Karnataka High Court Smt. M.V. Parvathavardhana vs M.V. Ganesh Prasad And Others on 28 February, 1997 Equivalent citations: 1999 (4) KarLJ 322 Bench: R Sethi, G P Goud JUDGMENT 1. With usual allegations and counter allegations of usurping each other's share in the joint property, has brought stated to be respectable family, in the Court litigating over a matter apparently having not much of the controversy. The litigation has been stretched to various forms by giving it judicial twists. Scores of cases are stated to be pending between the parties in various Courts in the State. All efforts made for reconciliation or at least finding out an agreed amicable way of settling the disputes have proved futile. Under the cloak of technicalities and taking advantage of the procedural wrangles, the parties to this litigation have left no stone unturned to allegedly frustrate each other's rights in the property which was earlier jointly owned and possessed by the parties, all being members of one family. Most of the facts are admitted, but the mode of resolving the disputes is in controversy. The only son in the family, namely, Shri M.V. Ganesh Prasad is in confrontation with the other members of the family who are none else other than his father, mother and sisters. The son is being termed as belligerent towards the members of the family who alleges on the other hand, that the other members of the family have united against him with the object of not only usurping his rights, but ruining him by deprivation of his due share in the joint property. 2. All the warring members of the family are the partners of a partnership firm under the name and style of M/s. Ganesha and Company which is unregistered company within the meaning of Section 582 of the Companies Act, 1956 (hereinafter called the 'Act'). The principal place of business and registered office of the partnership firm is at Hosamane Extension, Chickmagalur. The firm is admitted to be a partnership at will giving liberty to any of the partners to retire from it at any time by giving six months advance notice in writing.'The capital contribution of the firm is stated to be Rs. 14,50,000/- wherein the petitioner's son claims to have contributed Rs. 5,00,000/-. The son (hereinafter called the 'petitioner') and the father (hereinafter called the 'managing partner') have 40% share each, whereas, the mother of the petitioner, namely, Smt. M.V. Parvathavardhana has 10% share. Five daughters of the family have shares of 2 per cent each. The father of the petitioner, Shri M.L. Vasudeva Murthy, was designated as Managing Partner of the firm who was vested with the right and powers to carry out the day-today management of the firm and also being responsible for the maintenance of books of accounts of the firm. The petitioner who filed Company Petition No. 47 of 1988 in this Court submitted that in the event of dissolution of the firm, the assets of the firm were to be valued and each partner entitled to receive towards his or her capital either a portion of the assets of the firm in the shape of immovable property or any other property and also a share in proportion to their capital in the surplus assets, if any. It was contended that the partnership firm purchased a coffee estate known as 'Lalitha Bandara Estate' in a public auction. The partnership firm is stated to have developed the said estate which is claimed to be very valuable having an area of 650 acres upon which, coffee is grown. The estate also claim to have valuable timber, cardamom and arecanut grown in it. It was alleged that the income of

the Estate exceeded Rs. 25 lakhs annually. It was alleged by the petitioner that he was never given access to the property and books of accounts of the firm. He claims to have raised loans on the strength of his personal estate and the money so realized was utilised for the development of the firm. It is alleged that the managing partner and the firm did not repay the loan with the result that the charges/mortgage in favour of the personal estate of the son continued to be in force and his bankers restricted further credit facilities/release of funds/renewal of existing loans to his personal estate. He was warned that unless the credits are completed, accounts regularised, the loans would be recalled with penal interest. The father was alleged to have failed to properly manage the affairs of the estate belonging to the partnership firm. It was further alleged that the petitioner had not received any income from the estate or from the firm since 1984 and that the other partners had regularly been getting huge amounts from the firm towards their shares of income, apart from overdrawing their personal current accounts with the firm. Serious allegations of inflating the expenditure of the firm were levelled against the managing partner. He was also attributed various illegal acts and deeds as specified in para 12 of the petition. 3. Relations between the parties are stated to have taken a new turn on 27-2-1988 when the managing partner called a meeting of the partners of the firm at Gayathri Hall, Hotel Woodlands, Sampangi Tank Road, Bangalore. The meeting was attended by all the partners which is stated to have commenced at 4.20 p.m. and went up to 5.30 p.m. The Auditor of the firm, alleged to be a henchman of the managing partner was also present, despite the fact that he had no right to participate in the meeting of the partners. It was alleged by the petitioner that in the meeting of the partners the auditor suggested that the firm should be dissolved. The managing partner is stated to have given a ruled notebook of about 170 pages asking all the partners to sign the same. The petitioner refused to sign in the last page of the note book allegedly called as attendance register. He further claimed to have expressed his dissent with regard to the dissolution of the firm on the ground that there could be better income for the firm by change in the management or by improved management. He is stated to have contended that even after paying the tax as per amendment made in Karnataka Agricultural Income-tax Act, the income would be greater than what it was at that time. According to the petitioner, no decision was taken in the meeting and the same was abruptly ended at 5.30 p.m. He alleged that the managing partner wrote a letter to him on 28-2-1988 enclosing therewith a copy of the alleged minutes of the meeting held on 27-2-1988 wherein, it was mentioned that the petitioner had left the meeting hall in the middle and all the partners had resolved to dissolve the partnership firm, According to the petitioner, no decision was taken in the meeting for the dissolution of the firm. No discussion took place with regard to the distribution and disposal of the assets and liabilities of the firm. The minutes of the meeting were stated to be false and fabricated. According to the petitioner, upon dissolution of the partnership, the partners are entitled to receive towards their capital either a portion of the assets in the shape of immovable properties or other properties. He claims that in case of dissolution of the firm, he is entitled to 40 per cent of the estate. The petitioner con-

