

(2008) 01 MAD CK 0001

In the Madras High Court

Case No : O.P. 451 of 2008 and O.A. No's. 786, 769 and 770 of 2008

Hindustan Life Care

APPELLANT

Vs

Mr. N. Ramesh, and The Hon'ble Sole Arbitrator, Justice S.S.
Subramani

RESPONDENT

Date of Decision : 01-01-2008

Acts Referred:

Arbitration Act, 1940 — Section 17, 36
Arbitration and Conciliation Act, 1996 — Section 11(5), 16, 17, 19, 2(b)
Industrial Disputes Act, 1947 — Section 10A
Partnership Act, 1932 — Section 11, 12, 28(2), 32, 32(1)(b)
Penal Code, 1860 (IPC) — Section 120B, 420, 511
Presidency Towns Insolvency Act, 1909 — Section 9, 9(2), 9(3)

Citation : (2008) 01 MAD CK 0001

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : Satish Parasaran, for the Appellant; Chitra Sampath ? R1, for the Respondent

Final Decision : Allowed

Judgement

Chitra Venkataraman, J.

ORDER

1. The original petition is against the interim award dated 4.7.2008 passed by the learned Arbitrator wherein, the learned Arbitrator held that the firm Hindustan Life Care, first petitioner herein, would stand dissolved with effect from 20.12.2005; that the first respondent is entitled to share of profits of the firm subsequent to 20.12.2005 till the accounts are fully settled u/s 37 of the Act. The learned Arbitrator directed the petitioners herein to produce the accounts of the firm from 1.4.2005 till the date of dissolution and all subsequent accounts till the date of final settlement

before the Tribunal within two weeks. The learned Arbitrator directed the parties to file a list of panel of auditors to inspect the accounts and on the Tribunal appointing the Chartered Accountant, the accounts shall be scrutinised to find out the amount due to the parties. The petitioners herein questioned the award primarily on the ground that the learned Arbitrator exceeded his jurisdiction in ordering a dissolution of the firm. The main question that was posed before the learned Arbitrator was as to whether the first respondent was entitled to dissolution of the partnership concern or entitled to retirement only from the firm. Referring to the various clauses in the partnership agreement, learned counsel pointed out that the interim award of the learned Arbitrator directing dissolution of the company u/s 44 of the Indian Partnership Act, 1932 on just and equitable grounds went against the terms of the partnership agreement and hence, the award is without jurisdiction. He pointed out that even on the strength of the evidence of the first respondent herein, the application made by the first respondent has to be rejected that no ground existed for dissolution.

2. The facts leading to the invoking of the arbitration clause are as follows:

Under agreement dated 1.4.1995, the parties herein entered into a partnership by name Hindustan Life Care, the first petitioner herein. The partnership consisted of four Partners, viz., the second, third and fourth petitioners and the first respondent herein. The business of the firm was to deal in surgical disposals and surgical equipments. The profit sharing ratio was equal. Under clause 6 of the Partnership Deed, Ex.C-1, it was agreed that the partners of the firm would not carry on any business activity which would compete with the business of the firm, the first petitioner herein (hereinafter referred to as HLC). Considering the growth and the opportunities of the business of the firm, parties entered into a fresh supplementary agreement dated 21.6.2004 whereby, the first petitioner firm was to continue the same line of business and the total turnover would be equally distributed among the three field working partners, namely, 3rd and 4th petitioners and the first respondent herein for the purpose of sale territories, it was agreed that these partners would be entitled to an incentive at the rate of 10% of the turnover on each one of their territories. Under Clause 13, the parties agreed that none of the partners would enter into any agreement directly or indirectly with the principals with whom

the firm HLC was associated. Clause 16 provided that the partners shall not promote any competitive brand of TED anti embolism stockings of

Tyco Health Care either directly or indirectly. In the event of any such activity undertaken, such partner has to compensate a sum of Rs. 25 lakhs

to each of the other partners of the first petitioner firm. It was also agreed that in the event of any one of the partners retiring from the partnership,

for a period of one year from the date of retirement, the said partner shall not market the anaesthesia and respiratory range of products or any

other specific products. In the event of breach of any condition, the partner, who contravened, should compensate at Rs. 10 lakhs to each of the

other partners. The parties agreed that the firm was to promote Tyco's Vascular Therapy products in southern States of India and to promote

Ventilator and Anaesthesia circuits throughout India, If any of the partners intends to commence any business activity even remotely connected

with the business of the firm, the same has to be brought to the notice of the other partners. Under Clause 21, it was agreed that the dissolution of

the firm can be initiated only if the majority of the partners agreed to do so. If any partner or two partners wanted to leave the firm, they shall do so

only by retiring from the partnership, Admittedly, each of the partners having their own business gave a declaration of the business which they were

doing at the time they entered into partnership as well as the future business which they wanted to do. It was declared in the document dated

21.6,2004 that the recitals in the main partnership deed entered into under Ex.C-1 dated 1,4.1995 shall remain unchanged and shall continue to be

in force, In the annexure to the document dated 21.6,2004, the first respondent declared that he had started a company in the name of Hindustan

Health Care System. He also declared that he would not compete with the business of HLC and would not promote such products in the territorial

limits of HLC. Admittedly, the firm was running smoothly without any difference of opinion till 3.11.2005.

3. The case of the petitioner herein is that after signing the understanding on 21.6.2004, the firm started losing its business to such an extent that it

eroded the profitability of the firm. The business prospects after 2004 started dwindling in respect of the territories allotted to the first respondent

herein. It is alleged that the first respondent started drawing monies, which were not connected in any way to the efforts taken by him to the

development of the business of the firm HLC. The petitioners stated that it came to know that the first respondent started making entry into the business activities of the first petitioner HLC firm competing with the products promoted by the first petitioner firm and started distribution of these products. The petitioners referred to a specific instance of the business order obtained by the first petitioner firm on 2.11.2005 from M/s. Bone and Joint Clinic for supply of % Nos. of SCD Express for DVT Prophylaxis. The petitioners state that they came to know that a competitive quotation was submitted by the first respondent for the supply of Novamedix AV Impulse System for DVT Prophylaxis.

4. In the meeting held on 3.11.2005 for finalising the sale of the product, the first respondent started making adverse remarks as to the product supplied by the first petitioner and offered to secure orders for his own firm which was prejudicial and contrary to the understanding entered into between the partners. This prompted a letter dated 7.11.2005 from the petitioners informing the first respondent as to his activities detrimental to the interest of the firm. In reply dated 12.11.2005, the first respondent made certain counter allegations. It is seen that sometime in mid October, 2005, the firm herein went in for a loan facility from HSBC Bank, Chennai to the tune of Rs. 35 lakhs. There was a meeting among the partners on 4.11.2005 wherein, it was stated that the third petitioner herein is stated to have obtained certain loans in his individual capacity and was a defaulter therein; hence, he changed his name and date of birth so that his identity as a defaulter might not be disclosed. The first respondent herein objected to this and wanted the loan application to be withdrawn.

5. The first respondent contended that the second petitioner herein floated a company on 18.11.2005 contrary to the terms of the partnership deed. The case of the first respondent herein is that the other partners obtained a signature in a blank form in the loan application. On coming to know about the conduct of the third petitioner, the first respondent wanted the application to be withdrawn. However, in view of the difference that had surfaced among the partners, both as regards the alleged starting of a business which was competitive to that of the first petitioner herein and on the loan application made, the parties attempted for settlement of differences by taking the services of the firm's Chartered Accountant as a

conciliator. On 19.11.2005, the parties met at the firm's premises in the presence of Chartered Accountant. The meeting was adjourned to

25.11.2005. It is stated that the first respondent received a phone call from HSBC Bank that an enquiry was conducted on the letter from the first

respondent dated 19.11.2005 whereby, the first respondent had withdrawn his signature in the loan application and disclosed his intention to

withdraw from the partnership because of the fraudulent activities of the petitioners herein.

6.The first respondent's contention herein is that the parties met on 25.11.2005, 30.11.2005, 5.12.2005 and 12.12.2005; however, the parties

could not reach a settlement. The matter was adjourned to 16.12.2005. In the meantime, the petitioners herein filed O.A. No. 1109 of 2005 u/s 9

of the Arbitration and Conciliation Act and obtained an ex parte order of injunction against the first respondent from dealing with the products

which are competitive to the products of the first petitioner firm. In O.A.No,1110 of 2005, an injunction order was also obtained against the first

respondent from interfering with the operation of the Bank account. In O.A-No.1111 of 2005, the petitioners herein sought for an injunction to

direct the first respondent to return certain moulds belonging to the firm on which notice was ordered. However, subsequently, in O.A. No. 1109

of 2005, this Court vacated the orders passed; however allowed O.A. No. 1110 of 2005 and closed O.A.No.1111 of 2005 on the undertaking

given by the first respondent herein. O.A. No. 17 of 2006 was filed and sought for an interim injunction restraining the respondents from in any

manner carrying on the business of the firm pending arbitration proceedings. During the pendency of these applications, the first respondent herein

issued a registered notice wherein, he sought for dissolution of the firm u/s 44 (e) and 44(g) of the Indian Partnership Act, The petitioners,

however, replied in their letter dated 20th December 2005 that there was no procedure agreed among the partners in the appointment of the

Arbitrator and that the Arbitrator should be appointed only through the Court. The petition u/s 11(5) of the Act was thereafter filed by the

petitioners before this Court. The first respondent filed a petition u/s 11(5) of the Act, pursuant to the notice issued. This Court, by order dated

30.03.2007 in O.P. No. 932 of 2006, appointed a retired Judge of this Court, Justice S.S.Subramani as a Sole Arbitrator to resolve the disputes

among the parties. It is stated that on 23.12.2005, the first respondent herein filed a criminal complaint against petitioners 2 to 4 that they had

committed an offence under Sections 120B and 420 read with Section 511 of the Indian Penal Code and that the learned Magistrate had

forwarded the complaint to the Central Crime Branch, Egmore with a direction to register a case, investigate and file a report.

7. The first respondent herein filed a claim petition submitting that by reason of the fraudulent act of the petitioners in submitting the loan application

with false particulars and in not permitting the first respondent herein to peruse the accounts, the firm was liable to be dissolved. Hence, Clause 21

in Ex.C-2 will not be a bar for seeking dissolution. He also sought for a direction to the petitioners herein to render true and proper accounts of the

said firm with due regard to Sections 37 and 42 of the India Partnership Act 1932. The petitioners herein filed their counter affidavit and counter

claim. One of the main grounds taken therein was that the first respondent cannot seek dissolution of the petitioner firm in view of Clause 21 of the

agreement Ex.C-2 dated 21.6.2004. The petitioners contended that they are entitled to continue their firm.

