

**IMPORTANT PROVISIONS OF INDIAN PARTNERSHIP ACT, 1932
AND
DRAFTING OF DOCUMENTS RELATING TO PARTNERSHIP**

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1. Partnership is a compendium of several relationships merging into one. A partnership is a result of contract between partners, which results in constituting each partner as agent of the firm, with obligations which, in certain cases, may place a partner in the position of a trustee for the firm and of its property (vide Section 88 of the Indian Trusts Act, 1882). A partnership is not a corporate entity, but in some cases, a partnership can act as or is treated as a limited company. In some cases, origin of a partnership can be traced to the law of evidence, particularly rule of estoppel under Section 115 of the Evidence Act and Section 28 of the Indian Partnership Act, 1932 under which a person can become liable as a partner by representing himself or knowingly permitting himself to be represented to be a partner in a firm. Before the advent of companies as an independent legal entity with limited liability, and even thereafter, partnership as a medium for establishing, carrying on and expanding a business has been a preferred vehicle for businessmen and professionals alike.

A. General

2. Section 4 of the Indian Partnership Act, 1932 defines 'Partnership' as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 2(b) defines 'business' as including every trade, occupation and profession. Persons who have entered into partnership with one another are called collectively a 'firm'.

3. Section 2(23) of the Income-tax Act, 1961 provides that 'partnership' and 'firm' has the same meaning as in the Indian Partnership Act, but the expression 'partner' shall also include any person, who being a minor, has been admitted to the benefit of partnership.

4. The three minimum requirements of a partnership are:

- i) agreement to form a partnership.
- ii) agreement to share the profits of a business.
- iii) the business must be carried on by all the partners or any of them acting for all.

5. The question whether or not a partnership exists, is of importance. Once it is determined that persons are partners, whatever may be the arrangement or intention between themselves, each is liable for debts and liabilities of the firm upto the full extent of his or her assets. In *Ashutosh v/s. State of Rajasthan* (2005) 7 SCC 308, it is held that a partner is always liable for partnership debts unless there is implied or express restriction and a creditor is at liberty to recover the debt from any one or more of the partners and that a notice to a partner is binding on the firm because a partner stands as an agent in relation to the firm and a notice to the agent tantamounts to a notice to the principal and vice-versa.

6. Section 5 of the Partnership Act provides that the relation of partnership arises from contract and not from status. Section 6 provides that in determining whether a person is or is not a partner, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together and sharing of profits or of gross returns does not by itself constitute a partnership. An Agreement between the parties to the effect that a partnership does or does not exist is not by itself conclusive.

7. The following relationships or transactions will not by itself create a partnership

- (1) Members of a Hindu Undivided Family carrying on a family business as such, are not partners in such business (S.5).
- (2) co-ownership of property, whether the co-owners do or do not share expenses or profits or gross returns made by the use of the property. However, if co-owners use their property for carrying on business, they may be partners as regards the business. In *Champan Cane Concern vs. State of Bihar A.I.R. 1963 Supreme Court 1737*, the Supreme Court has held that the main differences between a partnership and co-ownership are :
 - (i) co-ownership is not necessarily the result of an agreement, whereas partnership is;
 - (ii) co-ownership does not necessarily involve community of profit or loss, but partnership does;
 - (iii) one co-owner can, without the consent of the other, transfer his interest to a stranger, a partner cannot do this; and lastly but prominently
 - (iv) while in a partnership each partner acts as an agent of the other, in a co-ownership one co-owner is not as such the agent, implied or real, of the other.

Two co-owners may appoint a common manager for facility of cultivation and management of their farms without entering into a partnership and the fact that the profits or even the losses are distributed in accordance with the shares of the two owners, does not necessarily establish a partnership within the meaning of the Partnership Act, 1932.

- (3) a contract for remuneration of an employee or agent of a person engaged in a business, by a share of profits or gross receipts of that business or by a payment contingent upon the earning of profits.
- (4) a loan to a person engaged or about to engage in any business, on terms that the lender shall receive a rate of interest varying with the profits or shall receive a share of profits.

However, receipt by a person of share of profits of the business will raise a presumption that he is a partner in the business, and if losses as well as profits are shared, the presumption will be stronger still, though not conclusive. If the agreement gives the supposed lender the rights and privileges of a partner, no device will enable him to escape the liabilities of a partner.

- (5) the receipt of a debt out of profits or gross receipts of a business.

- (6) Payment to a widow or child of a deceased partner in a business, of a portion of the profits as annuity.
- (7) Payment of a share of profits of a business to a previous owner or part owner of the business, as consideration for the sale of goodwill or share thereof. (S.6)
- 8(1) A preliminary agreement to enter into partnership does not by itself create a partnership until the partnership commences business. It is the carrying on of a business, not an agreement to carry it on, which is the test of partnership.
- (2) The relation between promoters associated only to form a company is not a partnership.
- (3) The relation between executors carrying on under the powers of the will and in the same firm name, a business owned solely by the Testator, is not in itself a partnership.
- (4) Voluntary associations for the purpose of carrying out temporary functions of a social character without any profit motive are not partnerships.
- (5) If persons jointly export their individual goods as a joint venture, dividing the receipts of the transactions in specific shares, there is no partnership as regards the separate parcels of goods provided by each, unless they are brought into the common stock.
9. Section 2(42) of the General Clauses Act defines a 'person' to include a company or an association or body of individuals, whether incorporated or not. But the Supreme Court has held that this definition cannot be imported into the Partnership Act and that 'person' under the Partnership Act means either an individual or any other legal entity, such as a Limited Company or Corporation established under a Statute. An unincorporated club or a firm cannot as such become a partner.
10. The position as to who can and cannot enter into Partnership can be summarised as follows :
- i) **Individuals who are majors** and have capacity to contract can enter into partnership, subject to contractual and statutory restrictions referred to in paras 10 and 11 below. There must be at least two or more principals before there can be a partnership. A person cannot be a partner in his individual capacity with himself in his representative capacity. If several persons on behalf of a single person run a business, there can be no partnership.
- ii) **Minors** cannot become partners, though all partners unanimously can admit minors (not necessarily children of partners) to the benefits of the partnership (Section 30) with right to the minors to opt to become a partner by giving public notice within six months of attaining majority or obtaining knowledge that he had been admitted to the benefits of partnership, whichever is later.
- iii) **A firm** as such cannot become a partner. A "firm" is not a person and cannot as such enter into partnership. *Dulichand Laxminarayan vs. CIT AIR 1956 Supreme Court 354; Income Tax Comm. v. Jadvaj AIR 1963 SC 1497; Kylasa Sarabhaiah vs. CIT AIR 1965 Supreme Court 1411.* All the partners of one

firm can become partners with all the partners of another firm, provided the total number of partners does not exceed 20 (or 10 in case of banking business). In such a case, the partnership is of individuals, and not of firms and though for sake of convenience of operation, the partners can be divided into groups, the unlimited liability is of the individual partners.

- iv) **A limited liability partnership** is a body corporate and is a legal entity and therefore may qualify to become a partner to the same extent as a Limited Company incorporated under the Companies Act.
- v) **HUF** as such cannot enter into partnership. The Supreme Court has held that HUF as such cannot enter into a contract of partnership, because it is a fleeting body. CIT vs. Kalu Babu Lalchand A.I.R. 1959 Supreme Court 1289; Rashiklal & Co. v. C.I.T. (1998) 2 Supreme Court Cases 49.
- vi) **The Karta or a member of HUF** can become a partner, and the other members of the HUF do not become partners or liable as partners and cannot claim any rights against the firm or other partners as partners. Firm Bhagat Ram vs. C.E.P.T. AIR 1956 Supreme Court 374. In Kshetra Mohan v. EPT Commissioner AIR 1953 SC 516, Supreme Court has held that when two Kartas constituted a partnership, the other members of the families do not become partners, though the Kartas are accountable to their respective families. The members of HUF who are not themselves partners, do not incur personal liability, though their share in HUF becomes liable for debts of the firm. In case of Karta who becomes a partner, both his share in HUF as also his personal property becomes liable for debts of the firm.

A Karta of HUF can enter into partnership with an individual member of that very family provided the member has contributed his own self acquired capital or personal skill and labour to the firm. Lachman Das vs. CIT AIR 1948 P.C. 8 : Firm Bhagat Ram vs. CEPT ibid; Chandrakant Manilal Shah vs. CIT AIR 1992 Supreme Court 66.

Within limits of his authority to carry on business, it is competent to the Karta to enter to a valid partnership with others, including Karta of another HUF or adult member of his own HUF.

Though a Karta may extend a family business by entering into partnership for carrying on same or allied business, Karta cannot extend the business into a business which is more hazardous or speculative than the previously existing one and impose on members of HUF risk and liability of new business started by him, unless the new business is started or carried on with the consent, express or implied, of adult members of HUF. Benares Bank Ltd. v. Hari Narain AIR 1932 Privy Council 182

- vii) **A limited company** can become a partner, provided such partnership is not ultra vires its constitution. For this purpose, the object clause in the Memorandum of Association of the company should confer on the company power to enter into partnership and the business activities of the firm should be within the objects authorised by the Memorandum of Association of the company. An object clause about formation of partnership can be as follows:

‘To enter into partnership or limited liability partnership or into any consortium or arrangement for sharing of funding or profits, co-operation or joint venture with any person or company carrying on or engaged in or about to carry on or engage in any operation, business,

trade, activity or transaction which the company is authorised to carry on or engage in or which can be carried on in conjunction therewith or which is capable of being conducted so as directly or indirectly to benefit the company.'

The execution of the Deed of Partnership on behalf of the company should be authorised by a Resolution of the Board of Directors (and of shareholders if necessary) and should be under common seal of the company.