tended that the managing partner, with the sole intention of harassing him and to defraud the other partners managed to fabricate the minutes of the meeting making it to appear as if all the partners other than the petitioner had agreed to the dissolution of the firm and further resolved that the entire assets be taken over by the managing partner with a further right vested in him to pay and settle the accounts of all the partners within two years with a meagre interest of 10%. It was contended that the entire conduct of the managing partner had been unfair intended to defraud the petitioner and other partners of the firm. The alleged resolution was stated to be contrary to Clause 14 of the Partnership Deed. The petitioner alleged that as there was lack of faith between the partners especially between him and his father who were the major shareholders in the firm, it was just and proper that the firm be dissolved and wounded up by the High Court under the relevant provisions of the Companies Act. According to the petitioner, the firm stood dissolved with effect from 28-2-1988 and only the formalities of its winding up were to be completed under the Companies Act. 4. In the statement of objections filed on behalf of the firm and its managing partner, it was submitted that the petition was not maintainable under the provisions of Sections 582 and 583 of the Companies Act, 1956. The allegations made in the petition were denied and it was submitted that such allegations could be determined and adjudicated by referring the matter to an arbitrator as provided for in Clause 15 of the Partnership Deed. The constitution and reconstitution of the firm and the parties having shares to the extent as specified in the petition filed by the petitioner were not denied. It was further submitted that the estate was being properly managed to the satisfaction of all the partners. The petitioner was stated to have been fully involved in the activities of the firm after completion of his education in the year 1980. He was aware of all the happenings, accounts and other transactions of the firm and intimately involved in the management of the business of the firm. The factum of purchase of coffee estate known as 'Lalitha Bandara Estate' in public auction was denied and it was submitted that in fact, the managing partner had participated in the auction on 28-12-1977 in his individual capacity when the firm had not been constituted. After the purchase of the said estate pursuant to the sale deed dated 29-3-1978, the name of the Estate was changed from 'Pompe Bandara Estate' to 'Lalitha Bandara Estate'. It was submitted that though the estate measured approximately 658 acres, coffee was grown in approximately 360 acres only. 57 acres of land was kharab land and rest of the area remained uncultivated and abandoned for more than 60 years. The statement that the income of the estate was more than Rs. 25.00 lakhs was not admitted. The statement of alleged income and losses was detailed by the aforesaid respondents in para 15 of their reply. Allegations regarding non-payment of the loan were denied. It was also not admitted that the managing partner had not been permitting the petitioner from going near the estate of the firm and its registered office. The petitioner was stated to be living separately from October 1981. All allegations made in para 12 of the petition have emphatically been denied. The holding of meeting on 27-2-1988 was admitted but it is denied that the meeting was called out of malice as alleged by the petitioner. Allegations made against the

activities of the firm were stated to be false and incorrect. The presence of the auditor in the meeting is not denied but has been tried to be justified on the ground that since the subject to be discussed at the meeting was concerned with implications of amendments made by the State Government to the provisions of the Karnataka Agricultural Income-tax Act, his presence was necessary. The allegation that blank note book was given to the petitioner for signature was denied. It was submitted that all the partners signed the minutes book but the petitioner unreasonably refused to sign the same on the pretence that he would sign it later. It is however submitted that petitioner had dissented to dissolve the firm. All other partners resolved in the meeting to dissolve the firm with effect from 1-4-1988 and that the business along with all the assets and liabilities of the firm as on 31-3-1988 was to be taken over and carried on by the managing partner in his individual capacity who was authorised to settle the accounts of all other partners within two years from the date of dissolution. It is claimed that it was further resolved that till the accounts were settled, the managing partner would pay the interest on the amounts due to the partners @ 10% p.a. from 1-4-1988. The allegation that the minutes of the meeting were false and fabricated were vehemently denied. In his letter dated 2-3-1988, the petitioner is stated to have admitted that discussion had taken place regarding dissolution of the firm. However, on 11-3-1988, for the first time, the petitioner sought to challenge the minutes. His challenge has been described to be afterthought. Petitioner's claim that he was entitled to 40 per cent share of the estate was seriously disputed. According to the respondents, the firm stood dissolved with effect from 1-4-1988 which had been resolved in the meeting held on 27-2-1988. The proceedings initiated by the petitioner were termed to be mala fide. 5. The petitioner filed the company petition which was admitted on 11-8-1988. After consideration of the objections filed on behalf of the respondents, the learned Single Judge ordered advertisement of the petition on 22-10-1988. When efforts were being made for settlement of dispute between the parties and no positive response was shown, the managing partner and other partners who were respondents in the petition raised the plea of non-maintainability of the petition and prayed for its adjudication in the first instance. After hearing both the sides, the Company Judge came to the conclusion that the grounds for non-maintainability of the petition were without any substance. Aggrieved by the aforesaid order, the present appeals have been filed by the managing partner and other partners against the petitioner-son. It is submitted that the order of the learned Single Judge was against law and facts. The learned Single Judge is stated to have based his findings on facts not pleaded, alleged in the petition or put before him. It is contended that the learned Judge failed to appreciate the contentions of the appellants insofar as the dissolution of the firm was concerned. According to the appellants, the decisions taken in the meeting on 27-2-1988 were unanimous and not by majority. It is pleaded that the learned Judge erred in holding that the decision of the partners to dissolve the firm would be governed by Section 48 of the Partnership Act and not by Clause 14 of the Partnership Deed. The interpretation put by the learned Judge upon the aforesaid Clause 14 is stated to be against the facts and contrary to law.