8. The petitioners contended that the petitioners have registered a new company only on 18.11.2005 after the first respondent intimated his

intention to withdraw from the firm in his letter dated 12.11.2005. The petitioners pointed out that there was no breach of the clauses under the

partnership deed either under Ex.C-1 or Ex.C-2 and that the newly formed company had not started any commercial activity. The petitioners

pointed out that the first respondent violated the various terms of the partnership agreement and that the first petitioner was entitled to recover a

sum of Rs. 105.00 lakhs. As to the allegation on the fraudulent documents submitted to HSBC Bank, the petitioners pointed out that the loan

application had already been withdrawn and that the complaint filed by the first respondent was found to be false. The Crime Branch had also

referred the case as a mistake of fact. Referring to the parallel business carried on by the first respondent detrimental to the interest of the partnership

firm, the petitioners submitted that in terms of the partnership deed, at best, the first respondent could only seek retirement and not dissolution.

9. On hearing both parties, the learned Arbitrator formulated the following questions for consideration:

1. Whether the claimant is entitled to the relief of dissolution of the firm Hindustan Life Care with effect from 20.12.2005 and whether the claimant is entitled for the rendition of accounts of the firm Hindustan Life Care?
2. Whether the aforesaid claim can be supported by invoking the provisions of Section 37 and 42 of the Indian Partnership Act, 1932?
3. Whether as per the covenants found in the supplementary partnership deed dated 21.6.2004, the claimant is deemed to have retired from partnership?
4. Whether the claimant has breached the covenants of the original partnership deed dated 1.4.1995 and for supplementary partnership deed dated 21.6.2004?
5. Whether the claimant is guilty of promoting a competitive firm, viz., Hindustan Health Care System and has been indulging in competitive activities by promoting A.V. Impulse systems?
6. Whether the respondents are entitled to their counter claim of Rs. 75,00,000/- or any other such relief as may be determined by the Hon''ble Tribunal for the claimant's breach of the partnership agreement by importing anesthesia and respiratory products from Global Med. Canada?
7. Whether the respondents are entitled to a sum of Rs. 30,00,000/- on their plea that the claimant has been promoting the same anesthesia and respiratory products within one year of himself ceasing to be partner?
8. To what other relief are the parties entitled to?
10. Evidence in this case was recorded from the first respondent as a claimant and from the Chartered Accountant as R. W. 1. Referring to the various clauses under the partnership agreement and with reference to provisions of the Indian Partnership Act, 1932, the learned Arbitrator pointed out that the parties "never intended that the partnership should be dissolved at the Will of the partners. The learned Arbitrator also pointed out that under Ex.C.2, so long as the majority of the partners wanted to continue the business and so long as they did not want a dissolution, the firm could not be dissolved. Referring to Clause 21 in Ex.C-2, the learned Arbitrator considered as to whether the first respondent could invoke Section 44 of the Indian Partnership Act to seek dissolution. The learned Arbitrator held that the claim for dissolution u/s 44 of the Indian

Partnership Act was not in any way prohibited by reason of Clause 21 of Ex. C-2, provided, the conditions specified under Sections 44 (c) and

44 (g) are satisfied. With that view, the learned Arbitrator considered as to whether the grounds made out by the first respondent justified his

prayer for dissolution. The learned Arbitrator viewed that the Tribunal could not reject the plea of the first respondent invoking the right u/s 44 of

the Act, which, according to him, was maintainable.

11. Three grounds were raised by the first respondent seeking dissolution, namely, i) fraud committed by petitioners 2 to 4 in filling a loan

application to HSBC Bank; ii) petitioners 2 to 4 formed a private company in the name and style of Hindustan Life Care P. Ltd. even during the

subsistence of the firm and iii) the first respondent was prevented from perusing the accounts, which he was entitled to as a partner and permitted

by the orders of the High Court in A. No. 103 of 2006 dated 29.6.2004, Ex.R-3.

12. On the question relating to the first respondent prevented from perusing the accounts, the learned Arbitrator came to the conclusion that

Section 12 of the Indian Partnership Act contemplated the right of the Partner to inspect the accounts and take copies therefrom. Learned

Arbitrator held that in spite of the orders of this Court, the first respondent was prevented from inspecting the accounts and the statutory right of

the first respondent was denied. The learned Arbitrator pointed out that having regard to the statutory right of the first respondent to peruse the

accounts, petitioners-2 to 4 have denied the first respondent's right to have access to the books of accounts.

13. The formation of a private company by the second petitioner along with the wives of petitioners-3 and 4 constituted breach of agreement;

hence, the learned Arbitrator pointed out that Clause 6 to Ex.C-1 barred the partners from carrying on any business activity competitive to the

activity of the firm; yet, in Ex.C-2, the supplementary agreement of the year 2004, it was provided that the breach committed of Clause 6 had to

be compensated monetarily in terms of Clauses 15, 16, and 17. Apart from that, the supplementary agreement also provided for a prohibition on

the retiring partner carrying on similar business (Clauses 13 to 16). Learned Arbitrator pointed out that the first respondent had formed a concern

of his own long before the misunderstanding arose declared in Ex.C-2 and

ratified by the other partners. Referring to Exs.C-6 and C-7 dated 11.11.2005, the learned Arbitrator pointed out that the Memorandum and Articles of Association for the new company formed through the wives of petitioners-3 and 4 and second respondent as Directors was even before the first respondent issued a notice of dissolution dated 12.11.2005. He pointed out that the stamp papers were purchased even as early as 9.11.2005; hence, the conduct of petitioners-2, 3 and 4 on the advice of the Chartered Accountant was not in good faith and offended Section 9 of the Indian Partnership Act, 1932. Learned Arbitrator pointed out that the Chartered Accountant, in whose presence conciliation proceedings were conducted, did not disclose the formation of the company to the first respondent herein and the formation of the company was an act in violation of Section 9 of the Indian Partnership Act as well as in breach of the terms of the Partnership agreement.

14. On the allegation of fraudulent act alleged to have been committed by petitioners-2 to 4 in submitting the loan application to HSBC Bank, the learned Arbitrator pointed out that admittedly, the loan application was submitted to the Bank before 4.11.2005. In the Board Meeting held on 4.11.2005, the third respondent admitted that he had given a wrong name and a different date of birth and even his father's name was changed on the ground that he was a defaulter in discharging the loan taken in his personal name. Having regard to the above and on the misunderstanding arising thereon, the first respondent requested the petitioners herein to withdraw the loan application. The learned Arbitrator pointed out that when the first respondent had proved certain facts as regards the allegation of fraud, the petitioners are bound to adduce evidence which they failed to discharge. Further, even though the first respondent had signed the statement in the loan application, yet it was returned by the third petitioner, about which the first respondent came to know only in the Board Meeting conducted on 4.11.2005. Hence, the petitioners were not honest in discharging the dealings with the first respondent.

15. As to the relief that the first respondent was entitled to, the learned Arbitrator came to the conclusion that Clause 21 is not a bar to raise a dispute u/s 44 of the Indian Partnership Act; consequently, the business carried on by the first respondent in AV Impulse System could not be

called a competitive product, since the same was introduced in the market long before the product of the first petitioner was marketed. Learned

Arbitrator pointed out that Exs.C-38 and C-39 showed that AV Impulse System and SCD Express were different products and the Tyco Health

Care which manufactured SCC Express had itself taken the distribution rights of AV Impulse System and if both were competitive products, then

the manufacturer himself would not have undertaken the marketing rights. Learned Arbitrator pointed out that AV Impulse System was in the

market long before SCD Express was introduced and it catered to more purposes than SCD Express. There was nothing to show that the first

respondent was promoting his business to the detriment of the firm's business. The petitioners had not produced the accounts maintained by them

to substantiate their case as regards the fall in business by reason of the orders placed by the first respondent for his concern. The relationship

between Global Med and the first petitioner firm was only that of vendor and purchaser, and in any event, the products of Global Med could be

marketed by anybody, since they are not marketed in their own brand name. There was no agreement between Global Med and the first

respondent for promotion of its products. The learned Arbitrator pointed out that there were no materials to show that the first respondent

committed breach by running a parallel competitive business.

16. On the question of denial of access to the books of accounts, the learned Arbitrator held that the petitioners were to be blamed for committing

a breach. He further held that the conduct of the petitioners showed that they wanted to eliminate the first respondent from the firm. The letter

addressed to the Bank by the first respondent on account of the fraud committed was not a misconduct on the part of the first respondent.

Consequently, the learned Arbitrator held that petitioners-2 to 4 were guilty of misconduct.

17. Referring to Clause 21 of Ex.C.2 and Ex.C.11, which was in reply to Ex.C-10 that the first respondent could retire from the partnership since

the dissolution would only be by a majority decision, the learned Arbitrator pointed out that the petitioners had no right to treat the first respondent

as retired from the partnership. The learned Arbitrator pointed out that the petitioners would not treat the first respondent as having retired from

12.11.2005 without giving an opportunity to the first respondent. He pointed out that the minutes of the Meeting showed that the reconciliation of the differences depended on the perusal of the accounts, but the accounts were not before the Chartered Accountant; as such, the contention of the petitioners that the first respondent agreed for an unconditional retirement on 19.11.2005 in the meeting held could not be accepted. Learned Arbitrator viewed that the petitioners had communicated their intention very clearly to oust the first respondent from the business and to liquidate the firm, so that the business could be taken over by the company. Going by the conduct of the petitioners herein in forming the new company, the learned Arbitrator held that on just and equitable grounds, the firm should be dissolved. To invoke the said finding, the learned Arbitrator held that the first respondent had not committed breach of the contractual terms in Exs.C-1 and C-2 and was not guilty of promoting a competitive firm and indulging in competitive activities by promoting AV Impulse System. There were no violations committed by the first respondent to grant the counter claim made by the petitioners. The learned Arbitrator pointed out that the Chartered Accountant failed to act as a neutral person and that he had not prepared the accounts according to law. The basis for the settlement between the parties had been done without taking into account the actual accounts. There was no agreement among the parties in the meeting held on 19.11.2005 that the first respondent would get certain amount as no decision was taken. In these circumstances, the interim award was made holding that the firm Hindustan Life Care had to be dissolved from 20.12.2005.

18. Learned counsel appearing for the petitioners took me through the various clauses and submitted that in terms of the specific agreement between the parties as contained in Exs.C1 and C2, the grounds relied on by the learned Arbitrator is totally unsustainable. Pointing out to the finding of the learned Arbitrator, he submitted that there was no just and equitable clause to order dissolution. Pointing out to the view of the learned Arbitrator on the just and equitable ground for dissolution, learned counsel pointed out that the learned Arbitrator exceeded his jurisdiction in invoking Section 44(g) for ordering dissolution on just and equitable ground. In the face of the admitted fact that the dissolution could only be by

a majority, the power u/s 44 of the Act for a dissolution under just and equitable ground could only be through a Court and not by the forum

chosen by the parties. He pointed out that the jurisdiction of the Arbitrator has to be only with reference to Section 28(2) of the Act. Given the

terms of the partnership deed and having regard to the dispute raised, the learned Arbitrator cannot assume equitable jurisdiction.