The Department of Company Affairs has in its Circular No.1-81 (20-1-81-CL-V) dated 14.9.81 had expressed the following view :

“The view of the department is that prima facie a company entering into a partnership with some other person or some other company would be ultra vires and will be against the principle that a particular company or an incorporated body should lawfully employ funds for purposes authorised by its constitution which would normally be the memorandum and the articles of association. However, a company or an incorporated body, if so authorised by its constitution, can enter into partnership with an individual person or with another company irrespective of nationality and residence. This would, however, require the company to adopt very special articles since many of the provisions of the Partnership Act would be difficult to apply to such a partnership. In view of this, while considering applications for registration of firms with bodies corporate as partners under the Indian Partnership Act, 1932, the State Government should examine the applications before them and find out whether the memorandum and articles of association of the applicant incorporated companies contain any special articles which authorise incorporated companies to enter into partnerships and the articles also take care of the possible anomalies which have been pointed out in the Calcutta High Court’s ruling in the case of Ganga Metal Refining Co. (P) Ltd. vs. CIT West Bengal (1968) 38 Com. Cases 117 : AIR 1967 Cal. 429.

In Ganga Metal Refining Co. Pvt Ltd v/s Commissioner of Income Tax, West Bengal [AIR 1967 Calcutta 429], three limited companies incorporated under the Companies Act, 1956, entered into a joint venture. The High Court of Calcutta held that such a venture is neither a partnership firm under the Partnership Act, 1932 nor the Income Tax Act, 1961. It can be regarded as an Association of Persons u/s 3 of the Income Tax Act. It was also observed in this case that normally and juristically if two companies under the Companies Act enter into a partnership, then each company becomes an agent for the other and agrees to share profits. This will create many problems for the two incorporated companies. They will have to be agents in such a manner which may not be permissible at all by their own articles and memorandum. This case came up for consideration in the context of one of the companies seeking to set off the loss of partnership business against the income from its usual business. The court held that the assessee is not entitled to set off the loss against its other income.

Section 370 (1A) of the Companies Act, 1956 contemplated a loan made by company to a firm in which a partner is a body corporate. Schedule VI-Part-1 of the Companies Act, 1956, on asset side provided for disclosure of capital invested in a partnership firm. Thus, it appears that a company which is authorised to carry on a business is authorised to carry on the same business in partnership or as a joint venture.

In Palmer on Company Law, it is stated that a company may be a partner in a partnership. Indeed, all the partners in a partnership may be companies.

- viii) **Trustees of a private trust** can become partners in a firm only if they are directed and empowered to enter into such partnership in clear terms under the Instrument of Trust, which is required to be construed strictly. Section 25 of the Partnership Act provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. Even a Trustee Partner will be personally liable for acts of the firm though he will have a right to reimbursement out of Trust funds.

Trustees of a Public Trust cannot invest trust moneys in partnership and cannot become partners in a firm.

- ix) **Association of persons**, body of individuals, unincorporated club or Association cannot enter into partnership.
- x) **Non-Resident Indian or a person of Indian origin resident outside India.**

Under Foreign Exchange Management (Investment in firm or proprietary concern in India) Regulations, 2000, a non-resident Indian or a person of Indian origin resident outside India, is permitted to invest by way of contribution to the capital of a firm (or a proprietary concern) in India, provided that :

- (a) the amount invested is received either by inward remittance through normal banking channels or out of an account maintained with an authorised dealer/authorised bank by the non-resident Indian or the person of India origin in NRE/FCNR/NRO account in accordance with the relevant Regulations;
- (b) the firm (or the proprietary concern) is not engaged in any agricultural/plantation activity or real estate business, i.e. dealing in land and immovable property with a view to earning profit or earning income therefrom;
- (c) the amount invested shall not be eligible for repatriation outside India;
- (d) where investment is made out of Non Resident Special Rupee (NRSR) account of the non-resident investor, the income earned on investment or proceeds of investment shall be credited only to the NRSR account of the investor.
- (e) (w.e.f. 9.4.2002) the firm (or proprietary concern) is not engaged in print media.

A firm (or a proprietary concern) in India is allowed to make payment to or for the credit of a non-resident Indian or a person of Indian origin, the sum invested by such person in that firm or the proprietary concern and the income accruing to such person by way of profit on such investment.

NRI/PIO's may invest in sole proprietorship concerns/partnership firms with repatriation benefits only with prior approval of RBI.

xi) **A person resident outside India** (other than non-resident Indian or a person of Indian origin resident outside India), is not permitted to make any investment by way of contribution to the capital of a firm (or a proprietary concern or any association of persons in India) except with permission of the Reserve Bank and subject to such terms and conditions as may be considered necessary

11. Individuals and Companies, who seek to enter into a partnership, need to be free from contractual and statutory restrictions on their ability to enter into such partnership. Examples of contractual restrictions are :-

- (i) terms of a partnership prohibiting its partners from assigning his share in the partnership or in the assets and properties of the firm or making any other person a partner with him therein or engaging directly indirectly in any business competing with that of the partnership;
- (ii) restrictions under Service Contract prohibiting an employee from engaging in any business activity or becoming interested as partner in any firm or business;
- (iii) provision under a Lease prohibiting the Lessee from parting with possession of premises leased.

If a person enters into a partnership in breach of his obligations under other Contracts, the partnership may be valid, but the consequences of breaches of other contracts, including, termination of lease or injunction restraining the person from carrying on business of new partnership may follow.

12. Apart from contractual restrictions, there can be several statutory restrictions on the power of a person to engage in active business or enter into partnership e.g. under Rules and Regulations governing conduct of professionals like Advocates, Chartered Accountants, Architects, Medical Practitioners. Thus, an Advocate is not permitted to personally engage in any business, but he may be a sleeping partner in a firm doing business provided that in the opinion of the appropriate State Bar Council, the nature of business is not inconsistent with the dignity of the profession. Several activities e.g. manufacture and sale of alcohol, operation of public transport, operation of cinema theatres require valid licences, which cannot be dealt with without obtaining permission of the concerned authorities.

(i) In *Additional CIT v/s. Deagon Ganga Reddy* (1995) - 214 ITR 650, a partnership was formed with 17 persons. This partnership was holding a liquor licence issued under Abkari Act which prohibited carrying on business in liquor without a licence granted for the purpose. G holding 10% share in this partnership, found it difficult to contribute the required capital towards his share and, therefore, formed what has been termed as a **“sub-partnership”** with 11 other persons, who agreed to provide the finance on being taken as partners in respect of the share of G in the main firm. The Supreme Court has held that partners of the “sub-partnership” did not become partners of the main firm and that since the terms of licence granted to the main firm did not prohibit formation of such “sub-partnership”, the sub-partnership was not illegal.

(ii) In *Biharilal Jaiswal v/s. CIT* (1996) 217 ITR 746, the Supreme Court has held that where liquor licence was in the name of an individual and the terms of licence expressly prohibited formation of partnership by Licensee,

partnership formed in violation of such a condition, is an agreement prohibited by law and when the law prohibits entering into a particular partnership agreement, there can be in law no partnership agreement of that nature.

(iii) In CIT v/s. Salkia Transport Associates (1994) - 207 ITR 274, Calcutta High Court has held that where buses and route permits issued under Motor Vehicles Act were held by one person and the Motor Vehicles Act prohibited transfer of route permits without permission of Transport Authority, formation of a firm with sole object of carrying on transport business by use of bus and route permits belonging to one of the partners without obtaining from the transport authority permission for transfer of bus or route permit, was void ab-initio.

(iv) In Gobardhan Chakraborty v/s. Abani Mohan AIR 1991 - Calcutta 195, it is held that where a cinema licence had been granted in the name of a proprietorship concern with express bar on transfer, partnership entered into by the Licensee is illegal and no suit can be brought for settlement of accounts on the basis of such illegal and forbidden partnership agreement.

Under Section 23 of the Indian Contract Act, 1872, the consideration or object of an agreement is unlawful if it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law or is fraudulent or the Court regards it as opposed to public policy and agreement of which the object or consideration is unlawful, is void. It is well settled that no suit can be filed for recovery of capital invested in an illegal partnership and members of an illegal partnership have no remedy against each other for contribution or otherwise.

13. Under Section 11 of the Companies Act, the number of partners in a partnership was limited to 20 (10 in case of banking business). This section did not apply to a joint family as such carrying on business and provided that where a business is carried on by two or more joint families, in computing the number of members, minors shall be excluded. There was a doubt on whether Kartas of two or more HUFs can enter into a partnership as such Kartas, where the total number of major members of such families (both male and female) exceed the minimum prescribed under Section 11 of the Companies Act. In Bisanchand Champalal Ginning Factory v/s. Govinda Vishnusa 1934 4 Company Cases 214, Nagpur Judicial Commissioner's Court held that only if individual members of one or more joint Hindu families enter into agreement of partnership amongst themselves, then each individual member must be reckoned a person for the purposes of Section 4 of the India Companies Act, 1913 (corresponding to section 11 of the Companies Act, 1956). The decision in Shyamlal v/s. Madhusudan AIR 1959 Calcutta 380, where it is held that it is not correct to say that when two or more joint families represented by their Kartas enter into a partnership, the number of members would be the Kartas and not the other members of the joint families represented by their Kartas, is impliedly overruled by the Supreme Court in Agarwal & Co. v/s. Commissioner of Income Tax, U.P. AIR 1970, S.C. 1343 where it is held that it is now well settled that a Hindu Undivided Family cannot as such enter into a contract of partnership with any person or persons and that the assumption in Section 4 of the Indian Companies Act, 1913 that a Hindu joint family can be a partner in a partnership appears to be based on an erroneous view of the law.

14. Section 464 of the Companies Act, 2013 provides that no association or partnership consisting of more than such number of persons (not exceeding 100) as may be prescribed shall be formed for the purpose of carrying on any business, unless it is registered as a company or is formed under any other law in force.

Section 464 provides that the same shall not apply to Hindu Undivided Family carrying on any business or an association or partnership if it is formed by professionals governed by special acts. Rule 10 of the Companies (Miscellaneous) Rules 2014 (in force w.e.f. 1.4.2014). Provisions of Section 464 of the Companies Act 2013 may not be applicable to Limited Liability Partnerships as a LLP is formed under Limited Liability Partnership Act which does not provide for limit on maximum number of parties in LLP.