It is submitted that the learned Judge should have taken note of the fact that the petitioner was entitled to the claim of 40% of the value of the estate and not 40% of the estate. The learned Counsel appearing for the appellants has vehemently argued that for proper adjudication of the plea raised regarding maintainability of the petition, the terms of Clauses 14 and 15 of the Partnership Agreement read with Section 47 of the Partnership Act were required to be taken note of, and that the mode of settlement of accounts as detailed in Section 48 of the Partnership Act were not applicable in the matter. In view of the arbitration clause, allegedly applicable the petitioner was not entitled to move the Court for winding up of partnership under the Act. It is submitted that the Court can neither go into the question of the validity of the minutes of the meeting nor can determine whether such minutes were in consonance with Clause 14 in view of the Arbitration Clause 15. The question as to whether the firm had been wound up or not and if wound up how to settle the accounts is stated to be in exclusive domain of the Arbitrator. It is contended in the alternative that even if the arbitration clause was not applicable, the resolution allegedly unanimously passed by the partners was applicable under Clause 14 of the Partnership Agreement which excluded the jurisdiction of the Court for determination of the dispute raised by the petitioner. It is further contended that without resolution being challenged in Civil Court, the petitioner could not have approached the Company Judge for winding up of the partnership under the provisions of the Act. It is contended that provisions of Section 583 of the Act were not applicable in the case. The conduct of the petitioner disentitled him to approach the Court for the grant of relief of winding up of the company. The pleas raised by the petitioner are stated to be contractual besides being contrary to the provisions of law. It is submitted that as the managing partner and other partners were ready and willing to give 40% of the value of the estate, the petitioner could not approach the Court in the form of a company petition. 6. Before adverting to the arguments advanced by the learned Counsel for the parties, it is necessary to take note of some of the facts which are either admitted or prima facie proved. Such facts are: (a) All parties to this petition are the members of one family. (b) The partnership firm comprises of members of the family having shares to the extent as noted herein above. (c) The father is the managing partner having 40% share, petitioner-son also has 40% share and the balance 20% shares belongs to lady members of the family who are impliedly admitted to be sleeping partners.

(d) The extent of the estate, the property of the partnership and its assets are almost admitted. The relationship between the partners have become strained. Petitioner alleging to have been isolated and the other members of the family grouped together against him.

(e) `The meeting of the partners was held on 27-2-1988 from which petitioner apparently walk`

(f) `The existence of Clauses 14 and 15 in the Partnership Deed are not disputed. The petiti`

(g) `The company petition was filed in the year 1988 for winding up of the firm and the obje`

(h) Since the petition is pending in the Court from the year 1988, the petitioner has not p

(i) That the firm is an unregistered company within the meaning of Section 582 of the Act.

7. From the facts noted above, it is apparent that all the partners in the firm concede that the aforesaid firm stands already dissolved. It is also admitted that there is no possibility of the parties amicably settling and that the process for winding up of the firm and its business had been resorted to. There are sharp differences with respect to the mode, method and manner regarding winding up of the firm and closure of its business.

8. Part X of the Act deals with winding up of unregistered Companies. Section 582 defines the unregistered company as: 'shall include any partnership, association or company consisting of more than seven members (at the time when the petition for winding up of the partnership, association or company as the case may be, is presented before the Court)'.

Section 583 provides for the winding up of an unregistered company in accordance with the provisions of the Act applicable to the case. The unregistered company can be wound up only on proof of the fact that it stands already dissolved or has ceased to carry on business or has carried the business only for the purposes of winding up its affairs or the company is unable to pay its debts or the Court is of the opinion that it is just and equitable for its winding up. Any partner can file a petition for winding up of an unregistered company. Under Section 585, every person is deemed to be a contributory who is liable to pay or contribute to the payment of:– (a) any debt or liability of the company; or

(b) any sum for the adjustment of the rights of the members among themselves; or

(c) the costs, charges and expenses of winding up the company.

No suit or other legal proceeding can proceed where an order is made for the winding up of an unregistered company.

9. Part VII of the Act deals with the winding up of the companies. Section 425 provides that the winding up of a company may be either by the Court or voluntary or subject to the supervision of the Court. Winding up has been held to be a means by which the dissolution of a company can be brought about and its assets realised and applied for payment of its debts and other liabilities. After satisfaction of the debts, the balance, if any, is required to be paid back to the members/partners in proportion to the contributions made by them, to the capital of the company/firm. Section 433 of the Act specifies circumstances under which a company may be wound up by the Court. Section 433 of the Act reads: "A company may be wound up by the Court:–

(a) if the company has, by special resolution, resolved that the company may be wound up by

(b) if default is made in delivering the statutory report to the Registrar or in holding th

(c) if the company does not commence its business within a year from its incorporation, or

(d) if the number of members is reduced, in the case of a public company, below seven, and

(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 wou

10. Chapter VI of the Partnership Act, 1932 deals with the dissolution of a firm. The firm may be dissolved with consent of all the partners or in accordance with a contract between them.