19. Referring to the decision reported in M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., , he pointed out that the

Arbitrator is not a Court of Law. Learned counsel made specific reference to the decision reported in Oil and Natural Gas Corporation Ltd. Vs.

SAW Pipes Ltd., , particularly to paragraph 54, and submitted that the Arbitrator was not called upon to decide on the availability of a relief under

just and equitable clause and the parties had not conferred any such jurisdiction to consider the case u/s 44(g) of the Indian Partnership Act. From

the angle of Section 44 of the Act, the award suffers legal infirmity for this Court to interfere u/s 34 of the Arbitration and Conciliation Act, 1996.

He also referred to the decisions reported in Tarapore and Co. Vs. State of M.P., Bharat Coking Coal Ltd. Vs. Annapurna Construction, and

Food Corporation of India Vs. Chandu Construction and Another, and pointed out that the issues framed had gone for a wrong decision to

assume jurisdiction u/s 44 of the Act. When the learned Arbitrator had rejected the plea of the petitioners u/s 42 of the Act, the assumption of

jurisdiction u/s 44 of the Act goes to the root of the case and the dissolution sought for by the first respondent tracing his rights under the Indian

Partnership Act certainly goes against the agreed terms under the contract. Thus the learned Arbitrator exceeded his jurisdiction and by reason of

the decisions reported in New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, Associated Engineering Co. Vs. Government of

Andhra Pradesh and another, and Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/Works, Palghat Division, Southern

Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator],

Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator],

Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway, , this Court has a jurisdiction to find out as to

whether the learned Arbitrator exceeded his jurisdiction by having a recourse to the contract. He submitted that in so exercising this jurisdiction,

this Court is not reappraising the evidence herein, but on the admitted position of law, the award is liable to be set aside. Apart from this legal sub-

mission, learned counsel also took me through the findings of the learned Arbitrator on the question of competitive character of the business alleged

to have been done by the petitioners as well as on the fraud committed only to submit that these findings are not supported by materials.

20. Per contra, learned counsel appearing for the first respondent pointed out that the statutory right given u/s 44 of the Act cannot be set at naught

by any contract as per Sections 5 and 8 of the Arbitration and Conciliation Act, 1996. The substantive law guides the rights of the parties. The

present case of the first respondent rested on his rights under the substantive law; hence, the decisions relied on by the learned counsel for the

petitioners are distinguishable. The decision of the Apex Court, instead of assisting the case of the petitioners, would come to the rescue of the first

respondent; consequently, prayed for dismissing the petition.

21. Heard the learned counsel on either side and perused the materials placed on record.

22. The only question that arises for consideration before this Court is as to whether the learned Arbitrator committed an error in law in ordering

dissolution by assuming the equitable jurisdiction u/s 44(g) of the Indian Partnership Act to order dissolution, when in the face of the contractual

terms, the dissolution could be brought about only on the majority of members deciding to go for a dissolution.

23. In this connection, the terms of the partnership deed need to be noted.

24. Clause 2 of the partnership deed, Ex.C-1 refers to the business of the firm, which reads as under:

2. The business of the firm shall be that of dealers in surgical disposables and surgical equipments. The firm can also enter into any other business

that the partners may from time to time deem fit.

Clause 6 of Ex.C.1 stipulates that during the currency of the agreement, the partners shall not carry on any business activity that connects with the

activity of the firm. Clauses 14 and 15 of the partnership deed, Ex.C.-1 refers to the applicability of the Indian Partnership Act, which read as

follows:

Clause 14: The provisions of the Partnership Act 1932 shall apply in so far as other matters are concerned.

Clause 15: In the case of disputes among the partners the provisions of the Indian Arbitration Act 1940 shall apply.

A supplementary deed was also entered into on 21st June 2004. Under Clause 22 of Ex.C-2, it was stated that except for certain contingencies

brought forth, the recitals in the main partnership deed shall remain as it is and shall continue to be in force. The Supplementary deed contemplated

payment of remuneration and allocation of field activity for the partner for promoting the sales. It also contained a penalty clause in the event of the

partner not contributing to the improvement in business. Apart from this, the agreement also contemplated prohibition as to the partner carrying on

business after his retirement and ceased to be a partner. It was agreed among the partners not to promote any competitive brand or the products

dealt with by the partnership concern and in the event of any violation, monetary consequences thereof were also provided. In terms of the

supplementary agreement, the partners have executed an affidavit disclosing the business carried on by each one of them. The said affidavit clearly

shows that each one of the partners, apart from entering into partnership, have been carrying on business in some product or the other and each

one has knowledge of others carrying on similar business. Clause 21 of Ex.C.2 touches on the dissolution rights and retirement rights, which reads

as follows:

21. This partnership agreement will not be binding on any partner in the event of dissolution of the company. The dissolution of the firm can be

initiated only if the majority of the partner agree to do so. If any partner or two partners wish to leave the firm, they shall do so only by retiring from

the partnership.

25. A reading of the partnership deed thus makes it clear that the dissolution of the partnership cannot be brought about by a unilateral decision of

any single Individual partner. All that has been recognised is his right to retire from partnership, As already seen, Clause 21 of the Supplementary

Deed states that the dissolution of the firm can be initiated only if the majority of partners agree to do so; if any partner or two partners wish to

leave the firm, they shall do so only by retiring from the partnership.

26. Going by these terms as narrated above, apart from providing for retirement and dissolution, it is clear that the disputes that arise among the

partners are to be resolved in accordance with the provisions of the Arbitration Act 1940. In the face of the specific provision as regards

dissolution and retirement, it is clear that the provisions of the Indian Partnership Act will govern the rights of the parties except on matters which

are enumerated in the agreement. Hence, it is not correct to say that the agreement entered into either overlooks the provisions of the Indian

Partnership Act or tries to contract on terms which are contrary to the provisions of the Indian Partnership Act.

27. Chapter VI of the Indian Partnership Act deals with the dissolution of the firm. Sections 39 to 55 cover this area. Dissolution of the Partnership

may take place with the consent of all the partners or in accordance with the contract between the partners (Section 40). Section 41 deals with

compulsory dissolution by an adjudication of all the partners or of all the partners but one declared as insolvent or by the happening of an event

which makes the business unlawful to be carried on in partnership. Section 41 further provides that when more than one undertaking is carried on

by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of the lawful business carried on by it. Section

42 deals with dissolution on the happening of certain contingencies. Section 43 is with reference to dissolution by notice on partnership at Will.

Section 44 deals with dissolution by the Court.

28. Admittedly, the partnership herein is not one at Will. As already seen, Clause 21 of the Supplementary agreement clearly circumscribes the

rights of the parties to go for dissolution. Hence, going by Section 40 of the Indian Partnership Act, the terms of the agreement on dissolution can

be with the consent of the majority of the partners in accordance with the terms of the contract between the parties. In the context of an agreed

clause in a partnership deed, could there still be a situation, where a dissolution can be brought for by a partner outside the terms of the contract.

Section 44 gives the answer that on a suit of a partner, the Court may dissolve the firm on anyone of the stated grounds. In the case on hand, the

ground on which the learned Arbitrator has passed an interim award is under

Sub-Clause (g) namely, just and equitable ground among various situations contemplated for dissolution by the Court. Sub-Clause (c), (d) and (g) read as follows:

44. (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard

being had to the nature of the business;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the

firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the

other partners to carry on the business in the partnership with him;

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

29. A reading of these provisions clearly shows that quite apart from what has been provided for under the agreement, an aggrieved partner can

invoke the provisions of the Indian Partnership Act before going to a Civil Court. In the face of this provision, the petitioner is not justified in his

contention that a dissolution could be brought about only in terms of the agreement. However, this submission is correct in so far as the jurisdiction

of the Arbitrator is concerned. Admittedly, arbitration, as an alternate dispute resolution, is a forum chosen by the parties to resolve their

differences. Considering the fact that the jurisdiction of the Arbitrator is circumscribed by the agreement between the parties on the nature of

disputes to be referred to the Arbitrator, a statutory right under the Indian Partnership Act does not automatically flow as a matter of agreement for

a reference before an Arbitrator to exercise the same power as that of a Court u/s 44 of the Act. Such resort to Section 44 of the Act by an

Arbitrator is possible only when the parties agreed to such a course. In the absence of any agreement, merely because there exists a statutory right,

that does not empower a partner to move the Arbitrator for a dissolution on the grounds u/s 44 of the Act. If the statutory right, as such, for

invoking the arbitration clause is available for any aggrieved partner to choose arbitration as a method of resolution of the disputes, certainly, there

is no need at all for Section 44 to be separately enumerated as distinct from the contractual terms as provided for u/s 40, under which, the parties

could agree upon the modality as to the dissolution of the firm. Hence, it stands to reason that what is not reserved for an Arbitrator to assume jurisdiction in terms of an agreement between the parties cannot be exercised so by an Arbitrator, but only by the Court. The fact that arbitration is like a Civil Court proceedings, does not mean that an Arbitrator, for all practical purposes, sits as a Civil Court to try the suit. Even as a matter of speaking that an arbitration proceedings can be guided by the Rules of evidence or procedure under the Civil Procedure Code, it does not mean that the Arbitrator sits as a Court to decide the dispute. It must be kept in mind that arbitration is a chosen forum of the partners in terms of the contract; whereas, the Court is not a forum chosen by the parties as matter of contract, even though the jurisdiction or the place of filing the suit may be a matter of contract.

30. On the question relating to the difference between Courts and Arbitral Tribunals, the litigation and arbitration, the Apex Court considered the same in the decision reported in *Paramjeet Singh Patheja Vs. ICDS Ltd.*, This related to a case where one Paramjeet Singh Patheja was a party to the Arbitration Proceedings initiated by the company. Incidentally, the company was registered with the B.I.F.R. and consequently, an award was passed on 26.6.2000. Thereafter, an insolvency notice was issued u/s 9(2) of the Presidency Tows Insolvency Act 1909 on the basis of the Arbitration award. The B.I.F.R. rejected the reference of the company. Thereafter, on 14.6.2002, an insolvency notice was served on the appellant before the Supreme Court. The appellant contended that the award was neither a decree nor an order for the purpose of provisions of the Insolvency Act and that no notice could be issued under the Insolvency Act on the basis of the award. The Supreme Court considered the question as to whether an arbitration award is a decree for the purpose of Section 9 of the Insolvency Act and that notice could be issued on the basis of the award: The Apex Court negated the said contentions, in the course of considering these claims, the Supreme Court considered the character of Court as distinct from arbitral Tribunal. The Apex Court pointed out that litigation is different from arbitration. The former is a legal action in a court of law where judges are appointed by the State; the latter is the resolution of a dispute between two contracting parties by

persons chosen by them to be arbitrators. These persons need not even necessarily be qualified trained judges or lawyers. The Supreme Court

further pointed out that

39. Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus a final award, without actually being

followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e. executed in the same manner as

a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the

award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute

such as the Insolvency Act are concerned.