15. The principal distinctions between a limited company and a firm have been summarised *New Horizons Ltd. v. Union of India* (1997) 89 Company Cases 785 at 803 (Delhi) as under :-

| <u>In the case of a firm</u> | <u>In the case of a limited company</u> |
|--|--|
| 1. The property belongs to individual members who are collectively entitled to it. | The property belongs to the Company and not to the members. |
| 2. Creditors of a firm are creditors of the members of the firm and on obtaining Judgement against the firm, can levy execution on the property of the partners. | Shareholders of the Company are not liable to the creditors of the Company and judgement against the Company normally gives no right to levy execution against the shareholders. |
| 3. A partner can carry on business and incur liabilities on behalf of the firm within the scope of the business of the firm to any extent (unless this authority is expressly excluded). | A shareholder has no power to incur liability on behalf of the Company or participate in the management of the Company (except by exercise of rights as a shareholder) |
| 4. A partner cannot contract with the firm (in which he is a partner). | A shareholder can contract with the Company (in which he is a shareholder). |

16. Advantages of a Partnership over a Limited Company are :

(1) **Simplicity of Formation**

For formation of a partnership a written agreement is not necessary. The fact of conducting a business in common with a view to earn profits, will bring a partnership into existence, the terms of which may be oral or evidenced by course of dealings between the partners or by exchange of correspondence, and the remaining terms will be supplied by the Indian Partnership Act, 1932. However, for avoidance of doubts and disputes, it is necessary to record terms of partnership in writing. In Maharashtra, for registration of firm with the Registrar of Firms, a Deed of Partnership in writing is necessary. The terms of partnership can be varied by consent of all the partners, express or implied by a course of dealing (S.11).

- (2) **Simplicity of Management and Accounts**
Partners can conduct the affairs of the firm informally, without being required to comply with various regulations to which a company is subject. A firm is not required to maintain Minutes of meetings of partners or file Accounts.
- (3) **Flexibility**
A partnership is not constrained by the principle of ultra vires and a firm may undertake or discontinue any activity that its partners may agree to from time to time.
- (4) **Confidentiality of Accounts and Affairs**
Copies of Deed of Partnership and accounts of the firm are not publicly available for inspection (except in case of firms registered with Registrar of Firms in Maharashtra where a true copy of the Deed of Partnership along with a Marathi translation thereof is required to be filed along with the Application for registration of the Firm and is available for inspection in the office of Registrar of Firms on application). Internal affairs of a partnership can remain confidential to the partners
- (5) **Financial Flexibility in injection and withdrawal of capital / monies:**
There are no restraints on the ability of partners to bring in and withdraw capital, draw on account of their share of profits and borrow from the partnership.

17. **Disadvantages of a partnership as compared to a Limited Company are :**

(1) **Joint and several liability of all partners**

for acts of the firm and of partners on behalf of the firm within their implied authority to carry on, in the usual way, business of the kind, carried on by the firm (S.19) unless the person with whom he is dealing knows of any restriction thereon or does not know or believe that partner to be a partner (S.20)

Every partner is liable to third parties jointly with all the other partners and also severally for all acts of the firm and of partners on behalf of the firm done while he is a partner (Section 25). So far as third parties are concerned, this provision cannot be varied by contract between partners. The essence of a partnership is that each of the partners is the agent of all firm comprising of all its partners (S.20). In a Limited Company, once shares are fully paid up, a shareholder is under no liability in respect of debts owned by the Company.

(2) **Lack of continuity**

A Company is a separate legal entry which can continue to exist regardless of death or insolvency of its shareholders, whereas a partnership has no legal existence apart from its partners and unless there is an agreement to the contrary, death or insolvency of any partner will dissolve the partnership. In case of partnership consisting of only two partners, death of one partner will result in dissolution of the firm (vide CIT v. Seth Govindram Sugar Mills AIR 1966 S.C. 24) and invite

consequences of such dissolution, including liability to tax on capital gains under Section 45(4) of the Income-tax Act.

(3) **Lack of transferability**

Subject to contract between the partners, no person can be introduced as a partner into a firm without the consent of all the existing partners (Section 31). It has been held that a contract to form a partnership or to admit a person (even a nominee or legatee of a partner) as a partner cannot be specifically performed. A partner cannot retire from a firm and substitute another person as partner in his place without the consent of all other partners, whereas a shareholder in a Limited Company is free, subject to restrictions in the Company's Articles of Association and lock-in period and other statutory restrictions and regulations, to transfer any part of his shares.

(4) **Possibility of deadlock in Management**

Unless otherwise provided in the Partnership Agreement, each of the partners is as much entitled as any of the others to take part in the management of the business of the firm. In view of unlimited liability of partners, it becomes necessary for the partners to be active in the management of the firm. In a Limited Company, the roles of providers of capital and of management can be separated, whereas in a partnership, providers of capital run the risk of incurring liabilities and, therefore, need to be active in the day-to-day management of the affairs of the firm. In a partnership, any one partner even, with an insignificant share in the profits of the firm, can create obstacles in the operations of the firm and bank accounts of the firm by other partners without his consent, as the liability of every partner in the firm for all acts of the firm is unlimited.

(5) **Constraints on borrowing capacity :**

As compared to a Limited Company, it is more difficult for a partnership to borrow, since a floating charge can be created on assets of a Limited Company, but not on assets of a firm and there are no provisions in case of partnership similar to the provisions for registration of charges in case of Limited Companies.

18.1 The principal distinctions between a firm and a limited liability partnership are as under:-

| Sr. No. | Features | Partnership Firm | Limited Liability Partnership |
|---------|--------------------------|--|--|
| | Applicable provisions of | The Partnership Act, 1932 | The Limited Liability Partnership Act, 2008. |
| 1 | Liability | Liability of partners for acts of the firm is unlimited (S.25) | Liability of a partner is limited to the extent of his capital contributed or agreed to be contributed as per LLP agreement. (S.27) (S.28) |

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| 2 | Perpetual Existence | No. | Yes. (S.3) |
| 3 | Separate Legal Entity | No. | Yes. It can own properties in its name. It can sue and be sued in its own name. (S.3) |
| 4 | Minimum Number of Partners | Two Partners. | Two Partners. (S.6) |
| 5 | Persons eligible to become partners | Individuals and body corporates subject to contractual and statutory restrictions. | Individuals and body corporates including limited companies incorporated in India and limited liability partnerships registered in India and limited liability partnerships incorporated outside India and Companies incorporated outside India (except co-operative societies and any other body corporates specified by Central Government as not eligible for becoming partner in LLP) subject to contractual and statutory restrictions, including under Foreign Exchange Management Act. |
| 6 | Maximum Number of Partner | As prescribed u/s 464 of Companies Act, 2013. | No maximum number of partners. |
| 7 | Minor | Minor can be admitted for the benefit of the Partnership. (S.30) | There is no provision to admit minor to LLP. |
| 8 | Document defining the activities | Partnership Deed. However it is possible to have oral agreement to form a partnership firm. | Limited Liability Partnership Agreement is the main document defining the activities of the LLP. If there is no LLP Agreement or it does not contain certain provisions, then Schedule 1 will prevail. |
| 9 | Management | By the Partners. Partnership deed can provide power to certain partners to run the business. | By the Partners. LLP Agreement can give the power to run the business to one or more partners. |

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| 10 | Compliance | No specific person has been designated for this purpose. Managing Partner / partners shall be responsible for compliance. | Designated partners (not less than 2 individuals of whom at least one shall be a resident in India) are liable for compliance under the LLP Act i.e. filing return, Annual accounts etc. (S.7) |
| 11 | Transferability of Shares | Partner can transfer his right as partner only with the permission of all partners. | Transfer of right of a partner to a share in the profits and losses of the LLP allowed. Transferee does not become partner in LLP automatically. (S.42) |
| 12 | Conversion | Firm can be converted into LLP u/s 55 of the Limited Liability Partnership Act by complying with the requirements. On such conversion, firm shall be deemed to be dissolved. | LLPs can be converted into limited company and company can be converted into LLP by following prescribed procedure. On such conversion LLP shall be deemed to be dissolved. (S.58). LLP cannot be converted into a firm. |
| 13 | Annual accounts/Return to be filed with the Registrar | There is no requirement of Annual Accounts and Annual Returns to be filed with any authority under Indian Registration Act. | Annual Returns and Statement of Account and Solvency for each financial year required to be prepared and filed and accounts of LLP are required to be audited. (S.34) |
| 14 | Inspection | Except for documents filed with Registrar of Firms, Accounts and documents of not open for inspection to the public. | Incorporation documents, Statements of Account and Solvency and Annual Returns filed with the Registrar open for inspection to the public. (S.36) |
| 15 | Investigation | Registrar of Firms has no power of investigation. | Central Government can appoint Inspectors to investigate affairs of LLP (S.43) suo motu or on application of partners of LLP. (S.44) |
| 16 | Compromise Arrangement or Reconstruction | Not provided in case of firm. | Provided in Chapter XII of LLP Act. |

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| 17 | Winding Up and dissolution | Dissolution of a firm provided in Chapter VI of the Partnership Act. Insolvency proceedings can be adopted against or by the firm under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 | Winding-up of LLP provided in Chapter XIII of LLP Act either voluntarily or by National Company Law Tribunal inter alia, if LLP is unable to pay its debts. |
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18.2 In the absence of any Agreement to the contrary, following provisions are applicable in case of LLP (First Schedule to LLP Act):-

1. All the partners of a limited liability partnership are entitled to share equally in the capital, profits and losses of the limited liability partnership.
2. The limited liability partnership shall indemnify each partner in respect of payments made and personal liabilities incurred by them-
 - (a) in the ordinary and proper conduct of the business of the limited liability partnership; or
 - (b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership.
3. Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership.
4. Every partner may take part in the management of the limited liability partnership.
5. No partner shall be entitled to remuneration for acting in the business or management of the limited liability partnership.
6. No person may be introduced as a partner without the consent of all the existing partners.
7. Any matter or issue relating to the limited liability partnership shall be decided by a resolution passed by a majority in number of the partners, and for this purpose, each partner shall have one vote. However, no change may be made in the nature of business of the limited liability partnership without the consent of all the partners.
8. Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes within thirty days of taking such decisions and are kept and maintained at the registered office of the limited liability partnership.
9. Each partner shall render true account and full information of all things affecting the limited liability partnership to any partner or his legal representatives.