11. A firm can be dissolved by adjudication of all partners or of all the partners but one as insolvent; or by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. Subject to the contract between the parties, a firm can be dissolved on the happening of certain contingencies as specified under Section 42 of the Partnership Act. Where a partnership is at will, as in the present case, a firm can be dissolved by any partner giving notice in writing to all other partners of his intention to dissolve the firm. Dissolution by Court can be prayed for under Section 44 of the Partnership Act. Section 45 deals with liabilities for acts of partner done after dissolution. Section 47 provides that after the dissolution of a firm, the authority of each partner to bind the firm and other mutual rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of dissolution, but not otherwise. Section 48 specifies the mode of settlement of accounts and Section 49 for payment of firm debts and of separate debts,

12. It has been argued on behalf of the appellants that as the partnership stood dissolved allegedly by an unanimous resolution, the petition under Section 583 of the Companies Act was not maintainable and in pursuance of Clauses 14 and 15 of the Partnership Deed read with the resolution of the partners, the process of winding up of the firm has to be carried on and completed by an Arbitrator and not by the Court. To appreciate this submission made on behalf of appellants it is necessary to have glimpse of the conditions of the partnership agreement and the alleged unanimous resolution of the partnership. Clause 14 of the Partnership Agreement reads as under: "In the event of the dissolution of the firm the assets of the firm will be valued and each partner shall be entitled to receive towards his/her capital either a portion of the assets of the firm in the shape of immovable properties or any other property as may be decided by the majority of the partners and a share in proportion to their capital in the

surplus assets, if any, of the firm. Before the distribution of the capital and assets of the firm among the partners on a dissolution, all outside debts including partners' loan shall be paid out of the assets of the firm". Clause 15 of the Partnership Agreement reads as under: "Any dispute arising among the partners hereto in respect of the business of the firm or in the matter of interpreting the provisions of this deed shall be referred to an Arbitrator acceptable to all the parties to the dispute and the decision of the arbitrator shall be final. The provisions of the Indian Arbitration Act, 1940, so far as may apply for this purpose". The relevant portion of the so-called alleged unanimous resolution of the partners relied upon by the appellants reads as below: "Point No. 6: After detailed discussion, it was decided by overwhelming majority of the partners (7 out of 8) to dissolve the firm with effect from 1-4-1988. The only partner Sri M.V. Ganesh Prasad, expressed his view that the partnership may be continued. In view of the majority decision, the following resolutions were passed:

(a) Resolved to dissolve the firm M/s. Ganesha and Company, Hosamane Road, Chickmagalur, with effect from 1-4-1988.

(b) Further resolved that the business along with all the assets and liabilities as on 31-3

(c) Till the accounts are settled, Sri M.L. Vasudeva Murthy will pay interest on the amounts due to the partners at 10% interest per annum from 1-4-1988.

(d) Resolved that for the purpose of settlement of accounts Sri B.K. Rajasekhar, Auditor will draw up the Balance Sheet as on 31-3-1988, on or before 30-6-1988 and the present Managing Partner shall finalise the accounts and make the Books of Accounts available for audit on or before 31-3-1988.

(e) Resolved further that the accounts and the Balance Sheet as on 31-3-1988, shall be pres

(f) Resolved that the accounts and Balance Sheet presented at the General Meeting, if appro

13. To substantiate his submissions that the resolution dated 27-2-1988 was unanimous, the learned Counsel has relied upon the dictionary meaning of the word 'Unanimous' as defined in Black's Dictionary. The word 'Unanimous' has been defined in the said dictionary as under: 'To say that a proposition was adopted by a "unanimous" vote does not always mean that every one present voted for the proposition, but it may, and generally does, mean, when a viva voce is taken that no one voted in the negative'.

14. What is important in this case is not the dictionary meaning of the word 'unanimous' but the dominant intention of the participants in the meeting. Only because the petitioner allegedly had not voted in the negative it cannot be presumed that the resolution passed by the other partners in

his absence was unanimous. The petitioner is admitted to have not agreed with the proposal either for dissolution or to be bound by the terms and conditions regarding winding up of the business, settlement of accounts and share in the assets and liabilities of the firm. The intention of the petitioner unequivocally demonstrates that he was not a party to the resolution which has been styled by the other partners to be unanimous. Only on the ground that as the resolution was allegedly unanimous, the petitioner could not be non-suited in the Court where he had applied and sought for the winding up of the company in consequence of its dissolution.

15. It has been conceded that the provisions of Section 34 of the Arbitration Act are not applicable in the proceedings initiated under the Companies Act. The proceedings in the company petition could not be stayed on account of the existence of the Arbitration Clause between the parties, even if it was presumed that there existed an arbitration clause in the Partnership Deed. In application filed for winding up of the company under the Act, it cannot be said that the relief claimed for winding up of the company had arisen out of or under the contract so as to refer to the arbitration under Section 34 of the Arbitration Act. Only such proceedings in respect of matter agreed to be referred can be stayed. The provisions of the Act being special provisions, the applicability of Section 34 of the Arbitration Act would not be attracted. Otherwise also, Clause 15 of the Partnership Agreement provided for reference to the Arbitrator in any dispute which arose among the partners in respect of the business of the firm or in the matter of interpreting the provisions of the Deed. It cannot be said that the disputes brought before the Court in the company petition related to in respect of business of the firm which according to both the parties had been decided to be closed down by dissolution of the firm. The contention of the appellants is that as the plea raised by the petitioner relate to the interpretation of the Deed, the same is required to be referred to the arbitration. According to them, Clause 14 read with the alleged unanimous resolution is a matter which did not require interpretation by the Court as the same was covered under the Arbitration clause, and that the company petition was not maintainable, Once the petitioner has taken a stand that he was not a party to the alleged unanimous resolution, it could not be said that the conditions of Clause 14 read with the resolution were applicable which could oust the jurisdiction of the company Court. Under similar circumstances, the Punjab and Haryana High Court in Trilok Chand Jain and Others v Swastika Strips (Private) Limited and Others, held that the relief sought in the Company Petition was not covered by the Arbitration Clause. In that case, the Arbitration Clause provided: "That any dispute or differences which may arise amongst the partners or their representatives with regard to the construction, meaning and effect of this deed or any part thereof or regarding the accounts, profits and losses of the business or the rights and liabilities of the partners under the deed of dissolution or winding up of the business or any other matter relating to