39. Section 36 of the Arbitration and Conciliation Act of 1996 brings back the same situation as it existed from 1899 to 1940. Only under the

Arbitration Act, 1940, was the award required to be made a rule of court i.e. required a judgment followed by a decree of court.

The Supreme Court concluded that:

43.....(iv) An arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2). The expression "decree" in the

Court Fees Act, 1870 is liable to be construed with reference to its definition in CPC and hold that there are essential conditions for a "decree"?:

(a) that the adjudication must be given in a suit,

(b) that the suit must start with a plaint and culminate in a decree, and

(c) that the adjudication must be formal and final and must be given by a civil or Revenue Court,

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the

institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and

Conciliation Act, 1996 cannot be construed to be a "decree" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the rules made thereunder.

In the course of its decision, the Supreme Court further held that:

21. The words "court", "adjudication" and "suit" conclusively show that only a court can pass a decree and that too only in a suit commenced by

a plaintiff and after adjudication of a dispute by a judgment pronounced by the court. It is obvious that an arbitrator is not a court, an arbitration is

not an adjudication and, therefore, an award is not a decree.

The Apex Court also held:

24. The above view has been consistently taken in decisions on Section 15 of the Arbitration Act, 1899 viz. *Tribhuvandas Kaliandas Gajjar v.*

Jivanchand Lallubhai and Co. 13, Manilal Lallubhai v. Bharat Spg. & Wvg. Co. Ltd. 14, Ramshai Mull More v. JoylallIS, Ghulam Hussein Khatau

*v. Shahban Mohib*¹⁶.

Referring to Section 36 of the Arbitration Act which is in pari materia with Section 15 of the 1899 Act the Supreme Court pointed out that ""In fact,

Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under CPC."" The

Supreme Court rejected the contention of the respondents therein holding that:

an award rendered under the Arbitration and Conciliation Act, 1996 if not challenged within the requisite period, the same becomes final and

binding as provided u/s 35 and the same can be enforced as a decree as it is as binding and conclusive as provided u/s 36 and that there is no

distinction between an award and a decree, does not hold water.

The Apex Court further referred to the decision reported in *The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind*

Cycles Ltd. and Another Vs. The Hind Cycles Ltd., Bombay, and Collector of Varanasi Vs. Gauri Shankar Misra and Others, and extracted at

paragraph 36 the decisions referred to above which may usefully be extracted hereto:

36. Moreover, the position that arbitrators are not courts is quite obvious and this Court noted the position as under in two decisions:

16. ""But the fact that the arbitrator u/s 10A is not exactly in the same position as a private arbitrator does not mean he is a tribunal under Article

136. Even if some of the trappings of a court are present in his case, he lacks the basic, the essential and the fundamental requisite in that behalf

because he is not invested with the State's inherent judicial power... He is not a tribunal because the State has not invested him with its inherent

judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties... (Engg. Mazdoor Sabha v.

Hind Cycles Ltd. 23, AIR p.882, para 16.) (emphasis supplied)

4. There was no dispute that the arbitrator appointed u/s 19(1)(b) [of the Defence of India Act, 1939] was not a court." (Collector v. Gauri

Shankar Misra 24, AIR p.386, para 4.)

31. In the decision reported in The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles Ltd. and Another Vs.

The Hind Cycles Ltd., Bombay, , the Supreme Court pointed out that the basic and essential condition which makes an authority or a body a

Tribunal under Article 136 of the Constitution is that it should be constituted by the State and should be invested with the State's inherent judicial

power. Since this test was satisfied by the Industrial Tribunals under the Act, in the decision reported in The Bharat Bank Ltd., Delhi Vs.

Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees' Union, Delhi, the majority decision held that the awards made by the

Industrial Tribunals are subject to the appellate jurisdiction of the Apex Court under Article 136. Contrasting this to a voluntary reference to a

panel of Arbitrators u/s 10A of the Industrial Disputes Act, 1947, the Apex Court held that it may perhaps be possible to describe such an

Arbitrator as in a loose sense, a statutory arbitrator. But yet he is not exactly in the same position as a tribunal under Article 136. The Supreme

Court pointed out that the fact that he is clothed with certain powers, no doubt, has the trappings of a Court. But it does not however mean that

the power of adjudication which he is exercising is derived from the State and so the arbitral Tribunal does not satisfy the character of an

adjudicating body. The Supreme Court pointed out that:

Even if some of the trappings of a court are present in his case, he lacks the basic, the essential and the fundamental requisite in that behalf

because he is not invested with the State's inherent judicial power... He is not a tribunal because the State has not invested him with its inherent

judicial power and the power of adjudication which he exercises is derived by him from the agreement of the parties. His position, thus, may be

said to be higher than that of a private arbitrator and lower than that of a tribunal. A statutory tribunal is appointed under the relevant provisions of a statute which also compulsorily refers to its adjudication certain classified classes of disputes. That is the essential feature of what is properly called statutory adjudication or arbitration.

32. In the background of this, the provisions of the Arbitration and Conciliation Act, 1996, needs to be noted. Section 2(b) of the Arbitration and Conciliation Act, 1996, refers to "arbitration agreement" to mean an agreement referred to in Section 7. Section 7 of the Arbitration and Conciliation Act, 1996, reads as follows:

7. Arbitration agreement. (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes

which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in- (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or

other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the

existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and

the reference is such as to make that arbitration clause part of the contract.

33. In terms of Section 7 of the Arbitration and Conciliation Act, an award to be passed by the Arbitrator shall be in terms of the claim and the

defence made. A reading of the provisions contained in the Arbitration and Conciliation Act, particularly, with reference to Chapters IV, V and VI

dealing with jurisdiction of the Tribunal to conduct proceedings and making of the award and termination of the proceedings, show that they are

mere procedural in nature. With reference to a substantial aspect of jurisdiction of the Tribunal and the authority to rule on this jurisdiction, section

19 in Chapter V states that the Tribunal shall not be bound by the CPC or the Indian Evidence Act, 1872, The parties are free to agree on the

procedure to be followed by the Tribunal in conducting its proceedings; failing any agreement as regards the procedure, the Tribunal may conduct the proceedings in the manner it considers appropriate, Section 34 is the remedial provision available to a party aggrieved by the award. Hence, when Clause 15 of the agreement provided that the provisions of the Indian Arbitration Act 1940 will apply to the disputes among the partners, it mean the applicability of the provisions of the Act as regards the procedure prescribed therein. Even here, the jurisdiction of the Arbitrator is guided only by the terms of the agreement between the parties and the reference of the dispute before the Arbitrator. The fact that Clause 14 provided that the provisions of the Partnership Act would apply, would only mean that the application is on matters not covered under the contract. At the same time, the said clause has to be read along with the provisions in the Supplementary Deed under Clause 21. Hence, the dissolution of the firm as a matter of reference to the Arbitrator could arise only as per the contractual terms when the majority of the partners agreed to do so and not when a situation arises as contemplated under Sections 43 and 44 of the Act. If in the exercise of a contractual right to have a dissolution brought about by the majority partners results in a dispute, that alone will have the applicability of the Arbitration and Conciliation Act to have the dispute settled before an Arbitrator and not otherwise.

34. Learned counsel for the petitioners relied on the decision reported in N. Satyanarayana Murthy and Others Vs. M. Venkata Bala

Krishnamurthy, . This case related to a situation where the contract law provided for a right to retire in case a partner was not satisfied with the management of the Managing Partner. When the dissatisfied partner voiced his protest, the other partners construed it as dissatisfaction and an

expression of the partner's intention to retire from partnership and accordingly asked the partner to retire from the partnership. When the

dissatisfied partner sought for relief of dissolution of the firm, the Andhra Pradesh High Court referred to the reliance placed on Section 44(g) of

the Indian Partnership Act. Referring to the scheme of Chapter VI of the Indian Partnership Act, the Andhra Pradesh High Court held that Section

44 is not made subject to the contract between the parties. Section 11 makes the contract between the parties subject to the provisions of the Act

and Section 44 gives the power to the Court to dissolve the firm under the stated circumstances. The Andhra Pradesh High Court held that a suit

was maintainable u/s 44 of the Act despite the omission to provide such a right of dissolution under the contract. Referring to the provisions of

Section 44(g), particularly to the meaning of the phrase "just and equitable" and under what circumstances this can be invoked to dissolve the firm,

the Andhra Pradesh High Court held as follows:

It is well settled that the clause "just and equitable" cannot be read ejusdem generis with the preceding enumerated clauses in a given section.

Though the enumerated conditions of the Cls. (a) to (f) are not available to exercise the power to dissolve a firm, still the court can exercise the

power under residue power given in "just and equitable" clause.

.....

I hold that "just and equitable" clause in S.44(g) cannot be read ejusdem generis with the preceding enumerated Cls.(a) to (f) of S.44 of the Act.

The Court has power to exercise its jurisdiction under S.44(g) which is independent of the preceding Cls.(a) to (f).

35. The Andhra Pradesh High Court referred to Lindley on Partnership and Pollock and Mulla that "just and equitable" means however something

more than convenient." A mere opinion of the Court that dissolution would, on the whole, be the best course is not enough. The Andhra Pradesh

High Court further pointed out that "the words "just and equitable" is incapable of precise definition, the width of the words is wide import, but

itself is a limitation upon the Court to exercise the discretion wisely taking into account not only the true intent and meaning of the articles of the

partnership but also general interest of all the partners.

36. The above decision further cautioned that the Court must also endeavour to see whether any alternative, just relief without dissolving the firm

could be granted to the plaintiff. In the course of its decision, it also referred to a decision reported in Vishnu Chandra Vs. Chandrika Prasad

Agarwal and Others, while affirming the right of the plaintiff for dissolution and held that even without dissolving the firm, the accounts could be

taken and the preliminary decree could be drawn for giving the relief to the retiring partners, if the partnership deed, as such, did not provide for a

right of retirement.

37. On an overall view of the various decisions cited, the Court came to the conclusion that even though there is a wide power u/s 44(g) to dissolve the firm on a "just and equitable" ground, the Court must consider the circumstances as to whether it would warrant dissolution, or without dissolution, the firm can be allowed to subsist in the interest of the remaining partners and without jeopardising the right of a retiring partner. The Court has the responsibility of moulding the relief on the exigencies available in a given situation. The reasoning of the Andhra Pradesh High Court to which I subscribe, needs to be the theme behind the dissolution brought about under "just and equitable" clause.