10. If a partner, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.
11. Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property, name or any business connection of the limited liability partnership.
12. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.
13. All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

In case of a partnership, in the absence of any agreement to the contrary, provisions mentioned at Serial Nos.1 to 7 and 9 to 11 above are applicable, but not those mentioned at Sr. No.8 (Minutes Book), 12 (Expulsion) or 13 (Arbitration). Section 33 of the Partnership Act provides that a partner may not be expelled from a firm by any majority of the partners, save in exercise in good faith of powers conferred by contract between the parties.

- 18.3.1 A 'firm' is a collective name for persons who have entered into partnership. A LLP is a body corporate and is a legal entity separate from that of its partners (S/6 of LLP 2008).
- 18.3.2 Section 29 of the **Advocates Act 1961** provides for only one class of persons entitled to practice the profession of law, namely, Advocates who can appear before courts and authorities as permissible under law. Section 24 of the Advocates Act 1961 provides for enrolment of qualified individuals with the Bar Councils as Advocates.
- 18.3.3 Bar Council of Delhi had issued communications to various law firms who had converted to LLPs warning them that the same could amount to professional mis-conduct within the meaning of Section 35 of the Advocates Act 1961.
- 18.3.4 The question whether or not Advocates can form LLPs is not free from doubt. One view may be that professionals like Advocates cannot seek to limit their liability by forming a Limited Liability Partnership. LLP is a body corporate distinct from its Partners. LLP cannot hold professional qualifications to practice as Advocates. The other view can be that even a partner in a LLP is personally liable for his own wrongful act or omission, (but not for wrongful act or omission of any other partner of the LLP) (Section 28) and under Section 33 of Limited Liability Partnership Act, the liability of the LLP and partners who have acted with intent to defraud creditors or for any fraudulent purpose is unlimited. Even in a partnership under the Partnership Act, 1932, a partner is not personally liable for wrongful act or omission of another partner in the firm, provided the act is not within the implied authority of that partner.

Therefore, just as Advocates can enter into Partnership with other Advocate/s, there should be no objection to formation of LLP consisting of Advocates only.

- 18.3.5 Rules under the Advocates Act, 1961 provide that an advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person who is not an advocate.
- 18.3.6 On the website of Ministry of Corporate Affairs, LLP framework has been suggested for multi-disciplinary combinations that would offer a menu of solutions to international clients, including for professionals such as Chartered Accountants, Cost and Works Accountants, Company Secretaries and Advocates etc.
- 18.4.1 By Circular No.02/2012 dated 1st March 2012 read with Circular No.40/2012 dated 17th December 2012 of Ministry of Corporate Affairs, it is provided that in cases of companies or limited liability partnerships, where one of the objects is to practice the profession of **Chartered Accountancy, Company Secretaries, Cost Accountancy or Architects**, the approval of the Council / regulator governing the profession shall be obtained both at the time of application for incorporation and while seeking a change in the name of a existing company or limited liability partnership.
- 18.4.2 Ministry of Corporate Affairs has issued Notifications permitting conversion of existing firms of Chartered Accountants, Company Secretaries and Cost and Works Accountants into Limited Liability Partnership with effect from 30th January 2012. The Institute of Chartered Accountants of India, Institute of Cost Accountants of India and the Council of Company Secretaries have issued guidelines for conversion of firm of Chartered Accountants, Company Secretaries and Cost and Works Accountants into Limited Liability Partnerships and for constitution of Limited Liability Partnerships by practicing Chartered Accountants, Company Secretaries and Cost and Works Accountants.
- 18.5 Under Sections 36 and 37 of the **Architects Act 1972** and Rules and Regulations framed thereunder, only an Architect registered with the Council of Architecture or a firm of Architects under the Partnership Act, 1932 comprising of all registered architects can represent itself as an architect or use the title and style of architect for practicing the profession of an Architect in India, with the exception of landscape architect and naval architect. The matter whether incorporation of companies / limited liability partnerships where one of the objects of such entities is to carry on the business of Architect should be permitted, is under consideration of the Government and pending finalisation of view of the Central Government thereon, incorporation of Companies/ LLPs where one of the objects of such entities is to carry on the business of architect is directed not to be proceeded with as mentioned in Circular No.17/165/2011-CL-V(PT) dated 10th October 2011.
- 18.6 The same considerations may apply to **medical practitioners**. Section 15 of the Medical Council Act, 1956 provides that no person other than a medical practitioner enrolled on a State Medical Register shall practice medicine in any state in India.

19. JOINT VENTURES

19.1 A Joint Venture is any arrangement whereby two or more parties cooperate in order to run a business or to achieve a commercial objective. The main types of Joint Venture are:

- (i) Corporate Entity
- (ii) Partnership
- (iii) Contractual arrangement between two or more parties like Consortium Agreements or Collaboration Agreements, where the parties wish to cooperate for a limited period or for a limited purpose, such as submitting a joint bid for construction contract. Some of these contractual arrangements come close to be a partnership, but the parties seek to avoid joint and several liabilities for each other's actions, which a partnership would involve.
- (iv) Trust – where the Trustees hold the Trust fund properties for specified purposes.

19.2 A Joint Venture Partnership will be confined to a single venture or specified ventures.

19.3 In a Joint Venture Agreement, it is advisable to include a term to the following effect.

“This Agreement relates only to the (single) Joint Venture referred to in this Agreement and shall neither constitute any party to this Agreement the agent of any of the other party nor shall it constitute a partnership between the parties to this Agreement.”

B. Drafting of Partnership Documents

20. The articles of partnership are intended for the guidance of persons who are not necessarily lawyers and should be so drawn as to be a code of directions to which the partners may refer as a guide in all their transactions and upon which they may settle among themselves differences which may arise, without having recourse to Courts.

21. Subject to the provisions of the Indian Partnership Act 1932, the mutual rights and duties of the partners may be determined by contract between the partners and such contract may be express or may be implied by a course of dealing (Section 11). Such contract may be varied by consent of all the partners, express or implied by a course of dealing (Section 11).

22. Every partner is liable to third parties jointly with all the other partners and also severally for all acts of the firm done while he is a partner (Section 25). **So far as third parties are concerned, this provision cannot be varied by contract between partners.**

23. Partners are bound :

- a) to carry on the business of the firm to greatest common advantage.
- b) to be just and faithful to each other.
- c) to render true accounts and full information of all things affecting the firm to any partner, his heirs or legal representative (Section-9).

- d) to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm (Section-10).

These provisions cannot be varied by contract between partners.

24. A minor may be admitted to the benefits of the partnership with the consent of **all** the partners (Section 30).

25. Subject to contract between the partners, no person can be introduced as a partner into a firm without the consent of all the existing partners (Section 31).

26. A Court may dissolve a firm on any of the grounds provided in Section 44.

27. **Subject to contract between partners:**

- a) the partnership is at will (Section 7).
- b) a partner can carry on any business **other than** that of the firm while he is a partner (Section 11(2)).
- c) every partner:
- i) has a right to take part in the conduct of the business;
 - ii) is bound to attend diligently to his duties in the conduct of the business;
 - iii) any difference arising as to ordinary matters connected with the business of the partnership may be decided by a **majority of partners**, and every partner shall have the right to express his opinion before the matter is decided;
 - iv) no change may be made in the nature of business without the consent of **all** the partners;
 - v) has a right to have access to and to inspect and copy any of the books of the firm; and
 - vi) in the event of the death of a partner, his heirs or legal representatives or their duly authorised agent have similar right of access, inspection and copying (Section-12).
- d) i) a partner is not entitled to receive remuneration for taking part in the conduct of the business;
- ii) the partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm;
- iii) where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits;
- iv) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of 6% p.a.;

- v) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the business and for reasonably protecting the firm from loss;
- vi) a partner shall indemnify the firm from any loss caused to it by his willful neglect in the conduct of the business of the firm (Section 13).
- e) The property of the firm includes all property and rights and interest in property originally brought into the stock of the firm or acquired by purchase or otherwise by or for the firm for the purpose and in the course of the business of the firm and goodwill of the business. Property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm (unless the contrary intention appears) (Section 14).
- f) The property of the firm shall be held and used by the partners **exclusively** for the purposes of the business (Section 15).
- g) If a partner derives any profits for himself from any transaction of the firm or from the use of the property or business connection of the firm or the firm name, by carrying on any business of the same nature as and competing with that of the firm, he shall account for that profit and pay it to the firm (Section 16).
- h) Where
 - i) a change occurs in the constitution of a firm or;
 - ii) a firm constituted for a fixed term continues to carry on business after the expiry of that term or;
 - iii) a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners remain :
 - i) the same as immediately before the change in case of (i);
 - ii) the same as before expiry of on term, so far as they may be consistent with the incidents of partnership at will in case of (ii); and
 - iii) same as those in respect of original adventures or undertakings in case of (iii) (Section 17);
- i) In the absence of any usage or custom of trade to the contrary, a partner does not have implied authority to :
 - i) submit a dispute relating to the business of the firm to arbitration;
 - ii) open a banking account on behalf of the firm in his own name;
 - iii) compromise or relinquish any claim or portion of a claim by the firm;
 - iv) withdraw a suit or proceeding filed on behalf of the firm;
 - v) admit any liability in suit or proceeding against the firm;
 - vi) enter into partnership on behalf of the firm (Section 19).

28. A partner may retire (inter alia) in accordance with an express agreement by the partners (Section 32).

29. A partner may be expelled from a firm by any majority of the partners in the exercise in good faith of powers conferred by contract between the parties (Section 33).

30. A retiring partner may carry on business competing with that of the firm and he may advertise such business, but **subject to the contract to the contrary**, he may not;

- a) use the firm name;
- b) represent himself as carrying on the business of the firm or;
- c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner [Section 36(1)].

31. A partner may make an agreement with his partners that on his ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable [Section 36(2) and Section-54].

