed to the winding up petition, which was unsigned, and without any authentication. Such being the state of affairs before the learned company judge we do not find any reason to hold otherwise as we find that the document annexed to the winding up petition was not at all a signed and authenticated document and, therefore, the learned company judge was fully justified in not relying on the said document and thereby refused to grant interest.

14. No other point was raised by learned counsel for the parties.

15. For the reasons aforesaid, there is no merit in this appeal and we affirm the impugned order of the learned company judge. Appeal is thus dismissed. In view of the order passed by us today in the appeal, the application has become infructuous. Accordingly the application is disposed of as infructuous.

16. There will be no order as to costs.

Jayanta Kumar Biswas, J.

17. I agree.