38. Learned counsel for the petitioners also referred to the decisions reported in N. Satyanarayana Murthy and Others Vs. M. Venkata Bala

Krishnamurthy, , M.O.H. Uduman and others Vs. M.O.H. Aslum, and Smt. Dropadi Vs. Bankey Lal and Others,

39. In the decision reported in Vishnu Chandra Vs. Chandrika Prasad Agarwal and Others, which was referred to by the Andhra Pradesh High

Court in the decision reported in N. Satyanarayana Murthy and Others Vs. M. Venkata Bala Krishnamurthy, the Supreme Court pointed out that

the partners' right to retire without effecting dissolution has to be ascertained from the terms of the agreement. The partner who wanted to come

out of the partnership filed a suit for dissolution of the firm and rendition of accounts, Referring to Clause 18 of the Partnership agreement, the

Apex Court pointed out that it contemplated a situation where a partner could retire from the business, apart from he being expelled from the

partnership. Holding the view that the plaintiff was entitled for a declaration that he could retire from the partnership without dissolving the firm, the

Supreme Court pointed out that Section 32(1)(b) of the Act enabled the partner to retire without dissolution when the contract provided for a

retirement of the partnership without dissolving the firm and continuing the ongoing business. The situation contemplated u/s 32 of the Act

incorporated as a term of the contract between the parties could not be overlooked.

40. The facts before this Court under the agreement between the parties is no different. The clear understanding between the parties is that the

partnership is not one at Will. Any partner can retire from the partnership after giving notice, and on such retirement, the retiring partner would not

carry on business which is competitive in nature to that of the partnership for a period of one year; that the partnership could be dissolved only

when the majority of the members wished so and that it was open to two partners to retire. One partner or two partners, who wish to leave the

firm can do so only by retiring from the partnership.

41. In the background of this definite understanding, going by the decision of the Andhra Pradesh High Court, I agree with the contention of the

learned counsel for the petitioners that the Arbitrator has no jurisdiction to go on to the question of dissolution at the instance of one of the partners

claiming relief u/s 44 of the Act,

42. The decision reported in M.O.H. Uduman and others Vs. M.O.H. Aslum, relied on by the learned counsel for the petitioners needs a

reference. This case related to a plea for dissolution of the partnership. The Apex Court considered the question as to whether the partnership was

one at will. Though the decision arose with reference to a partnership deed registered at Pondicherry as per the provisions of the French Law and

consistent with the French Civil Code, the Apex Court pointed out that the provisions of the Indian Partnership Act would be of relevance,

Referring to the clauses that the partnership would continue till there were two partners, the Supreme Court held that the partnership was not at will

and the suit for dissolution of partnership was not maintainable, The Court held that the rights conferred under the partnership deed are legal rights

and the contract between the parties operates as law as per the terms thereof.

43. In the background of this decision, the reliance placed by the first respondent as well as by the petitioners on the decision of the Supreme

Court reported in M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, needs to be noted. This case which arose

under the Arbitration Act is with reference to a partnership dissolution. The facts of the case are that four brothers entered into a partnership. The

firm V.H.Patel and Company was engaged in the business of manufacture, storage, sales and marketing of varieties of tobacco and tobacco

preparations. The firm had three registered trade marks. Dispute arose as to the use of the trade marks and a mutual agreement was executed

between the partners that the trade marks of the firm Would, then on, be owned by all the partners and could be used by each of the partners

separately and only in the territories allotted to him under the agreement; each partner was to have a percentage in the share of profits and losses

under the deed of partnership. Subsequently, the relationship between the parties worsened. A suit was filed under the Trade and Merchandise

Marks Act for an injunction against some of the partners and the firm. The Trial Court passed an injunction order and ultimately the issue came up

before the Supreme Court. A consent order was passed by the Supreme Court, whereby, the parties agreed to have the dispute resolved through

the sole named arbitrate. The consent terms stated that disputes relating to the rights and obligations of the parties arising out of the agreement and

the retirement deed and to the user of the trade marks in question and determination of the rights of the partners in the suit for declaration and

injunction be referred to arbitration. The partnership deed also contained an arbitration clause on all disputes and questions in connection with the

partnership to be referred to arbitration. Claims were filed before the Arbitrator and an award was ultimately passed, whereby, while setting the

rights of the parties as to the exploitation of the trade marks, the Arbitrator rejected the plea of the respondents seeking dissolution of the firm on

the ground that it was beyond the scope of the reference. On a petition before the High Court, the finding as regards the prayer for dissolution as

beyond the scope of reference was set aside and the matter was remitted before the Arbitrator for a decision afresh. On further appeal before the

Supreme Court on behalf of the firm, one of the contentions taken was that the parties had not referred all the disputes between them to arbitration.

The partnership deed did not provide for dissolution of the firm at will, but by mutual agreement; therefore, dissolution could be ordered only by

the Court on "just and equitable" ground; that dissolution would not be within the jurisdiction of the Arbitrator. The Supreme Court held that when

there was no mutual trust between the parties and the relationship became so strained, it was impossible to carry on the business as partners and it

was open to them to claim dissolution. The scope of reference had to be looked at from the angle as to what was the spirit behind the reference to

arbitration. The Supreme Court pointed out that the idea was to settle all the disputes between the parties and not to confine the same to any one

or the other issue arising thereunder. Referring to Clause 11 that all disputes, were questions in connection with the partnership and that the dispute

existing between the parties shall be referred to arbitration under the provisions of the Indian Arbitration Act 1940, the Supreme Court pointed.

out that though the disputes, between the parties originated on the basis as to whether one or the other partner had not retired from partnership,

when the dissolution of the partnership was not possible by mutual consent, the dispute could certainly arise necessitating reference to arbitration as

provided under Clause 11 of the Partnership deed. As such, the arbitrator had, full jurisdiction to enter upon the question of dissolution of

partnership. Referring to the contention that an arbitrator had no power to dissolve the partnership firm on just and equitable ground as that was

the power of the Court, the Supreme Court observed that a mere strained relationship would not be enough to dissolve the partnership the

Supreme Court further pointed out "it is not necessary for us to examine this contention in this case when the partners sought for dissolution of the

partnership on various grounds enumerated in Section 44(C) to (f) (sic) may also be sufficient and may not be necessary to invoke the inherent

jurisdiction of a court such as dissolution is just and equitable. If there has been breach of agreement and conduct is destructive of mutual

confidence certainly such conduct can give rise to a ground for dissolution of the partnership. While mere disagreement or quarrel arising from

impropriety of partners is not sufficient ground for dissolution, interference should not be refused where it is shown to the satisfaction of the

adjudicating authority that the conduct of a partner has been such that it is not reasonably practicable for other partners to carry on the business in

partnership.

44. The Supreme Court further pointed out the power of an arbitrator to dissolve the partnership that:

the law is clear that where there is a clause in the articles of partnership or agreement or order referring all the matters in difference between the

partners to arbitration, the arbitrator has power to decide whether or not the partnership shall be dissolved and to award its dissolution. (See

Phoenix v. Pope⁸;) Power of the arbitrator will primarily depend upon the arbitration clause and the reference made by the court to it. If under the

terms of the reference all disputes and difference arising between the parties have been referred to arbitration, the arbitrator will, in general, be able

to deal with all matters, including dissolution. There is no principle of law or any provision which bars an arbitrator to examine such a question,

Although the learned counsel for the petitioner relied upon a passage of Pollock & Mulla, quoted earlier, that passage is only confined to the

inherent powers of the court as to whether dissolution of partnership is just and equitable, but we have demonstrated in the course of our order that

it is permissible for the court to refer to arbitration a dispute in relation to dissolution as well on grounds such as destruction of mutual trust and

confidence between the partners which is the foundation therefor.

45. The judgment relied on by the first respondent has to be understood as declaring the principle of law that the jurisdiction of the Arbitrator is

decided by the clause in the articles of partnership agreement requiring matters to be referred to arbitration. If the terms of reference include all

disputes and differences that have arisen between the parties, the Arbitrator will deal with all matters including dissolution, Referring to the

commentary from Pollock and Mulla that a Court, in its discretion, may not stay a suit for dissolution if the same is sought u/s 44(g) and (e) and

that it is for the Court to decide to dissolve the partnership on a just and equitable ground, the Supreme Court pointed out that the passage was

confined to inherent powers of the Court to order dissolution on just and equitable ground, but on the facts before the Supreme Court, it was

permissible for the Court to refer the dispute in relation to dissolution as well on other grounds to arbitration. The view of the Apex Court in

Paragraph 12 clearly demonstrates that the jurisdiction of the Arbitrator is circumscribed by the terms of the contract or the terms of reference by a

Court, But left to the Arbitrator himself, there is no such thing as an inherent power as is available to the Court to order dissolution of partnership

on just and equitable ground, for the precise reason that the assumption of authority by the Arbitrator itself is a result of an agreement between the

parties. Hence, the area on which the Arbitrator may deliberate upon is certainly circumscribed by the terms of the contract, Unlike a Court, there

is no inherent power to assume jurisdiction on any of the grounds given u/s 44 of the Act, unless the contract provides for, thus enabling a partner

to invoke the clauses u/s 44 of the Indian Partnership Act. it must be remembered that in so stating, it does not mean that an aggrieved partner is

left remediless; the statutory protection is always there for an injured partner to approach the Court u/s 44 when the contract is silent on this aspect

and it specifically states that other than what had been provided for in the agreement, the Indian Partnership Act will govern. The decision of the

Supreme Court clearly shows that the parties must agree in their partnership deed to enable an arbitrator to exercise his jurisdiction even on

matters falling u/s 44 of the Indian Partner-Ship Act. The decision, hence, has to be understood as one raised on the peculiar facts that the

Arbitrator has the authority to decide on the question of dissolution by reason of Clause 11, which provided all disputes and questions in

connection with the partnership to be referred to arbitration. The decision, in fact, advances the cause of the petitioners that but for a reference

from Court and the clause under the partnership deed, the Arbitrator could not assume inherent power for dissolution. Going by the terms of

agreement, I agree with the submission of the learned counsel for the petitioners herein that the Arbitrator lacks jurisdiction to order dissolution.

46. Learned counsel for the first respondent relied on the decision reported in 2001 (2) RAJ 317 (Calcutta) (Mahendra Kumar Poddpr V. Bansal

Builders & Ors.) that the word ""Court"" u/s 44 of the Indian Partnership Act included Arbitrator. I reject this contention by reason of the decision

of the Supreme Court reported in Paramjeet Singh Patheja Vs. ICDS Ltd., As regards the reliance placed on the decision reported in Olympus

Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, relating to the power of the arbitrator to grant discretionary relief, the same has to

be understood in the background of the arbitration agreement. Even here, the decision of the Supreme Court fully clarifies the role of the arbitrator

which is already dealt with in the preceding paragraph. Hence, I reject the contention of the first respondent.

47. In the light of the decision that an arbitral Tribunal is not a Court and that unless the agreement provides for a dissolution under the stated

circumstances in Section 44, the arbitral Tribunal cannot assume jurisdiction to pass an award dissolving the firm on just and equitable grounds as

given u/s 44(g).