32. **Subject to contract between the partners**, a firm may be dissolved (inter alia) :

- i) In accordance with a contract between the partners (Section 40);
- ii) If constituted for a fixed term by the expiry of that term;
- iii) If constituted to carry out one or more adventures or undertakings by completion thereof;
- iv) By death or insolvency of any partner (Section 42).

33. In settling the accounts of a firm after dissolution, **subject to agreement by the partners**, the rules provided in Sections 48 to 52 are to be followed.

34. After a firm is dissolved, every partner or his representative may **in the absence of a contract between the partners to the contrary**, restrain any other partner or his representative (except a partner who has bought the goodwill of the firm or his representative) from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up (Section 53).

35. In settling the accounts of a firm after dissolution, the goodwill shall, **subject to the contract between the partners**, be included in the assets, and it may be sold either separately or along with other property of the firm (Section 55).

36. Usual provisions in a Deed of Partnership are :

- (i) **Date and parties.**
- (ii) **Recitals.**
- (iii) **Agreement to become partners** and effective date of commencement of partnership and nature of business and power to make changes therein or particulars of adventure or undertaking for which the firm is formed.
- (iv) The name and style of the firm and of its business and power to make changes therein.

The partners have freedom to choose their firm name subject to two qualifications, first that they may not use the name or style tending to mislead the public into confusing them with others already trading under the same or similar names and second they cannot use any name specified in the Schedule to the Emblems and Names (Prevention of Improper Use) Act, 1950 or any colourable imitation thereof, without the previous permission of the Central Government.

Section 58(3) of the Indian Partnership Act, 1932, as amended in Maharashtra, provides that a firm shall not have any of the names or emblems specified in the Schedule to the Emblems and Names (Prevention of Improper Use) Act, 1950 or any colourable imitation thereof, unless permitted to do so under that Act, or any name which is likely to be associated by the public with the name of any other firm on account of similarity, or any name which, in the opinion of Registrar, for reasons to be recorded in writing, is undesirable.

It has been held that an honest Defendant can be restrained from using his own name if such user leads to confusion and to the public buying the goods of the Defendant in the belief that they are those of the Plaintiff and that no special burden of proof is laid on the Plaintiff by the mere fact that the name which the Defendant is honestly using, is his own.

- (v) The duration of the partnership whether (1) at will (b) for fixed term (c) till completion of a particular adventure or undertaking, (d) terminable by notice, or (e) terminable by any other mode.
- (vi) Whether death, retirement or insolvency of any partner shall result in dissolution of the firm.
- (vii) Principal (only and other) **place/s of business** and power to make changes therein.
 - (1) If the place of business (ownership, tenancy, right of occupation) is and is to remain the property of one or some of the partners, this should be stated with an agreement by other partners not to claim any interest therein and a provision made that on dissolution or retirement of the partner/s entitled to premises, such partners alone shall be entitled thereto. A genuine partnership in which a tenant of business premises becomes a partner and allows his partnership to carry on its business from such premises during the subsistence of the partnership, with tenancy rights reserved to the tenant, who should pay the rent and outgoings of the premises himself and with agreement by the other partners not to claim any interest in the premises or tenancy rights, does not amount to assignment or sub-letting of premises which can furnish a ground for eviction to the landlord under the Maharashtra Rent Control Act, 1999.
 - (2) Under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999, a landlord is entitled to recover possession of any premises if the Court is satisfied that the tenant has on or after 1st February 1973 unlawfully sub-let or given on licence the whole or part of the premises or assigned or transferred in any other manner his interest therein. This provision does not prevent a

tenant who has taken business premises on rent from taking partners and carrying on business in partnership and does not restrict the tenant from allowing the use of his premises to his partners for carrying on business. (G. Rangamannar v/s Desu Rangiah - AIR 1954 - Madras -182).

- (3) Where a tenant takes a partner in his business reserving the tenancy rights in himself, the transaction is not an assignment, transfer or sub-letting in favour of the partner or partnership. (Helper Girdharbhai v/s Saiyed M.M. Kadri - AIR 1987 - S.C. 1782 - Jaffar Hussain Ebrahim v/s Taiyabali - AIR 1997 S.C. 1757).
- (4) The partners cannot be considered as sub-tenants or licensees of the premises, as no part of the premises is in their exclusive possession, but if after such partnership is entered into, the tenant by a subsequent agreement transfers all his interest in the tenanted premises, the transaction may amount to unlawful assignment, entitling the landlord to possession of the premises. It will have to be found in each case whether a plea of partnership is intended to be a mere cloak to cover up the use by the person other than the tenant or whether the tenant is himself carrying on the partnership business.
- (5) The fact that the tenant is not related to the partners or that the tenant is not physically present at the place of business, do not by themselves prove the transfer of legal possession or interest in the premises (Manchharam Sobhraj v/s Jamnadas - AIR 1976 - Gujarat 47).
- (6) In Gangaram v/s Ashok Kumar 1969 Maharashtra Law Journal (Notes) 43, it is held that the failure to produce the account books of the firm, the tenant not taking part in the business of the firm, the business carried in the name of the stranger and evidence of prior sub-letting indicated that the document of partnership was merely a cloak brought into being in order to defeat the claim for eviction on the ground of sub-letting. It has been held that the provisions in the Partnership Deed that the rent shall be paid by the firm and the firm shall be the tenant amounts to assignment.
- (7) The firm not being a legal entity, in case of tenancies granted in the name of a firm, all the partners of that firm on the date of commencement of the tenancy in their individual capacity become tenants of the premises.
- (8) Where the tenancy of premises is a partnership asset and on the dissolution of the partnership it goes to the share of one of the partners, such transaction does not amount to sub-letting or assignment.
- (9) Where premises are let out to a firm, if in place of an outgoing partner, a new partner is taken, it does not amount to sub-letting or assignment provided at least one partner continues to remain a partner therein.

- (10) If premises let out to the firm on its dissolution are allotted to one of its partners, such partner alone becomes tenant and in case such partner reconstitutes the dissolved firm with two or more new partners, the reconstituted firm does not become the tenant.
- (11) Where the tenant is a working partner in the firm and is precluded from doing any other business, the provision that the partnership should pay the rent may not lead to the conclusion that there was sub-letting or assignment of tenancy rights.
- (12) In *Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar* (2010) 1 SCC 217 Supreme Court has laid down the following principles with regard to the aspect of partnership as a defence to the ground of subletting.
- (i) In order to prove mischief of sub-letting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by the tenant in favour of a third party with exclusive right of possession, and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.
 - (ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to sub-letting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.
 - (iii) The existence of deed of partnership between the tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducting evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.
 - (iv) If the tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.
 - (v) Initial burden of proving sub-letting is on the landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to the tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

- (vi) Initial burden lying on the landlord would stand discharged by adducting prima facie proof of the fact that a party other than the tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.
- (viii) The premium, if any, paid by any party for becoming a partner.
- (ix) The property of any partner allowed to be used by the partnership during its subsistence and position thereof on dissolution, particularly of premises, tenancies, goodwill and trade name, specifying what is not to be considered partnership property. Where one partner is or is to be solely entitled to the whole or some part of property to be used for common purposes, the partner's rights concerning the same during the subsistence and on dissolution of the partnership should be specified. Goodwill of the business should be provided for. In *Sujan S. Sawant v/s. Kamlakant* 2005 (1) Bombay Cases Reporter 763 it is held that unless provision taking away right of a partner in goodwill is found in partnership documents, goodwill has to be included in the assets of partnership and that mere absence of provision in partnership deed relating to goodwill is not sufficient to take away the right of a partner to a share in the goodwill of the firm.
- (x) Provision relating to **Capital** of the partnership and the manner of contribution thereof and interest, if any, to be paid thereon. Amount in excess of fixed capital contributions can be brought in and withdrawn by partners as loans and advances, on which interest can be provided and provision for interest on capital at rates not exceeding 12% p.a. (reduced from 18% p.a. to 12% p.a. by Finance Act, 2002 w.e.f. 1.6.2002) simple, as allowed under Section 40(b) (iv) of Income Tax Act, 1961 can be made. Under Section 40 (b) (iv) of the Income-tax Act, 1961, as substituted by Finance Act, 1992 with effect from 1-4-1993, payment of interest to a partner is not deductible in computing the taxable income of the firm, unless the following conditions are satisfied :
 - (1) payment of such interest is authorised by and is in accordance with the terms of Partnership Deed,
 - (2) such payment relates to a period falling after the date of the partnership Deed, and
 - (3) such payment of interest does not exceed the amount calculated @ 12% simple interest per annum
- (xi) Loans and advances by the partners to the firm and interest at rate not exceeding 12% p.a. simple as allowed under Section 40(b)(iv) of Income-tax Act thereon and period of notice for recovery thereof and similar provisions regarding moneys due from any partners to the firm.
- (xii) Division of profits and losses of the firm and minors, if any, admitted to the benefits of the partnership.

- (xiii) Working partners of the firm and their duties and powers and remuneration, subject to maximum prescribed under Section 40(b) (v) of the Income-tax Act.

Under Section 40 (b)(v) of the Income-tax Act, 1961, as substituted by Finance Act, 1992 with effect from 1-4-1993, payment of salary, bonus, commission or remuneration to a partner is not deductible in computing the taxable income of the firm, unless the following conditions are satisfied :

- (i) the partner to whom the remuneration is paid is a working partner who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner ,
- (ii) payment of such remuneration is authorised by and is in accordance with the terms of Partnership Deed and relates to the period falling after the date of such Partnership Deed and the Partnership Deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration. In Circular No.739 dated 25th March, 1996 issued by CBDT, it is directed that where neither the amount of remuneration of a working partner has been quantified nor even the limit of total remuneration has been specified but the same has been left to be determined by the partners at the end of the accounting period, in such cases payment of remuneration to partners cannot be allowed as deduction in the computation of the firm's income and it is clarified that no deduction under Section 40(b)(v) will be admissible unless the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration.
- (iii) the total amount of such remuneration to all the partners during the previous year does not exceed the aggregate mentioned below w.e.f. 1.4.2010.
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| (a) on the first Rs.3,00,000/- of the book profit or in case of loss | 1,50,000/- or @ 90% of book profit, whichever is more |
| (b) on the balance of the book profit | 60% |

'Book profit' means net profit as shown in the profit and loss account for the relevant previous year computed in the manner laid down in the Income Tax Act as increased by the aggregate amount of the remuneration paid or payable to all partners of the firm if such payment has been deducted while computing the net profit. In CIT v/s. Kajah Company (2004) 266 – ITR 122 (Kerala), it is held that 'net profit', both under the Income Tax Act and under the general law, would not take in the statutory liability to pay income tax and for working out the remuneration of partners, the income tax liability is not required to be deducted for arriving at the figure of 'net profit'.