the firm shall be referred to arbitration". The Court after referring to the facts of the case concluded: "A bare reading of Clause 15 of the Partnership Deed dated March 16, 1989 clearly indicates that it has no relevance to the relief prayed for in Company Petition 39 of 1990 i.e., for the winding up of the respondent-Company. It is beyond dispute that proceedings under Section 433/434 read with Section 439 of the Companies Act, are in a completely different jurisdiction than the one under which remedy or relief can be sought by way of arbitration. It is fallacious to conceive that the proceedings for winding up under the above noted sections of the Companies Act, in any way, are the proceedings for the recovery of any amount. On the contrary, the above noted provisions, record or codify the circumstances/grounds on which a company can be ordered to be wound up by the Court. So, none of the disputes referred to in the above noted Clause 15 of the Partnership Agreement can be corelated to the relief in Company Petition No. 39 of 1990. For this conclusion of mine, I seek support from the following earlier pronouncements of this Court as well as the other High Courts:

(i) Salaq Ram v New Suraj Finance and Chit Fund Company Private Limited (Company Application No. 8 of 1979 in Company Petition No. 147 of 1978 decided on July 12, 1979) .... No judgment taking a contrary view has been brought to my notice by learned Counsel for the applicants".

16. In another case, entitled William Jacks and Company (India) Limited v Saraswati Industrial Syndicate Limited, the Punjab and Haryana High Court held: "The jurisdiction for ordering winding up of a company is a special jurisdiction which has been conferred on the High Courts. The object of passing such an order is that the assets of the company should be realised and debts paid expeditiously. The passing of such an order against a company has a serious consequence and, therefore, the jurisdiction has been conferred on the High Courts. The order of winding up can be passed on the grounds mentioned in Section 433 of the Companies Act, 1956. It does not appear to be the intention of the Legislature that such a power can be conferred on an arbitrator. The petition for winding up cannot be treated as one for recovery of an amount of debt from the company. Therefore, an application under Section 34 of the Arbitration Act, 1940, is not maintainable in a winding up petition". To the same effect are the judgments in Narinder Singh Randhawa and Another v Hardial Singh Dhillon and Others and Madura Coats Limited, Madurai and Others v Chetan Deu . This Court in M. Vinoda Rao and Others v M. Janardhana Rao and Others, held: "Winding up proceeding commenced in that behalf is not a civil suit. Nor is the Companies Court a Civil Court. It is a proceeding of special nature and character which provides for winding up not only companies incorporated under the Act but also any other body of persons which will answer to the description of unregistered company.

What is being decided in this proceeding is whether an unregistered company should or should not be wound up. In that view of the matter Section 34 of the Arbitration Act which expressly refers to 'any legal proceeding against any other party to the agreement' cannot be construed to have any application to proceeding which in its very nature is a proceeding which will result in an order in rem and not in personam".

17. In G.P. Ganapaiah Maiya and Others v M.T.R. Associates and Others , it was held that the Company Court had the jurisdiction to wind up a partnership or similar association of persons answering the description of 'deemed company under the Companies Act, and need not refer the parties/dispute to the Civil Court for redressal of their grievances. When there is no dispute that the partnership which was an unregistered company within the meaning of Section 582, had been dissolved, the Company Court, on the motion of a person who is entitled to move the Court, is bound to wind up the company. Referring to the judgments of the Supreme Court in Mis. Madhusudan Gordhandas and Company v Madhu Woollen Industries Private Limited and Vasantrao and Another v Shyamrao and Others , which were relied upon in support of the contention that the Company Court had no jurisdiction to wind up the firm, it was held: "Proceedings under the Companies Act are summary in character and is a speedier way of safeguarding the interest of the partners or other persons who have formed themselves into an association of persons answering to the description of 'deemed companies' under the Act to settle their mutual rights as well as public interest if it is involved. It may be in some cases such companies may owe debts to third partiesrcreditors whose interest also is to be safeguarded instead of driving them to civil litigation".
18. Even though the learned Counsel for the appellants formulated a number of points regarding which he addressed lengthy arguments, yet the main thrust of the arguments revolves around the provisions of Section 47 and Section 48 of the Partnership Act. Clauses 14 and 15 of the Partnership Deed read with the alleged unanimous resolution of the partnership dated 27-2-1988. The substance of all the submissions was that as the firm had already been dissolved in terms of the conditions specified in the resolution, the remedy available to the petitioner was to get the assets of the firm settled either through the Arbitrator or alternatively from a Civil Court, but not resort to the remedies of winding up of the firm which is an unregistered company under the Companies Act. It has been contended that the petitioner was entitled to only the share in the assets of the firm, but had no interest left in the estate of the partnership. In support of his contentions, the learned Counsel has referred to host of authorities to impress upon us that the Company Court had no jurisdiction and the petition was liable to be dismissed. He has contended that since dissolution is accepted, the mode of winding up of the business has to be as unanimously agreed by the partners or alternatively by a majority of the partners.
19. The decision of the Supreme Court in Brack F.D. Mehta v Minoo F.D.