48. Now advertng to the facts in this case, the agreement provided that the dissolution can be brought forth only in terms of Clause 21 of the

supplementary agreement. Learned counsel for the first respondent submitted that as per Clause 15, it was agreed that in case there is dispute among the partners, the provisions of Indian Arbitration Act, 1940, shall apply. Hence, the disputes stated therein have to be understood as including the one seeking dissolution by a partner, which was contested by other partners, As already pointed out, even though the said argument would have gone for acceptance, the fact remains that the agreement contemplated dissolution only by majority of the members and that the right given to an individual partner is only to seek a retirement. It must be remembered that the supplementary agreement provides in detail as to the rights and obligations of partners" post-retirement and that if one partner or two partners wish to leave the firm, they shall do so only by retirement from the partnership. The number of partners who had originally constituted the partnership are four in number. The Act contemplates a minimum of two partners to constitute a partnership. Hence, by exit of one or two partners, the partnership does not come to an end automatically. However, if any one of the partners wishes to go for a dissolution, the provisions that guide such exercise would be one as out-lined under the Indian Partnership Act and certainly not by virtue of what has been agreed on under the Partnership deed.

49. It may be seen that in the decision re-reported in AIR 1917 PC 116 (Rehmatunissa Begum & ors. V. Price & Ors.), the privy council considered the authority of the arbitrator to decide on a question of just and equitable ground to dissolve the partnership. Dealing with the question as to whether contractual term would stand in the way of a partner invoking Court's protection for dissolution on equitable grounds and to the nature of statutory right available to a partner, the Privy Council, in the decision reported in 22 CWN 601 (Privy Council) held as follows;

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligation of the partners may have been regulated and defined by the partnership contract. It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the Court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted.

50. Short of repetition, it must be noted that the dissolution as per the terms of agreement could be brought forth only on the majority of the

partner agreeing to do so. By reason of the agreed terms binding on the parties and regulating the rights of the partners inter se, I do not agree

With the submission Of the learned counsel appearing for the first respondent that the learned Arbitrator has authority to order a dissolution by

invoking the just and equitable clause. The clause on dissolution as already referred to reads as follows:

21. This partnership agreement will not be binding on any partner in the event of dissolution of the company. The dissolution of the firm can be

initiated only if the majority of the partners agree to do so. If any partner or two partners wish to leave the firm, they shall do so only by retiring

from the partnership.

Clause 14: The provisions of the Partnership Act 1932 shall apply in so far as other matters are concerned.

Clause 15: In the case of disputes among the partners the provisions of the Indian Arbitration Act 1940 shall apply.

51. Learned counsel for the first respondent placed reliance on the decision reported in Vijayalakshmi Jayaram Vs. M.R. Parasuram and others,

and submitted that even when specific provisions are not provided for under a partnership deed, an Arbitrator could exercise his powers in terms

of Section 44 of the Indian Partnership Act. She drew my attention particularly to paragraph 10 of the judgment that the learned Arbitrator is

bound to take into account the ingredients mentioned in Section 44 while deciding the issue as to whether the firm is to be dissolved or not. It must

be noted that the said decision turns on Clause 26 of the partnership deed which stated that ""with regard to any dispute arising out of the

agreement or of the interpretation of any clauses here under and in any matter of policy or decision, day to day working, administration, finance

and future development programme, such dispute shall be referred to the Arbitrator"", I do not find that any help could be taken from the said

decision which turns on the facts of the case.

52. Touching on the role of the Arbitrator vis-a-vis a Court's jurisdiction, in the decision reported in Markfed Vanaspati and Allied Industries Vs.

Union of India (UOI), the Supreme Court quoted with approval Russell on

Arbitration as follows:

An arbitrator is neither more or less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with. Whatever has been mentioned by Russell in this paragraph is equally true for Indian Arbitrators.

53. There is yet another reason as to why this Court is not able to accept the reasoning of the learned Arbitrator. As already seen, in the decisions referred to above, the jurisdiction of the Arbitrator is one traceable to the agreement between the parties. Even assuming that the Arbitrator has the authority to order a dissolution on just and equitable ground, so long as the rest of the partners have expressed their desire to get along with the partnership business, it is not for the Arbitrator to put an end to the partnership. The partnership deed gives a right to a partner to retire. The dissolution on just and equitable ground, hence, would arise when there is an impossibility of binding the partners by a common cause. The consistent case of the other partners is that they wished to carry on their business as before and that the letter written by the first respondent could only be treated as one for retirement. There is nothing on record to show that it has become an impossibility for the partnership firm to carry on the business with the exit of one of the partners. The allegations as regards the

fraud committed are with reference to the loan applied for, or for that matter, starting a company to run a parallel business. It is not denied by the partners herein that each one of them has a parallel business as has been carried on by the firm. Although such violations by each one of the partners do not justify the defence of the petitioners herein to start a new company, yet, so long as the purpose of entering into a partnership firm has not come to an end and the majority of the partners desire to have the business run as a firm, I do not find that the Arbitrator could order a dissolution on a just and equitable ground referring to the allegations of fraud and starting a company. This is particularly so in the context of Section 11 of the Indian Partnership Act, which has been worded deliberately to make it clear that the relationship of partners shall be determined by the contract between the parties and subject to the provisions of the Act. The decision of the Andhra Pradesh High Court referring to the just and equitable clause reported in N. Satyanarayana Murthy and Others Vs. M. Venkata Bala Krishnamurthy, as well as Vishnu Chandra Vs. Chandrika Prasad Agarwal and Others, clearly go against the reasoning of the learned Arbitrator. The consensus among the partners still subsisting to carry on the business except the dissenting member, I do not find, the reasoning given by the learned Arbitrator invoking the just and equitable clause is correct for this Court to accept.

54. Learned counsel for the first respondent referred to the decision of this Court re-reported in AIR 1954 Madras 9 (Vali Venkataswami and Ors.

Vs. Gannabathulla Venkataswami) that a contract between the parties is made subject to the provisions of the Act and Section 44 being one of the

provisions of the Act, the contract is undoubtedly subject to the rights u/s 44 of the Act. There is no two view on this. The right of a partner to go

u/s 44 before a civil Court is not denied by the petitioners herein. All that has been objected to is that the statutory right is not something which can

be invoked as a unilateral exercise to confer jurisdiction on the Arbitrator when the assumption of jurisdiction by the Arbitrator is conditioned upon

the terms of the agreement to refer the disputes to the Arbitrator. Going by Section 7 of the Arbitration and Conciliation Act, 1996 and the fact

that the contract between the parties does not consider any of those statutory rights u/s 44 as amenable to an arbitral proceedings, the submission

of the learned counsel for the first respondent has to be rejected.

55. Learned counsel for the first respondent referred to the decision reported in 2002 (3) RAJ 628 (Del) (J.B.Dadachanji V. Ravinder Narain &

anr.), particularly to the passage from V.H.Patel's case at page 368, as well as to 2003 (2) RAJ 65 (Del) (Navin Kumar V. Standard Restaurant)

at para 20 that in view of Section 16 of the Arbitration Act, the Tribunal has been conferred the authority to rule on its own jurisdiction including

giving a ruling on any objection with reference to the existence of the terms of the arbitration agreement and pointed out that the question before the

arbitrator is related to a right under a substantive law which prevails over the contractual terms. She pointed out the allegations of fraud committed

by the petitioners and having regard to the fact that the contractual agreement itself is subject to the provisions of the Act on the participation of the

petitioners in the proceedings before the Court, it is not open to the petitioners to challenge the award u/s 34 of the Arbitration and Conciliation

Act, 1996 for this Court to interfere.

56. In this connection, she relied on the decisions reported in (2004) 1 MLJ 154 (State Bank of India v. Ram Das and another), 2003 (3) RAJ

335 (Union of India v. Maa Agency & Anr.) and Sh. R.C. Bhalla and another Vs. N.C. Bhalla and others, to impress on the principle of law that

the question as to the jurisdiction of the Arbitrator cannot be raised before this Court. She pointed out that the Indian Partnership Act being a

substantive law and the Arbitration and Conciliation Act 1996, the procedural law, the Arbitrator is bound to give effect to the substantive rights

under the statute. In these circumstances, this Court may not interfere with the award passed.

57. Learned counsel for the petitioners, however, pointed out that u/s 28(2) of the Arbitration and Conciliation Act, 1996, the Tribunal shall decide

the question only if the parties have expressly authorised it to do so and subsection (3) provides that in all cases, the Tribunal shall decide in

accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. The jurisdiction, hence,

in this case, has to be confined to the terms of the agreement and with reference to Section 28(2) of the Arbitration and Conciliation Act, 1996.

The fact that the parties agreed to go for arbitration related to the question as to

whether the first respondent could seek for dissolution or for retirement, does not mean that in the process of deciding this issue, the learned Arbitrator could pass an interim award dissolving the firm in terms of Section 44(g) of the Indian Partnership Act. Having regard to Clause 14 of the agreement, learned Arbitrator has to go by the terms of the agreement and in terms of Section 28(2) of the Arbitration and Conciliation Act, 1996, learned counsel placed reliance on the decision reported in M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., particularly to paragraph 43, that an Arbitrator is not a Court of law. He also referred to the powers of the Court as laid down in the decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., that when the learned Arbitrator was not asked to decide on the availability of the ground on just and equitable clause for dissolution and the dispute was only as regards the retirement right in terms of the agreement, the learned Arbitrator cannot assume the powers of the Court u/s 44 of the Indian Partnership Act. He referred to the decision reported in Tarapore and Co. Vs. State of M.P., paragraphs 25, 28 and 30 that even in the absence of a similar provision contained in Section 28 of the Arbitration and Conciliation Act, 1996 in the 1940 Act, yet, the ruling of the Supreme Court will have relevance.

58. In this connection, he referred to the decisions reported in Bharat Coking Coal Ltd. Vs. Annapurna Construction, ; Food Corporation of India Vs. Chandu Construction and Another,) and Fertilisers and Chemicals Travancore Ltd. Vs. Kerala State Electricity Board and Another, and pointed out that the first respondent's right to seek dissolution is not out of any contractual right, but on account of a statute, which, at best, could be agitated only before a Court of law but not before any forum chosen by the parties. In so exercising the authority, the learned Arbitrator exceeded his jurisdiction. For the purpose of looking at the jurisdiction of this Court, necessarily, one has to look at the contract. He referred to the decision reported in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/Works, Palghat Division, Southern Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, Southern

Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor

and Chief Accounts Officer, Metropolitan Transport Project, Southern Railway, and submitted that certainly this Court has a jurisdiction to

interfere, when the award lacks any authority for the arbitrator to pronounce on a dispute which was not capable of a reference to arbitration in

terms of the agreement.

59. Touching on the submission made u/s 28(2) of the Arbitration and Conciliation Act, 1996, learned counsel for the first respondent pointed out

that in deciding this issue, one has to look at Sections 28(1) and 28(3) of the Arbitration and Conciliation Act, 1996. The first respondent opted

for relief u/s 44 of the Act; which, at any rate, cannot be put down by any contractual terms. The claim of the first respondent rested on the rights

under the substantive law. Hence, the learned Arbitrator was justified in considering the same to pass an interim award in favour of the first

respondent. She made a particular reference to the decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and

submitted that there was no wanting of jurisdiction on the Arbitrator.