- (xiv) Drawings of partners.

- (xv) Bank accounts of the partnership and mode of operation thereon. In *Best Enterprises v/s. S. Elanchizian – AIR 2006 Madras 274*, in arbitration proceedings relating to a firm consisting of four partners, which was sought to be dissolved unilaterally by one partner holding 29% share and at whose instance operation of the Bank Account of the firm was frozen by the bankers of the firm, the application of the other three partners to permit them to operate the bank account of the firm was granted by the Court on the ground that under the Partnership Agreement, the bank account of the firm could be operated by any two of the partners and the partner holding 29% share could not unilaterally dissolve the firm and freeze operation of the Bank Account of the firm.
- (xvi) Maintenance of accounts and accounting period and place and custody of partnership books and access thereto.
- (xvii) Making up and signing of periodical accounts and agreement that accounts when finalised shall not to be reopened by partners.
- (xviii) Powers and duties of partners, amount of attention to be given to the affairs of the firm, employment, borrowing powers, carrying on any other business or competing business, decision making powers.
- (xix) Power and mode of nomination on death or retirement.
- (xx) Mode of retirement from the firm and of determining the amount of moneys and properties to be paid and allotted to the retiring partner.
- (xxi) Grounds for and mode of expulsion of a partner and consequences of such expulsion.
- (xxii) Ground for and mode of dissolution of the firm and Mode of settlement of accounts on dissolution.
- (xxiii) Arbitration Agreement.
- (xxiv) Execution Clause.

37. Usual provisions in a **Deed of Retirement** are :

- (i) **Date and parties**
- (ii) **Recital of Partnership and of Notice or Agreement for retirement.**
- (iii) Declaration of retirement by Retiring Partner and the date of retirement.
- (iv) Acknowledgement by Retiring Partner of receipt of amount/property from firm and/or Continuing Partners in full satisfaction of all his claims.
- (v) Release by Retiring Partner of all his share in the firm and its properties in favour of the Continuing Partners.

- (vi) Mutual Release of claims for accounts and demands between the Retiring Partner and the Continuing Partners, except as provided in the Deed of Retirement.
- (vii) Authority to Continuing Partners to collect assets of the Partnership.
- (viii) Appointment by the Retiring Partner of Continuing Partners as the Attorneys of the Retiring Partner for collection of debts and property of the firm.
- (ix) Covenant by the Continuing Partners to pay and discharge all debts and liabilities including tax liabilities of the firm and keep the Retiring Partner indemnified in respect thereof.
- (x) Execution Clause

38. Sometimes the Deed of Retirement includes a declaration by the Retiring Partner to the effect that except as recorded in the Books of Accounts of the firm, the Retiring Partner has not incurred any debt or liability on behalf of the firm and that in case it is found that any liability had been incurred by the Retiring Partner on behalf of the firm, which is not recorded in the Books of Accounts of the firm, the Retiring Partner shall bear and pay the same and keep the firm and the Continuing Partner indemnified in respect thereof.

39. Usual provisions in a **Deed of Dissolution** are :

- (i) **Date and parties.**
- (ii) Recital of Partnership and Notice/Agreement for Dissolution;
- (iii) Declaration by all the partners of dissolution of the firm and the date of such dissolution.
- (iv) Mode of settlement of accounts of the dissolved firm either by payment of a fixed amount by one partner to the other/s and take over of the assets and business and liabilities of the firm by the partner making such payment or by division of assets and liabilities of the firm between the partners or by providing for ascertainment and sale of assets and payment of the liabilities of the firm thereout and payments to the partners out of the surplus or any other manner.
- (v) In case any of the assets of the firm are taken over by any partner, release and transfer of the share of the other partners therein in favour of the partner taking over such assets;
- (vi) Mutual release of partners of claims against one another except as provided under the Deed of Dissolution;
- (vii) In case any of the partners of the dissolved firm are to be authorised to collect the assets of the firm, grant of authority to such partner and appointment of such partner as the Attorney of the other partners of the dissolved firm;
- (viii) In case any of the liabilities of the dissolved firm are taken over by a partner, covenant by such partner to bear and pay the liabilities and keep the other partners indemnified in respect thereof;

- (ix) Agreement by the parties to sign and execute and do such further deeds and acts as may be required for winding up the affairs of the dissolved Partnership.
- (x) In case all the affairs of the dissolved Partnership are not wound up on the date of execution of the Deed of Dissolution, Arbitration Agreement.
- (xi) Execution Clause

40. Under Article 47 of Schedule I to the Bombay Stamp Act, 1958, as amended by Maharashtra Stamp (Amendment) Act 2015, the rates of stamp duty on Deeds of Partnership, Retirement and Dissolution are as follows:

| Description of Instrument | Proper Stamp Duty |
|--|--|
| 1 | 2 |
| 47. PARTNERSHIP- | |
| (1) Instrument of any partnership inclusive of, Limited Liability Partnership and Joint Venture to run a business, earn profits and to share profits, whether in cash or in kind- | |
| (a) where there is no share of contribution in partnership, or where such share contribution brought in by way of cash does not exceeds 50,000. | Five hundred rupees |
| (b) where such share contribution brought in by way of cash is in excess of rupees 50,000. | One per cent of the amount of share contribution subject to maximum of rupees fifteen thousand. |
| (c) where such share contribution is brought in by way of property, excluding cash. | The same duty as is leviable on a Conveyance under clause (a), (b) or (c) as the case may be of Article 25 on the market value of such property. |
| (2) Dissolution of partnership or retirement of partner inclusive of Limited Liability Partnership and Joint Venture to run a business, earn profits and to share profits, whether in cash or in kind- | |
| (a) where on dissolution of the partnership or on retirement of a partner any property is taken as his share by a partner other than a partner who brought in that property as his share of contribution in the partnership. | The same duty as is leviable on a Conveyance under clause (a), (b) or (c) as the case may be, of Article 25, on the market value of such property, subject to a minimum of rupees one hundred. |
| (b) in any other case | Five hundred rupees. |

In *S. Narayanapa v/s. Bhaskar* AIR 1966 S.C 1300, the Apex Court has held that a deed of Retirement where the retiring partner is paid certain amount in lieu of all his claim, right, title and interest in the business and assets of the firm is not a conveyance.

Under Article 27 of Schedule I of the Bombay Stamp Act, 1958, stamp duty on a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper stamp duty has been paid is the same as is payable on the original, subject to a maximum of Rupees One Hundred (w.e.f. 07.05.2005).

Under section 52B introduced in the Bombay Stamp Act, 1958 w.e.f. 1-12-1989 a stamp paper is required to be used within six months of date of its purchase and under Section 34 introduced in the Bombay Stamp Act, 1968 w.e.f. 15th September, 1996 the stamp paper is required to be in the name of one of the executants of the document.

41. A Partnership Deed is not required to be registered even if immovable property belonging to one of the partners is brought in the firm. Similarly a deed of retirement or dissolution is not required to be registered as it does not amount to a transfer. In *Narayanappa vs. Bhaskar* AIR 1966 S.C. 1300 affirming AIR 1959 A.P. 380 (F.B.), the Supreme Court has taken the view that share of a partner in a partnership is movable property and therefore on retirement of any partner or on dissolution, the division of even immovable property among the partners does not amount to transfer and does not require registration. Similar view has been taken in *C.I.T. v. Amber Corporation* (1974) 95 ITR 178 and in (1981) 127 ITR 29 (Raj) and *Samyuktha Cotton Trading Co. v. Bheemi nent* AIR 2005 A.P.I In *N. Khadervali Saheb v/s N. Gudu Saheb* (2003) 3 S.C.C. 229, Supreme Court has held that a partnership is not an independent legal entity and that firm name is only a compendious name given to the partners and the partners are the real owners of its assets and that allotment of assets to individual partners on dissolution of the partnership does not constitute transfer of any asset of the firm and hence an Award recording or directing distribution of assets of the dissolved firm after settlement of accounts, does not require compulsory registration. With amendments to Bombay Stamp Act relating to stamp duty on Partnership, Retirement and Dissolution mentioned in para 38 above, it may be advisable to register Instruments of Retirement and Dissolution, when any immovable property is taken as his share by a partner other than a partner who brought in that property as his share of contribution in the partnership.

42. Provisions of Section 45 of Income-tax Act about conversion of a capital asset into stock-in-trade and transfer of capital asset by way of capital contribution or otherwise and distribution of capital assets on dissolution of a firm or otherwise are required to be considered.

43. Section 170 of the Income-tax Act about the liability on succession to business otherwise than on death and Sections 187 to 189A of the Income-tax Act are relevant for consideration on Retirement or Dissolution.

44. Sections 44 and 46 of the Maharashtra Value Added Tax Act, 2002 about VAT liability of outgoing partners and of estate of a deceased partner are also relevant while considering Retirement and Dissolution.

C. REGISTRATION OF FIRMS

45.1 Section 69 of the Indian Partnership Act, 1932 as amended in Maharashtra by Maharashtra Act No.29 of 1984 with effect from 1st January, 1985 provided as follows (amendments by Maharashtra Act No.29 of 1964 shown in italics):-

“69. Effect of non-registration

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

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

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

- (2A) *No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:*

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

- (3) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of set-off other proceedings to enforce a right arising from a contract but shall not affect

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

deleted and substituted by

- (a) *the firms constituted for a duration upto six month or with a capital upto two thousand rupees; or;*

- (b) the powers of an official assigned, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the

Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.”