Mehta, has been relied upon by the appellants to impress upon us that the question as to whether the winding up of the firm had taken place or not can be referred to the arbitration. It is submitted that in the aforesaid case, there also existed an arbitration/agreement to refer the dispute to the arbitration and the Supreme Court, on facts, held that as the parties had agreed that the partnership be dissolved and that such a question was covered by the arbitration clause, the matter was required to be referred to the Arbitrator. In that case, the arbitration clause provided: "All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or between one of them and the personal representatives of the other or between their respective personal representatives touching these presents or the interpretation of this deed or the construction of the application thereof or any clause or thing herein contained or any account valuation or division of assets, debts or liabilities to be made hereunder or as to any act, deed or commission of either partner or as to any act which ought to be done by the partners in dispute or as to any other matter in any way relating to the partnership business or the affairs and transactions thereof or the rights, duties or liabilities of either partner under these presents shall be referred to two Arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Indian Arbitration Act or any statutory modification thereof for the time being in force". (emphasis supplied)

20. As noticed hereinabove, the arbitration clause, in the partnership agreement governing the parties to this litigation is admittedly distinct and distinguishable. As noted earlier, only such disputes which aros3 in respect of the business of the firm or in the matter of interpreting the provisions of the deed, had been agreed to be referred to the arbitration. It may further be noted that the Hon'ble Supreme Court in this case did not consider the scope of the provisions of the Companies Act, but were dealing with the application admittedly filed under Section 33 of the Indian Arbitration Act, 1940. The scope of the provisions being oUstinct, the judgment cannot be applied to the facts of the present case. The reliance of the appellants on this judgment is therefore misplaced.
21. In Saligram Ruplal Khanna and Another v Kanwar Rajnath , the Apex Court considered the scope of Section 47 of the Partnership Act in a matter which had arisen in civil suit for dissolution of partnership and rendition of accounts, the Court referred to Clauses 16 and 17 of the Partnership Deed for the purposes of determining the period of limitation and held that the suit was barred by limitation as admittedly the suit had been filed after three years from the date of dissolution of the firm. While dealing with the word 'transaction' in Section 47 of the Partnership Act, the Court held that the said word referred not merely to the commercial transaction of purchase and sale but included also all other matters relating to the affairs of the partnership. The Supreme Court did not deal with any aspect of the controversy with which we are concerned in the present litigation.
22. The learned Counsel for the appellant in support of his contentions, has

relied upon the judgments in Nawaneetdas Lakshmidas v Gordhandas Lakshmidas and Another, Tilak Chand Jain v Darshan Lal Jain and Another , Manohar Das and Others v Board of Revenue, Uttar Pradesh, Narendra Bahadur Singh v Chief Inspector of Stamps, Uttar Pradesh , M. Vinoda Rao's case, supra, William Jacks and Company (India) Limited's case, supra, Pannalal Paul and Others v Srnt. Padmabati Paul and Others, Sushil Kumar Gupta v Anil Kumar Gupta and Others , Synchron Machine Tools Private Limited and Others v U.M. Suresk Rao and Hutchegowda v Smt. Jayamma and Another .

23. After going through the aforesaid judgments relied upon by the learned Counsel, we are of the opinion that the facts of the present case and the point of law sought to be adjudicated are distinct and the ratio of none of the aforesaid judgments is applicable in the present case.

24. Assuming, but not agreeing that the petitioner is bound by the resolution dated 27-2-1988 and there is an arbitration agreement between the parties, it cannot be held that the company petition was not maintainable. No provision of law has been cited nor does any such provision exists ousting the special summary jurisdiction of the Company Court in a case where the deemed company or an unregistered company is sought to be wound up in accordance with the provisions of the Act. The principles ousting the Civil Court's jurisdiction, in presence of an arbitration clause, cannot be applied in a case under the Act, particularly when it is conceded that the principles underlying Section 34 of the Arbitration Act were not applicable in the proceedings under the Act. The Act itself does not specify that in presence of any alleged arbitration clause or settlement arrived at between the parties, the Company Court would not have the jurisdiction. The general principles of ousting the jurisdiction in presence of the alternative efficacious remedy cannot be pressed into service in a matter pending under the Act. The appellants have not been in a position to show as to how the proceedings under the Act were not maintainable only on the ground of the assumed existence of the arbitration clause and presumed unanimous resolution of the partners. The arguments on behalf of the appellants have been stretched to impliedly debar the Company Court to proceed with the matter which we have already noted was neither fair nor proper and much less being legal. Even in matters where the principles of Arbitration Act are applicable, and the disputes between the parties are pending in a Civil Court, such a prayer if made at a belated stage would have rightly been rejected. Any party invoking the arbitration clause, is obliged to raise such an issue at the earliest and cannot be permitted to object the maintainability of an action in a Court at a belated stage. After having participated in the proceedings, even a party to a suit, relying upon an arbitration clause is debarred from praying for the stay of the proceedings in the suit pending in a Civil Court. It has authoritatively been held by all the Courts in the country that the existence of an arbitration clause/agreement is not a bar to the jurisdiction of the Court and the failure to apply for stay of the proceedings at the earliest

must be deemed to be waiving the right to have reference made to the Arbitrator. The existence of an arbitration clause in an agreement is not a condition precedent to any action but is termed to be a mere collateral agreement. Such an agreement cannot oust the jurisdiction of the Court which otherwise exists in it. It only bars a specified remedy. It could not therefore be said that the Company Judge did not have the jurisdiction to entertain the petition, proceed with and adjudicate upon it.