60. In considering this question, one needs to advert to the scope of Sections 28(2) and 28(3) of the Arbitration and Conciliation Act, 1996. As

far as Section 28(2) of the Arbitration and Conciliation Act is concerned, the equitable jurisdiction of the Arbitral Tribunal to decide the dispute as

amicable compositeur arises only if the parties expressly authorised it to do so. Sub-section (3) of Section 28 of the Arbitration and Conciliation

Act, 1996 stipulates that in all other cases, the Arbitral Tribunal has to decide the dispute in terms of the contract and shall take into account the

usages of the trade applicable to the transaction. As far as the present case is concerned, it is the contention of the first respondent that he is not

seeking relief u/s 28(2) of the Act. The relief sought for is u/s 44 of the Indian Partnership Act, the right under which is not controlled by any of the

contractual terms. Hence, the right that is available to the first respondent and the jurisdiction of equity available to the Tribunal demand balancing

of the contractual terms under the statutory rights, in which event, the statutory rights certainly will have a greater weight for the Tribunal to advert

to grant the relief. When the first respondent had opted for relief under the substantive law and as per Sections 5 and 8 of the Arbitration and

Conciliation Act, 1996, the Arbitrator has the duty to decide the disputes in accordance with the substantive law and no illegality could be pointed

out on the interim award passed by the learned Arbitrator dissolving the partnership. Learned counsel for the petitioners, however, placed reliance

on Section 28(2) as well as Section 28(3) of the Arbitration and Conciliation Act, 1996 and impressed on the need for sticking on to the

agreement for the resolution of the disputes. When the parties have agreed to have the dispute referred to arbitration, the decision has to be on the

specific question raised and not by assumption of an equitable jurisdiction.

61. I agree with the submissions of the learned counsel for the petitioners. It may be noted that u/s 7 of the Arbitration and Conciliation Act, the

parties agreed to have the disputes resolved through arbitration. The agreement may be with reference to all or certain disputes which may arise

between them in respect of the contractual obligations. Under Section-28 of the Act, as already noted, the jurisdiction and the Rules applicable to

substantiate all disputes are necessarily conditioned by the jurisdiction conferred on the Arbitrators. This jurisdiction is the result of a consensus on

the parties to the dispute. Hence, if the arbitrator has to decide an issue on equitable grounds, there must be a specific agreement between the

parties to confer such jurisdiction on the learned arbitrator. Admittedly, in this case, no such jurisdiction was conferred on the learned Arbitrator.

As may be seen from the award, the dispute that arose between the parties referred to the arbitrator was as to whether the first respondent has to

retire or the firm has to be dissolved. The dispute, hence, is not as to the claim of the parties for a dissolution on just and equitable grounds, but to

decide on the rights of the parties as to whether the first respondent could retire from the firm or a dissolution could be ordered. Hence, the

question as to whether the dissolution could be ordered under any of the clauses of Section 44 of the Act and more so u/s 44(g) under just and

equitable clause is not a matter for the Arbitrator to decide, but for the parties to work out the remedies in accordance with Section 44 of the Act

before a Court of law.

62. As to the jurisdiction of the Arbitrator, the decision relied on by the learned counsel for the petitioners particularly, M.D., Army Welfare

Housing Organisation Vs. Sumangal Services Pvt. Ltd., needs to be noted. It is

related to a case where the Army Welfare Housing Organisation entered into a contract with Sumangal Services Private Limited for construction of a composite housing project on turnkey basis on approximately 17.9 acres of land situate on VIP Road in the town of Kolkata. Dispute arose between the parties. One of the clauses under the agreement stipulated that in the event of any default on the part of the contractor, the employer was entitled to complete the work at the contractor's risk and recover the excess cost, actual or estimated, as approved by the architect, from the contractor. In view of the cancellation of the contract, the contractor filed a suit against the employer, while the employer filed an application u/s 20 of the Arbitration Act before the Delhi High Court for appointment of an arbitrator in terms of the arbitration clause. Ultimately, after going on an appeal as against the interim order, the parties went before the Supreme Court. With the consent of the parties, the Apex Court referred the disputes to an arbitrator and withdrew the suits filed by the parties. The employer filed an application seeking permission to commence and complete the interrupted construction work which was opposed by the contractor on several grounds. Due to the delay in passing the award, the Apex Court constituted a Board of three Arbitrators in the place of a sole arbitrator, before whom the parties had filed their respective claim petitions. The Arbitral Tribunal allowed the application by the employer as regards its claim to the title, ownership and possession of 14.17 acres of land as well as the cost of completion of the balance work at the risk and expenses of the contractor. Against this, the contractor filed an application before the Apex Court challenging the interim award. One of the questions raised in the review application before the Arbitrator at the instance of the contractor was as to whether the Arbitrator had jurisdiction to pass an interim order on the title as well as the recovery of cost on the completion of the project. The Apex Court held that the Arbitral Tribunal erred in dismissing the review application without deciding the question as to whether the Tribunal had jurisdiction to pass an interim order or not. The Supreme Court pointed out that the prayer in the interim application at the instance of the employer was to commence and complete the unfinished work and to direct the contractor to hand over the keys of the stores and materials and not to interfere in any manner

with the development and construction of unfinished housing project. The Apex Court pointed out that the interim order passed by the Arbitral

Tribunal was not on the consent of the parties. The Arbitrator assumes jurisdiction to pass an interim order only at the behest of the employer.

There was no consent between the parties for making such an interim order.

63. Referring to the decision reported in *Hakam Sing Vs. Gammon (India) Ltd.*, , the Apex Court pointed out that the Arbitrator has no

jurisdiction to pass an interim award. Even by consent, no such jurisdiction could be conferred. The Apex Court pointed out that the Arbitral

Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power *ex debito*

justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the

subject matter of reference. Referring to Section 17 of the 1996 Act, the Supreme Court pointed out that the power of the Arbitrator is a limited

one and that he cannot issue a direction which would go beyond the reference or the arbitration agreement. The Supreme Court further pointed out

that an award passed without jurisdiction is a nullity and that failure to consider the scope of Clause 130 of the agreement would amount to a legal

misconduct. The Arbitrators were, in law, bound to consider the relevant provisions of the contract, and in particular, those which deal with the

rights and liabilities of the parties.

64. The Apex Court referred to the decision reported in *Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor*,

and pointed out as follows:

It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where

there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards

the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has

acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional

facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to

pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this

limited purpose reference to the terms of the contract is a must.

65. The Apex Court further referred to the decision of the Court in the case of Bharat Coking Coal Ltd. v. L.K.Ahuja reported in Bharat Coking

Coal Ltd. Vs. M/s. L.K. Ahuja and Co., and held that the arbitrators could not ignore the terms of the contract. It further held that an arbitrator

cannot be equated with a Court of law; whereas, the Court has an inherent power, an arbitrator does not have. It is a Tribunal of limited

jurisdiction. Its jurisdiction is circumscribed by the terms of reference. An arbitrator can act only within the four corners of the agreement and not

beyond the terms. The Apex court pointed out that the Court cannot sit in appeal over the award of the arbitrator but can certainly interfere when

the award suffers from non-application of mind or when a relevant fact is ignored or an irrelevant fact not germane for deciding the dispute is taken

into consideration.

66. In terms of the view thus expressed, the Apex Court ultimately held that the award could not be upheld.

67. A reading of the decision clearly shows that in terms of the agreement between the parties, the learned Arbitrator has to act within the scope of

reference to decide the issues in terms of the agreed terms under the contract. In this background, when we look at Section 28 of the Arbitration

and Conciliation Act, certainly, Sub-Section (2) to Section 28 of the Arbitration and Conciliation Act has relevance, and in any event, having

regard to the fact that the parties never agreed to confer jurisdiction on the learned Arbitrator to decide the issue u/s 44(g) of the Act, the interim

award passed has to be set aside as one without jurisdiction and beyond the scope of reference.

68. The question of availability of an equitable jurisdiction is conditioned upon the agreement between the parties and in the absence of any such

agreement, the learned Arbitrator cannot assume jurisdiction on the lines of Section 44 of the Indian Partnership Act. Arbitration being one as a

result of an agreement between the parties, even if one has to balance Section 28(1) and Section 28(3), then the assumption of an equitable

jurisdiction as per Section 44 (g) of the Indian partnership Act is dependent on

the terms of agreement. Going by the decision of the Supreme Court reported in M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, , in the absence of any such agreement, the assumption of jurisdiction is beyond the agreed terms and as such, outside the scope of jurisdiction of the learned Arbitrator, demanding interference by this Court. The decisions referred to above clearly show that arbitration, as a method of settlement of the disputes, is a chosen forum as per the terms of the agreement between the parties.

69. In this connection, as to the assumption of jurisdiction at the instance of one of the parties, the Supreme Court, in the decision reported in Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., pointed out that "what confers jurisdiction on the arbitrator to hear and decide a dispute is an arbitration agreement and where there is an initial want of jurisdiction which cannot be cured even by acquiescence, the arbitrator shall derive their jurisdiction from the agreement and consent of the parties. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. An unilateral appointment/reference both will be illegal. It may make a difference if in respect of a unilateral appointment and reference, the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party participating is stopped later from saying that the arbitrator does not have jurisdiction.

70. The contract specifies the nature of disputes that are to be brought before an Arbitrator for its resolution. A reading of the Partnership Deed and the Supplementary Deed does not contemplate reference of every and any kind of a dispute among the partners before the Arbitrator. All that the clause contemplated was the adoption of the procedure as under the Arbitration Act 1940. In Clause 15, it is specifically agreed that the disputes among the partners are governed by the provisions of Indian Arbitration Act, 1940. Under Clause 14, it is agreed that the provisions of the Indian Partnership Act would apply in so far as the matters not specifically mentioned are concerned. In Clause 15, it is specifically agreed that in case of disputes among the partners, the provisions of the Arbitration Act 1940 will apply. Clause 21 of the Supplementary Agreement deals with a situation of dissolution and retirement. If any partner or two partners wish

to leave the firm, it is only by retirement from the partnership and not by a dissolution. In the face of the specific agreement and read with Clause 14 of the partnership deed, the statutory remedies available to the aggrieved partner to seek dissolution u/s 44 of the Act, hence, would only be through a Court of law and not by resort to arbitration proceedings.

Clause 21 makes it clear that, should there be a dispute as to the rights under the contract with reference to retirement or a dissolution, this dispute

alone would go for arbitration. With the parties thus agreeing to this course, a unilateral exercise seeking dissolution by virtue of Section 44(g) of

the Indian partnership Act does not confer any authority on the learned Arbitrator to pass an interim award basing the same on just and equitable

grounds. In the circumstances, I do not agree with the view of the learned Arbitrator as to the interim award passed on the view that equitable

jurisdiction is available as a statutory remedy before the learned Arbitrator, which is a forum chosen by the parties for resolution of the dispute.