45.2 In *V. Subramaniam v/s. Rajesh Raghuvendra Rao* 2001 (1) All Maharashtra Law Reporter 311, Division Bench of the Bombay High Court considered the question whether the Maharashtra Amendment No.29 of 1984 by which Section 69 of the Indian Partnership Act was amended to provide that a suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm by or on behalf of any person suing as a partner of a firm which is not registered is barred, is ultra vires the Constitution of India and upheld the constitutional validity of Maharashtra Amendment Act No.29 of 1984. In this case, the Maharashtra Amendment Act No.29 of 1984 was challenged on the following grounds:

- (a) Amendment operates in Maharashtra alone and partners of unregistered firms in Maharashtra alone are subjected to the disability introduced by the amending act, while similarly situated partners of unregistered firms in other States are not subjected to such disability.

This challenge was negated by following decision of the Supreme Court in *State of M.P. v/s G.C. Mandawar* AIR 1954, S.C. 493, in which it is held that Article 14 of the Constitution does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject, the provisions are discriminatory.

- (b) The discrimination made between the partners and heirs of deceased partners, in as much as partner of an unregistered firm cannot bring a suit even for accounts or for realisation of his share or property of the firm, but the heirs of such partner can.

This ground was negated for the reason that heirs who are not responsible for non-registration of the firm cannot be visited with the same stringent consequences as the partner responsible for such non-registration.

- (c) Bar of suit for accounts and realisation of assets of an unregistered firm is unreasonable, as the application for registration is required to be signed and accompanied by true copy of Deed of Partnership signed by all the partners, which may not be possible after disputes arise.

This argument was negated on the ground that every partner must be deemed to have been aware of the disadvantages of non-registration, on the date on which he enters into partnership.

- (d) The provision as to registration of firms is for protection of third parties and the bar on partners of unregistered firms suing for dissolution and accounts has no nexus to the object of registration.

This argument was negated on the ground that the expansion of the disability to inter se disputes between the partners was for bringing in greater disincentive for non-registration and for encouraging registration for protection of members of the public and third parties.

- (e) Maharashtra Amendment Act No.29 of 1984 places unreasonable restriction on the right to carry on business, which includes the right to close down business.

It was held that the restriction under the Maharashtra Amendment Act No.29 of 1984 is in the interest of general public and therefore valid.

- (f) There being no provision in the Act to the effect that the registration, when granted, would be deemed to be effective from the date of the application, if a dispute arises in the interregnum between the date of application and actual date of registration, even a vigilant partner would be rendered without a remedy specially considering the bureaucratic manner in which the Registrar acts.

While negating this ground the Court held that a suit filed by one partner against another to compel him to sign an application for registration under Section 58 is not hit by the bar under Section 69 and that an independent suit can be brought to compel a partner by a decree of Court to sign the application for registration. The Court recommended that the Registrar of Firms should be given adjudicatory powers or at least the power to direct a recalcitrant partner to sign an application for registration.

45.3 The decision of the Bombay High Court in *V. Subramaniam v/s. Rajesh Raghuvendra Rao* has been **overruled by the Supreme Court in *V. Subramaniam v. Rajesh Raghuvendra Rao* (2009) 5 SCC 608**, where the Supreme Court considered whether subsections (2-A) and (3)(a) (which prohibit a partner in an registered partnership in Maharashtra from filing a suit for dissolution or for accounts of a dissolved firm or realising properties of a dissolved firm, unless the duration of the firm was only six months or its capital is up to Rs.2000) introduced by the Maharashtra Amendment Act 29 of 1984 in section 69 of the Partnership Act 1932 were unconstitutional. The Supreme Court held that these amendments violate articles 14, 19(1)(g) and 300-A of the Constitution of India and virtually deprive a partner in an unregistered firm from recovering his share in the firm or from seeking dissolution of the firm. It held that the restrictions placed by the amendments are arbitrary, excessive, beyond public interest and not reasonable and that the amendments are therefore ultra virus and unconstitutional. The Supreme Court stated that the effect of the 1984 amendment would be that a partnership firm is allowed to come into existence and function without registration, but it cannot go out of existence (with certain exceptions). This can result in a situation where in case of a dispute amongst the partners, the relationship of partnership cannot be brought to an end by approaching a court of law. A partner can neither file a suit to compel the mischievous partner to cooperate for registration, as such a suit is not maintainable, nor can he resort to arbitration if any, because the arbitration proceedings would be hit by section 69(1) of the Partnerships Act.

45.4 In *Haldiram Bhujawala v/s. Anand Kumar* reported in (2000) 3 SCC 250, the Supreme Court has held that if the firm is not registered on the date of the suit and the suit is to enforce the right arising out of a contract with a third party Defendant in the course of its business, then it will be open to the Plaintiff to seek withdrawal of the Plaint with leave and file a fresh suit after registration of the firm subject to the law of limitation, thus overruling the decision of the Bombay High Court in *M. L. Chaturvedi v/s. Sanjay Finance Corporation*

1998 (1) Bombay Cases Reporter 782, as held by the Bombay High Court in Vilas S. Mahalle v/s. Rajdhaniprasad reported in 2005 (4) Bombay Cases Reporter 869.

- 45.5 In CIT Andhra Pradesh V/s Jayalakshmi Rice & Oil Mills AIR 1971 SC 1015, the Supreme Court has held that the registration of the firm is effected only when the entry is recorded in the Register of Firms and the Statement is filed by the Registrar as provided in Section 69. In this case, it is also held that registration of a firm after institution of a suit will not cure the defect of non-registration at the time of institution of the suit. This decision as also several decisions of the High Courts and of the Supreme Court (including Sriram Finance Corporation v. Yasin Khan AIR 1989 SC 1769) in which it is held that a suit filed by an unregistered firm is incompetent from its inception as per Section 69(2) of the Partnership Act and subsequent registration of the Plaintiff firm will be of no avail, have been referred to by the Supreme Court in Raptakos Brett & Co. Ltd. v/s. Ganesh Property – AIR 1998 S.C. 3085, where the Supreme Court has observed that if pending the suit and before a decree is obtained, the Plaintiff firm gets itself registered, the defect in the earlier filing would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained and if such an approach is adopted, no real harm would be caused to either side. These observations are obiter dicta and the Supreme Court has observed that the decisions of the Supreme Court holding that subsequent registration of the Plaintiff firm will not render the suit maintainable require reconsideration. In Balaji Constructions Company v/s. Lira Siraj Shaikh AIR 2006 Bom. 106 the Division Bench of the Bombay High Court has considered the decision of the Supreme Court in Sriram Finance Corporation v/s. Yasim Khan AIR 1989 S.C. 1769 in which it is held that if on the date of the filing of the suit the Plaintiff firm is not registered, the suit is not maintainable, as also the obiter dicta of the Supreme Court in Raptakos Brett & Co. Ltd. v/s. Ganesh Property AIR 1998 S.C. 3085 referred to above and held that the Judgement of the Supreme Court in Sriram Finance Corporation – AIR 1989 S.C. 1769 holds the field and binds the High Court and **held that registration of the Plaintiff firm during the pendency of the suit will not cure the defect of non-registration of the Plaintiff firm at the time of filing of the suit.**
- 45.6 Application for registration of a firm is required to be submitted under the signature of all the partners whilst the firm is in existence and not after dissolution of the firm and the firm is required to be registered prior to the institution of the legal proceedings Jayesh Pandya v/s. Sukanya Holdings 2005 (5) Bombay Cases Reporter 721.
- 45.7 In Shah Velji Narsi v/s Vasantrai, 2003(4) All MR 1054, Bombay : 2004(2) Bombay Cases Report 352, it is held that if the name of the partner in whose favour the cause of action accrued was not shown in the Register of Firms, the suit was not maintainable in view of mandatory requirement under Section 69(2) of Partnership Act.
- 45.8 In Sharad Vasant Kotak v/s Ramniklal (1998) 2 Supreme Court Cases 171, it is held that a suit for dissolution of a firm filed by a founder partner of the firm, whose name was included in the Register of Firms relating to the registration of the firm as originally constituted was maintainable, though subsequent changes in the constitution of the firm had not been recorded with the Registrar of Firms because induction of new partners amounts to reconstitution and not dissolution of the firm.

- 45.9 In *Shree Balaji Steels Vs. Gontermann-Peipers (India) Ltd.*, [2003]114 CompCas193(Cal)] it is held that winding up petition under section 433 of Companies Act filed by an unregistered firm cannot be construed to be a “suit” within the meaning of Section 69(2) of the Partnership Act as winding up does not result in decree and that winding up petition cannot be construed as ‘legal proceeding to enforce right arising from contract or conferred by Partnership Act’ because winding up petition is not filed to enforce a right arising from a contract but for exercise of statutory right to have commercially insolvent company wound up by the Court. In the case of *Kottamasu Sreemannarayanamurthy v. Chakka Arjanadu* AIR 1939 Mad 145, a Division Bench of the Madras High Court observed that an unregistered partnership firm was entitled to seek adjudication of a debtor as insolvent as such adjudication cannot be said to seek enforcement of a right arising from a contract.
- 45.10 In *M/s. Raptakos Brett Brett & Co. Ltd. v. Ganesh Property* (AIR 1998 Supreme Court 3085), it is held that suit by an unregistered firm for possession based on breach of covenant by Lessee under the Lease Deed cannot be always considered as one for enforcement of rights arising out of contract for tenancy. In case there are averments in Plaintiff showing that the claim was based on breach of covenant to restore possession in Lease Deed as well as right of Lessor to get possession under law of the land, such a suit will not be barred since later cause of action is outside the sweep of Section 69(2) of the Partnership Act.
- 45.11 In *Firm Ashok Traders v/s Gurumukh Das Saluja*, (2004) 3 Supreme Court Cases 155, it is held prima facie that application to the Court under Section 9 of the Arbitration and Conciliation Act 1996 for interim reliefs relating to arbitral proceedings is neither a suit nor a proceeding in a suit nor a proceeding to enforce a right arising from a Contract and not affected by the bar under Section 69 of the Partnership Act. In this case, there are references to the decisions of the Supreme Court in
- (i) *Delhi Development Authority v/s Kochar Construction Works* (1998) 8 SCC 559 where the Supreme Court has held that Section 69 of the Partnership Act was applicable to an application under Section 20 of the Arbitration Act, 1940 (for filing arbitration agreement in Court and making an order of reference to arbitration), as such application was included within the meaning of ‘other proceedings’ in Section 69 (3) of the Partnership Act.
 - (ii) *Kamal Pushpa Enterprises v/s D.R. Construction Company* - AIR 2000 S.C. 2676, in which the Supreme Court has held that the bar under Section 69 of the Partnership Act is not applicable at the stage of enforcement of the Award by passing a decree in terms thereof, because the Award crystallises the rights of the parties and what is enforced at the stage of passing decree in terms of the Award is not any right arising from the Contract.
 - (iii) In *M/s. Jayamurugan Granite Exports v. M/s. SQNY Granties* (AIR 2015 MADRAS 266), it is held that non-registration of the firm would not be a bar under Section 69 of the Partnership Act for institution of proceedings under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrators.