25. The argument that after the resolution of the partners dated 27-2-1988, the process of winding up of the firm had been completed and that the petitioner was entitled only to the share to be paid in accordance with the resolution, is also without any substance and cannot be used as a lever to oust the jurisdiction of the Court dealing with the petition filed under Section 583 of the Companies Act. Chapter VI of the Partnership Act deals with the dissolution of the firms. A firm may be dissolved with the consent of all the partners or in accordance with the contract between the partners. A firm can also be dissolved by an adjudication of all the partners or of all the partners but one as insolvent or by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. Liabilities of the partners after dissolution are governed by the provisions of Section 45 and rights of the partners to have business wound up after dissolution are specified in Section 46. Section 47 provides that after the dissolution of a firm, the authority of each partner to bind the firm and the other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of dissolution but not otherwise. Section 48 specifies various modes of settlement of accounts between the partners. Similarly, Section 49 deals with the payment of firm debts and of separate debts and Section 50 with personal profits earned after dissolution. Section 52 deals with the rights where partnership contract is rescinded for fraud or misrepresentation. Under Section 53, no partner of a dissolved firm can use the firm name or firm property. Section 55 deals with the sale of goodwill after dissolution, A reference to various sections of the Partnership Act clearly shows that mere dissolution by itself does not result in the winding up of the business of the firm. Lindley on Partnership (14th Edition at page 652) dealt with this aspect and observed: "In order to wind up the affairs of a dissolved partnership, it is necessary first to pay its debts; secondly, to settle all questions of account between the partners; and, thirdly, to divide the unexhausted assets (if any) between the partners in proper proportions; or, if the assets are insufficient for these purposes, then to make up the deficiency by a proper contribution between the partners. This can be done by the partners themselves, or their representatives; but if disputes arise then recourse must almost always be had to the Court".

26. The dissolution of the firm leads to the dissolution of the partnership as between the partners, but partnership does subsists though only for

the purposes of winding up its business and adjusting the rights of the partners inter se. The learned Counsel for the appellants relied upon the judgment in Santdas Moolchand Jhangiani and Another v Sheodayal Gurudasmal Massand, before the learned Single Judge to urge that the winding up was a part and parcel of the dissolution and the deed of resolution can itself provide for taking over of assets and liabilities by one of the partners simultaneously. In that connection the learned Single Judge rightly held: "That was a case where a question arose as to whether document purporting to be a deed of dissolution and which contained certain terms of payment of money by continuing partner to the outgoing partner amounted to a bond under the Bombay Stamp Act. It was held that a deed of dissolution must cover other matters which arise out of the fact of dissolution such as settlement of accounts, amount found due to such settlement, closing down or continuation of business etc., that these are matters that depend upon the fact of dissolution and arise out of that fact and/or ancillary thereto. It was therefore held that the deed of dissolution was not liable to be stamped as a bond. Under law all the partners can by agreement wound up the firm at the time of dissolution itself by allowing one or some of the partners to take over all assets and liabilities of the firm. But it does not follow that in all cases of dissolution there should be contemporaneous winding up of the firm. The provisions of the Partnership Act contemplates a firm continuing even after dissolution for purposes of winding up".

27. It has been next contended that the Court had no jurisdiction to go into the question of winding up unless the alleged unanimous resolution dated 27-2-1988 was set aside by the Civil Court, particularly, when there are allegedly no pleadings that the resolution was invalid. Apparently, such a statement is farfetched. As we have already pointed out, the dissolution of the firm is not disputed but its winding up process is subjudice before the Court. The dissolution by means of the so-called unanimous resolution cannot be pleaded as a bar for the Court to take steps for winding up of the company/firm under the Act. The petitioner admittedly is not a party to the resolution and in view of the findings we have arrived earlier, such resolution cannot be termed to be unanimous so as to bind the petitioner as well. In the absence of an agreed mode of winding up of the dissolved firm, the only remedy available to an aggrieved partner is to approach the Court under the Act and get the company wound up. The learned Counsel for appellants has relied upon the case of Vasantrao, supra, in this behalf. In that case, the Apex Court held that where the partnership was an unregistered company and the suit was filed for dissolution of the partnership and accounts including the prayer for declaration that the firm stood dissolved from certain specified date, it could not be said that the Civil Court had no jurisdiction to entertain the suit in view of Part X of the Act. It is held that the relief for declaration could not be claimed in proceedings under Part X of the Companies Act which provided only for the winding up of the unregistered companies. Such is not the position

in the present case. On the basis of the aforesaid judgment, plea has been raised for ousting the jurisdiction of the Company Court despite the fact that the parties are not in litigation in any Civil Court. There is no dispute regarding the dissolution of the firm. Difference of dates regarding the dissolution of the firm is also not material in the instant case. In Vasantrao's case, supra, the appellant had filed a suit for dissolution of the partnership and accounts and prayed for a declaration that the firm stood dissolved on 9-1-1974. The defendants raised an objection that the Civil Court had no jurisdiction to entertain the suit in view of the provisions of Part X of the Act. In that context the Apex Court held: "It is difficult to appreciate why the suit should not be maintainable at any rate insofar as it is one for dissolution of the firm. As already stated, one of the reliefs prayed for is a declaration that the firm stood dissolved from January 9, 1974. This is not a relief that can be claimed in a proceeding under Part X of the Companies Act which provides for the winding up of unregistered companies. However, it is not necessary to consider whether the Civil Judge had jurisdiction to entertain some of the claims made in the suit, because Section 590 of the Companies Act makes it clear that Part X of the Act does not affect the operation of the Indian Partnership Act". It may be noticed that in the same case, the High Court (AIR 1977 Bom. 188) had held that a suit seeking relief of dissolution of registered partnership consisting of eight partners and a declaration that the firm stood dissolved as and from a particular date was maintainable in a Civil Court despite the provisions of Part X of the Companies Act. The maintainability of the suit in the Civil Court was justified on the ground that under Part X of the Companies Act, the relief of dissolution of the firm and declaration as prayed for could not be granted. Considering the position in the present case where the factum of the dissolution of the firm is admittedly not in dispute and the date of dissolution with some difference is impliedly admitted. The reliance of the learned Counsel on Vasantrao's case, supra, is misplaced.