71. Learned counsel for the first respondent brought to my attention that the jurisdiction of the Court u/s 34 of the Arbitration and Conciliation Act

does not enable this Court to interfere with the award based on a substantive provision of law. She pointed out that the Arbitrator is the sole judge

of the quantity as well as the quantity of the judgment demanding dissolution on just and equitable grounds. Hence, it is not open to the Court to

reexamine the decision or to test the reasonableness of the reasons given by the Arbitrator.

72. It may be seen from the decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., that the Apex Court pointed out that

the Court has no jurisdiction to interfere with the award if the Tribunal committed an error of fact or law in reaching its conclusion on the question

submitted before the Tribunal for its decision. The Supreme Court pointed out that if there is a general reference in deciding the contractual dispute

and the award is passed on erroneous legal proposition, the Court could interfere. So too, where the award is based on erroneous proposition of

law or its application and erroneous decision in point of law on specific question of law submitted to the Arbitrator, the same would call for

interference. At the same time, mere erroneous decision in point of law does not make the award bad. The Supreme Court pointed out that the

Arbitrators may not be justified in ignoring the express terms of the contract and when specific questions are raised before the learned Arbitrator

and the parties desired to have a decision on these questions. If an award passed on a claim made by one of the parties to which the other party

has not consented, the Court has jurisdiction to interfere with the award. Hence, both parties must specifically agree to the particular question in

dispute to be referred to the Arbitrator for his decision and when the Arbitrator exceeds the jurisdiction, the court has a jurisdiction to interfere u/s

34 of the Arbitration and Conciliation Act, 1996 on the ground of an error apparent on the face of the record. The Apex Court pointed out that

the general issue referred to consider a question of law is not enough to clothe the arbitrator with the jurisdiction to decide the same otherwise on a

point of law.

73. In the decision reported in AIR 1995 SC 468 (Thawardas Pherumal V. Union of India) the Apex Court pointed out that ""a reference requires

the assent of both sides. In the absence of either agreement about the terms of reference from both sides or an order of the court, the arbitrator is

not vested with the necessary exclusive jurisdiction. It is a well settled principle of law that the agreement for arbitration is the very foundation on

which the jurisdiction of the arbitrator has to act.

74. In the decision reported in Union of India (UOI) Vs. A.L. Rallia Ram, the Supreme Court held that it is from the terms of the arbitration

agreement that the arbitrator derives his authority to arbitrate and in the absence thereof, the proceedings of the arbitrator would be unauthorised.

75. Leaving aside this well established principle, a perusal of the award shows that the first respondent herein went before the Arbitrator, having

regard to the differences that had arisen between him and the other partners. The award itself begins with the observation as follows:

The main question that arise for consideration in this dispute is whether the claimant is entitled to the dissolution of the 1st respondent partnership

or whether he is entitled only to retire from the firm?

76. In the background of the dispute thus raised and clearly understood between the parties, the issues raised also on the lines as stated above, the

view of the learned Arbitrator that the provision in Clause 21 of the partnership agreement was not a bar to raise a dispute u/s 44 of the Act is

clearly beyond the scope of the reference as agreed to between the parties and by the terms of the contract. Going by the decisions of the Apex

Court as referred to above, I have no hesitation in holding that the learned Arbitrator exceeded his jurisdiction in passing the interim award.

77. As to the merits of the claim between the parties even to exercise equitable jurisdiction, it is no doubt true that there are allegations of fraud

committed by one of the partners by giving false name, address and father's name for the purposes of making a loan application before the Bank

by the firm. It is an admitted fact that all the partners were carrying on business de hors the partnership entered into and each one was tolerating

each others' business without a protest or a dispute raised. Whatever might have been the reason for such a conduct, when disputes surfaced, it

went for conciliation with the Chartered Accountant acting as a Conciliator. Till then, the first respondent did not project his stand as has been now

projected for a dissolution u/s 44(g) of the Indian Partnership Act. The resort to this provision comes only when the conciliation failed and the first

respondent gathered information about a company to be floated by the other partners, which, according to the first respondent, would be

competitive to the business of the partnership firm; hence, dissolution was the only course.

78. Countering the submission of the learned counsel for the first respondent that the petitioners have not let in any evidence, learned counsel for

the petitioners pointed out that the evidence of the first respondent itself is good enough to show the futility of the claim for dissolution under the

provisions of Section 44(g) of the Act. He pointed out that the loan application was subsequently withdrawn; as such, the first respondent cannot

have any such grievance any more as regards the loan application. He pointed out to the police report closing the file. As to the starting of the new

company, he pointed out that the same came only subsequent to the breaking of the relationship.

79. Leaving aside the allegations and counter allegations on fraud and other competitive business started through a company newly floated,

whatever be the reasons or justification that the first respondent may have to come out of the partnership, as of today, all the three partners, who

are petitioners before this Court, desire to have the partnership continued and in terms of Clause 21 of the Supplementary Agreement, the firm

cannot be dissolved by any single partner. The Partnership Agreement is a result of a trust that is reposed among the partners to carry on the business. When the majority still have trust in each other to have the business carried on in the same name and style, can the differences of one single partner with others warrant a dissolution on a just and equitable ground that the firm cannot run any more. As rightly pointed out by the petitioners, considering the clauses in the agreement on the competitive business run by the partners causing loss to the firm and as to the rights of the partners to run a business post-retirement, Clause 21 must be given its due weightage; as such, the only relief that an individual partner can have when the rest of them desire to carry on the business as before would be to retire; hence, rightly the letter sent by the first respondent was treated as a notice for retirement. In the circumstances, learned counsel for the petitioners submits that the prayer of the first respondent is totally misconceived. Referring to the various clauses in the agreement, which are already adverted to, learned counsel for the petitioners pointed out that the partners' right to carry on the business has not been prohibited under the agreement. Clauses 13 and 16 practically have no relevance, having regard to the fact that every other partner is doing business in the same product or a competitive product. When the first respondent voiced no complaint against others, carrying on business on the fact that he himself had been carrying business in a competitive product, the stand of the first respondent that by floating a new company with the wives of petitioners 2 to 4, there has been a violation of the terms of the partnership, hence, cannot be countenanced. Learned counsel for the petitioners pointed out that these issues are not matters of consideration for ordering dissolution on just and equitable ground. He pointed out that the first respondent's statement that he had no access to the books of accounts is denied by his own admission in the course of cross examination. In this background, learned counsel pointed out that the dissolution sought for by the first respondent is not on account of the right that he has under the contract, but on account of a statutory right, the learned Arbitrator has rejected the plea u/s 42; whereas, he assumes jurisdiction u/s 44 of the Act to order a dissolution, which is certainly beyond the scope of the Arbitrator. Referring to the text by Mustill and Boyd, learned counsel pointed out that in the absence of an express authority u/s 28 of the Arbitration and

Conciliation Act, the award is clearly a case of exceeding the jurisdiction. To test this, one has to necessarily look at the contractual terms.

80. I agree with the submissions of the learned counsel for the petitioners. As already pointed out in the preceding paragraphs, in the decision of

the Supreme Court reported in *M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others*, a dissolution of a

partnership may arise where there is a breach of agreement and the conduct of the parties are destructive of mutual confidence. The situation must

be of such a severality that the conduct of the partner or partners is of such character that it will not be reasonably be practicable for other partners

to carry on the business in partnership. In the decision reported in *Vishnu Chandra Vs. Chandrika Prasad Agarwal and Others*, referring to the

terms of the agreement, the Supreme Court pointed out that when the situation contemplated u/s 32 is incorporated as a term of contract, the same

could not be overlooked. In this context, the contentions of the petitioners are fully justified and I have no hesitation in rejecting the plea of the first

respondent to seek dissolution u/s 44(g) of the Act.

81. As to the jurisdiction of this Court u/s 34 to interfere with the view of the learned Arbitrator, the reliance placed by the learned counsel for the

petitioners on the decisions reported in *New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation*, and *Associated Engineering Co.*

Vs. Government of Andhra Pradesh and another, support the contentions of the petitioners demanding interference by this Court. Noting all the

earlier decisions, in the decision reported in *Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/Works, Palghat Division*,

Southern Railway, Mr. Pancham [Presiding Arbitrator], Chief Engineer, Construction III, *Southern Railway*, Mr. T.P.R. Narayana Rao

[Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, *Southern Railway* and Mr. M. Jayachandran

[Arbitrator], Financial Advisor and Chief Accounts Officer, Metropolitan Transport Project, *Southern Railway*, this Court held that to test the

question raised as to whether the award was within the jurisdiction or beyond the scope of jurisdiction, understanding the terms of the agreement is

necessarily to be undertaken by the Court. Having regard to this and going by the terms of agreement, I fully agree with the submissions made by

the learned counsel for the petitioners that the award passed by the learned Arbitrator goes beyond his jurisdiction and hence liable to be set aside

u/s 34 of the Arbitration and Conciliation Act, 1996.

82. A reading of the award shows that the learned Arbitrator has gone into the question as regards the opportunity given to the first respondent to

peruse the accounts and whether there was breach of trust. The learned Arbitrator, after adverting to these aspects, directed the appointment of a

Chartered Accountant to go into the accounts to settle the claims of the individual partners. It may be noted that even in a case of retirement from

partnership by a partner, necessarily, the various claims as regards the accounts need to be gone into. The settlement of the claims of the outgoing

partners and the various claims related thereto necessarily involves the scrutiny of the accounts, which, at best, could only be through the assistance

of a Chartered Accountant. The petitioners treated the letter of the first respondent as a notice of retirement and having regard to the acceptance of

the same and in the context of the allegations made by the first respondent that he was not granted the opportunity to peruse the accounts, the

directions given by the learned Arbitrator to have the books audited by the Chartered Accountant, hence, has to be approved. Affirming such

direction of the Arbitrator certainly has to be taken with reference to the retirement of the partner from the firm and not with reference to

dissolution. Having regard to the same, I agree with the submission of the petitioners herein that the interim award in so far as it ordered dissolution

merits to be set aside. As held by the Supreme Court in the decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , if

the award is against the terms of the contract, it would be patently illegal, which could be interfered with u/s 34 of the Arbitration and Conciliation

Act and the procedure adopted is patent enough to affect the rights of the parties. The fact that the petitioners participated in the proceedings

cannot be taken as an estoppel, particularly in the context of the dispute referred to arbitration. In the light of the said decision, which has been

consistently followed by this Court and by the Apex Court, I have no hesitation in setting aside the award and thereby allowing the Original

Petition. Accordingly, the Original Petition is allowed. No costs. Consequently, O.A. Nos. 786, 769 and 770 of 2008 are closed.