- 45.12 In U.P. State Sugar Corporation Ltd. v/s. Jain Construction Co. (2004) 7 SCC 332, it is observed that arbitration proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932 as held in Jagdish Chandra Gupta v/s. Kajaria Traders (India) Ltd. AIR 1964 SC 1882. In U.P. State Sugar Corporation Ltd. supra, a reference is made to the decision of the Supreme Court in firm Ashok Traders v/s. Gurumukh Das Saluja (1998) 8 SCC 559 referred to in para 42.8 above (in which it is observed that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration under Section 9 of Arbitration and Conciliation Act, 1996) and it is observed that correctness or otherwise of the decision of the Supreme Court in the case of firm Ashok Traders was not in question in U.P. State Sugar Corporation Ltd. supra.
- 45.13 In Masood M. Husain v/s. Gulam 2007(2) Bombay Cases Reporter 291, Division Bench of the Bombay High Court has considered the decision of the Supreme Court in Firm Ashok Traders v/s. Gurumukh (2004) 3 SCC 155 and held that an application under Section 9 of the Arbitration and Conciliation Act for interim reliefs pending arbitration is neither in a suit nor a right arising from a contract and that a right arising from a partnership deed or conferred by the partnership is enforced in an Arbitral Tribunal and the Court under Section 9 only formulates interim measures so as to protect the right before the Arbitral Tribunal from being frustrated and followed the Supreme Court Judgement in the case of Firm Ashok Traders as a precedent.
- 45.14 Under the Arbitration and Conciliation Act, 1996, which has replaced Indian Arbitration Act 1940, an award is enforceable as a decree and the step of obtaining decree in terms of award has been eliminated. It appears that an Award passed by an Arbitral Tribunal on contractual claims of an unregistered firm can be executed and cannot be objected to in execution proceedings, on the ground that the firm was not registered. Bar under Section 69 applies to suit and other proceedings. Precedents support the view that arbitration proceedings are not 'other proceedings' within the meaning of that term under Section 69 of the Partnership Act and claims arising out of a contract by an unregistered firm before an Arbitral Tribunal cannot be rejected on the ground that the firm is not registered and Award granting claims of an unregistered firm arising out of contract is valid and enforceable as a decree. In Masood M. Husain referred to in para 45.13 above the Bombay High Court has held that arbitration proceedings are not 'suit' or 'proceedings' within the meaning of those terms in Section 69 of the Indian Partnership Act. However, in following decisions of the Bombay High Court under Indian Partnership Act, 1940, it was held that a reference of disputes to arbitration by a partner of an unregistered firm was not maintainable. Narainji v/s Kiran Gajendra (1994) 3 Bombay Cases Reporter 286, Chandulal Hathibhai Shah v/s Champaklal (1994) 2 Bombay Cases Reporter 174 (Division Bench) = 1993 Maharashtra Law Journal 1267.

D. Recent Decision on Partnership

46. Some decisions of the Supreme court and Bombay High Court dealing with the nature of partnerships and rights and obligations of partners are :-

1. **Firm / Proprietorship**

In Comptroller and Auditor General v/s Kamlesh Vadilal Mehta (2003) 2 S.C.C. 349, it is held that the partnership is not a legal entity like a Company. It is a group of individual partners and there is no justification for assuming that partnership firms are more efficient in carrying out audit work than individual Chartered Accountants who have formed sole proprietorship concerns and that once a person like a Chartered Accountant is qualified, experienced and efficient, it is difficult to understand how he could be discriminated against only for the reason that he has chosen to act alone in the professional career and has not been able to form a partnership. In this case, the action of the Comptroller and Auditor General in inviting applications from firms of Chartered Accountants for empanelment for audit of Government Companies was held discriminatory, on the ground that the classification between proprietary and partnership firms is arbitrary and unfair.

2. **Firm and its partners are not distinct entities**

In Jayesh H. Pandya v/s Sukanya Holdings Pvt. Ltd. AIR 2003, Bombay 148, it is held that firm and its partners are not distinct entities and that partners cannot be held to be debtors of the firm before settlement of accounts. In this case, the Bombay High Court has observed as follows in para 6 at page 149.

‘The commercial men and the accountants on the one hand and lawyers on the other, have different notions respecting the nature of the firm and its assets. Commercial men and accountants look upon the firm in the same way in which the lawyers look upon a Company, a corporation i.e. a body distinct from its members and having rights and obligations different from those of its members. Hence, in keeping the partnership accounts, the firm is made a debtor to each partner for what he brings into the common stock and each partner is made a debtor to the firm for all that he takes out of that stock. In the mercantile view, each partner is a debtor or creditor of the firm. The tax laws of this country also, in many ways, look at the firm in the same way as the accountants. The firm is regarded as a separate assessable entity under the Income Tax Act. The firm is assessed separately as a distinct taxable entity, an assessee, under the Income Tax Act. Tax is paid by the firm on the profits made by the firm. The net profits after the payment of the taxes are distributed amongst the partners in proportion of their share in the profits. Until recently, the partners also used to pay separate income tax on the profits coming to their hands. But this notion of the accountants and commercial men is not the legal notion of the firm. The firm is not regarded by lawyers as distinct from the partners comprising it. Unlike a corporation, firm is not a legal person; partners are collectively called as a firm. What is called the property of the firm is firm’s property and what is called as the debts and liabilities of the firm, are their (partner’s) debts and their liabilities. In point of law, the partner is not a debtor or creditor of co-partners and in law, he cannot be either a debtor or creditor of the firm of which he is a partner.’

3. **Partner's separate property**

In Shashi Kapila v/s R.P. Ashwin, 2002(1) SCC 583, it is held that a tenant does not cease being a tenant just because the partnership firm in which he subsequently becomes a partner enters into an agreement with the landlord for purchase of the tenanted premises, because such a tenant cannot project himself individually as a Transferee under the Agreement. In this case, it is held that a partner in a firm has an existence separate from that of the firm and, therefore, retains his rights over his personal property, which may not automatically be taken to be incorporated into the assets of the partnership. In this case, neither the tenant who was a partner nor the firm in which he was a partner had contended that the tenanted premises had become asset of the partnership firm.

4. **Liability of Partner**

In Bank of Baroda v/s Himalaya Brush Industries 2000 (3) Bombay Cases Reporter 697, it is held that even if one of the partners forged the signature of his partner on cheques on bank account of the firm and operated the bank account in collusion with the Bank Manager, as the partnership was not dissolved, liability of the firm even if one of them cheated the bank, did not cease and all the partners continued to be liable to the bank for monies due from the firm.

5. **Liability of Retiring Partner** :-

In Syndicate Bank v/s R.S.R. Engineering Works (2004) 6 S.C.C. 265, the Supreme Court has held that in the absence of agreement with the creditor discharging the retiring partners, the retiring partners would remain liable towards their pre-retirement liability. In this case, the Supreme Court has also observed that partnership is not a species of joint tenancy and in the absence of agreement to the contrary, there is no survivorship as between partners, concerning their beneficial interest in the partnership assets.

6. **Goodwill**

In Ramnik Vallabhdas Madhavani v/s Taraben Pravinlal Madhavani (2004) 1 S.C.C. 179, the Supreme Court has observed as under in para 68 at page 523

‘the term “goodwill” signifies the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the share of the right to use the old name and otherwise. It is something more than a mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits. “Goodwill” may be the whole advantage belonging to the firm, its reputation as also connection thereof. It, thus, means that every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business whether connected with the premises of business or its name or style, everything connected with or carrying the benefit of the business.’

7. **Valuation of Retiring Partner's share**

In Pamuru Vishun Vinodh Reddy v/s Chillakuru, 2003(2) All Maharashtra Law Reporter - 373 (S.C.), it is held that in case of dispute, a retiring partner is entitled to valuation of his shares as on the date of retirement and interest for delay in determination and payment of the share amount. Under Section 37 of the Act, a retiring partner cannot claim that valuation of his share should be as on the date of valuation or payment, as otherwise the result would be that the retiring partner would be deemed to have continued to be a partner in the firm even after his retirement.

8. In Mohammad Laiquiddin v. Kamala Devi Misra (2010) 2 Supreme Court Cases 407, it is held that where there are only two partners constituting a partnership firm, on death of one of them, the firm is deemed to be dissolved despite existence of a clause which says otherwise and partnership is not a matter of heritable status but purely one of contract. Thus on the death of a partner, his heirs cannot become new partners by virtue of succession.
9. In Cox & Kings India Ltd. v. Indian Railways Catering & Tourism Corpn. Ltd., (2012) 7 Supreme Court Cases 587 the submission that a Joint Venture Agreement was akin to partnership has been rejected.
10. In Horace Kevin Gonsalves vs. Prabha Ganpat Borkar (2015) 6 Mah LJ 208, it is held that Power of Attorney by one partner in favour of a third party to deal with the firm property, without the consent of the other partners is not permissible.