28. It has been argued that as the petitioner was seeking embargo under one of the resolutions for the purpose of maintainability of the company petition, the resolution cannot be segregated and that his petition filed prior to 30th June, 1988 is not maintainable. Such a plea raised has no legs to stand inasmuch as the petitioner has categorically stated that he was not a party to the resolution, nor bound by its terms. Mere reference of resolution for the purpose of showing that all the parties had agreed for the dissolution of the firm could not be made a basis for submitting that whole of the resolution as such was binding upon him and could allegedly be not segregated. There is no question of resolution being segregated in view of the specific stand taken by the petitioner that he was not a party to such a resolution. His petition, therefore, could not be held to be premature.
29. The learned Counsel for appellants further submitted that as the dissolution was accepted, the company petition was not maintainable because,

at the time of agreement of dissolution, the mode of winding up of the company had been settled by the majority partners. Such a plea if accepted would defeat the very purpose of the provisions of the Act. The only condition precedent for approaching the Court under the Act is that the unregistered company stood dissolved and that its winding up was necessitated which can be completed under the provisions of the Act. The passing of the resolution by itself did not amount to the commencement of the winding up operations as submitted. After dissolution, the winding up has to take place in accordance with Sections 46 and 48 of the Partnership Act and for that limited purpose, the partnership subsists. In Tilak Chand Jain's case, supra, it was held: "Even if dissolution of partnership is held to have taken place that by itself could not be the proof that assets of the dissolved partnership have been distributed and applied towards the discharge of liabilities, debts and residue has been shared by the partners. It must be evident by some cogent evidence such as details of accounts and other documents which are prepared by the partners when the assets are distributed. One of the important assets being goodwill, has got to be valued and converted into cash. If there is no evidence of its having been valued and converted into cash, it is to be presumed that goodwill has not been sold or purchased and is being used by a partner against whom relief is sought to the exclusion of the outgoing partner".

30. A perusal of the resolution relied upon by the appellants would also indicate that the managing partner was authorised to take over the assets and liabilities of the firm, and to settle the accounts of all the partners. Such accounts were to be taken after the dissolution which was required to be approved by the partners in a meeting to be held after 30th June, 1988. Upon the approval of the aforesaid accounts in the meeting, the accounts were to bind the other partners and not otherwise. The perusal of the conditions of the resolution and the conduct of the parties unambiguously, show that the winding up process had not been completed but was to commence.

31. We are also not inclined to agree with the submissions of the learned Counsel for the appellants that as the petitioner had accepted the minutes of the meeting, he was estopped from approaching the Court for the purposes of winding up of the company allegedly on account of his conduct. Merely because, the petitioner attended the meeting initially and referred to the holding of such meeting, subsequently would not debar him from approaching the Court. In the facets of all the circumstances, we are satisfied that the petitioner had never agreed for the winding up of the firm in the manner specified in the resolution as relied upon by the other partners. There appears to be some vacillation in his stand so far as the dissolution of the partnership is concerned, but there is no ambiguity in his declaration that he had not agreed with the minutes of the meeting and was not a party to the resolution which allegedly provided the mode of winding up of the company. On account of his alleged conduct, the petitioner cannot be non-suited in the Court where he has filed the peti-

tion for winding up of the company under the Act. The appellants have further contended that as the petitioner was not a contributory, he could not maintain his petition. Such a plea raised before the learned Single Judge was rightly rejected holding as under: This argument is based on the assumption that under the resolution the firm is already wound up. When once it is found that there has been no factual and legal winding up, it follows that the petitioner being a partner of the firm continues to be liable in respect of the liabilities of the firm and he would be a contributory in terms of Section 585 of the Act. The fact that the petitioner has claimed 40% share in the estate and in the income without agreeing to take up any share of the liabilities, which circumstance was highlighted by the learned Counsel for respondents, does not in any way absolve the petitioner of his statutory liability nor does it deprive him of the character of a contributory".

32. At the fag end of the arguments, the learned Counsel for the appellants suggested that as his clients were willing and prepared to give 40% of the value of estate, the company petition be dismissed and an Arbitrator be appointed for the purpose of giving the share value to the petitioner to the extent of 40%. The offer apparently looks to be very attractive, but when seen in the context of the circumstances, cannot be held to be a bona fide offer for settlement of disputes between the parties. The appellants have consistently, persistently and vehemently opposed the claim of the petitioner of having share in the estate and not in the value of the estate. The purpose of the present appeal appears to be only to deprive the petitioner of his due share in the estate. If the offer of the appellants is fair, reasonable and bona fide, there does not appear to be any reason for resisting the application for winding up of the company which has been unnecessarily dragged for about a period of nine years. Without commenting upon the rival contentions of the parties regarding each others' bona fide, we are satisfied that winding up of the company is the only option left in the facts and circumstances of the case. Raising of an objection regarding non-maintainability of the company petition and the present appeal cannot be termed to be a step in the right direction for the settlement of the disputes as has been proclaimed and projected on behalf of the appellants.

33. After considering various aspects of the case, the facts and circumstances and the questions of law raised before us, we are satisfied that the objection regarding the non-maintainability of the company petition raised on behalf of the appellants was misconceived, without any basis, against the provisions of law and intended only to prolong the agony of litigation. The order of the learned Single Judge is well-reasoned and in accordance with law requiring no interference. There is no merit in these appeals which are dismissed with cost assessed at Rs. 5,000/-.