

Unit 1 : General Nature of Partnership

* **Partnership** : It is 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

* **Elements / characteristics of Partnership :**

- i) Association of 2 or more persons
- ii) Agreement
- iii) Business
- iv) Agreement to share profits
- v) Business carried on by all or any of them acting for all

i) Association of 2 or more Persons :

Partnership is an association of 2 or more persons only. Only persons recognized by law can enter into an agreement of partnership

ii) Agreement

Partnership must be result of an agreement between two or more persons

There must be an agreement entered into by all the persons concerned.

III Business

- First, there must exist a business which includes trade, every trade, occupation and profession
- The motive of business is acquisition of gains
- Therefore, there is no partnership when there is no intention to carry on the business & to share the profits

IV Agreement to Share profits

- Sharing of profits is an essential element of partnership
- No partnership where only one partner is entitled to the whole profits of business
- Partner must agree to share the profits in any manner they choose
- But an agreement to share losses is not an essential agreement

v Business created on by all or any of them acting for all

→ The business must be created on by all the partners or by anyone or more of the partner acting for all.

→ This is the cardinal principle of the Partnership law

→ There should be a binding contract of mutual agency between the partners

→ The true test of partnership is mutual agency, If the element of mutual agency is absent then there will be no partnership

In KD Kamnath & CO.

The two essential condition to be satisfied are that :-

- 1 An agreement to share the profits
- 2 Business must be created on by all or any of them acting for it.

True Test of Partnership

1 Agreement

- Partnership is created by an agreement not by status

→ and therefore members of HUF & Birmese Buddhist husband & wife carrying on business are not partners in a business.

2 Sharing the Profits

The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such person partners

The receipt by a person :-

→ of a share of profits of a business OR

→ of a payment contingent upon the earning of profits

→ varying with the profits earned by a business

Does not itself make himself as a partner with the person carrying on the business and particularly, the receipt of such share or payment

- a lender of money to persons engaged or about to engage in any business
- b Servant or agent as remuneration
- c widow or child of deceased partner as annuity
- d by a previous owner or part or owner of the business as consideration for the sale of goodwill and share thereof.

3 Agency

- Mutual agency is the cardinal principle of Partnership
- Each partner carrying on the business is the principal as well as an agent of other partner. Act of one can bind all the partners.

Case Santirajan Das Gupta vs Daryaan Muzamull (Supreme Court)

Supreme Court reach the conclusion that there is no partnership between the parties:

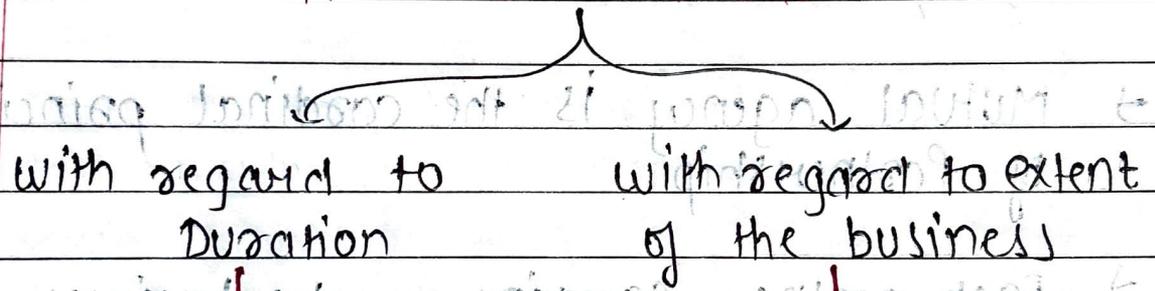
- a Parties have not retained any record of terms and condition of partnership

b Partnership business has not maintained of accounts of its own which would be open to inspection by both parties.

c No account of the Partnership was opened with any bank

d No written intimation was conveyed to the Deputy Director of Procurement with respect to newly created Partnership

* **KINDS OF PARTNERSHIP**



Partnership at will Partnership for fixed period Particular Partnership General Partnership

1 with regard to Duration :-

a Partnership at will :-

- No fixed period has been agreed upon for the duration of Partnership
- No provision (purpose) made as to the determination of the business
- Where a Partnership entered into for a fixed term is continued after the expiry of such term it is to be treated as having become a partnership at will.

b Partnership for fixed period

- Purpose is made by a contract for the duration of the Partnership, the Partnership is called Partnership for fixed period.
- This kind of Partnership created only for fixed period
- Such Partnership comes to an end on the expiry of the fixed period

2 with regard to extent of Business

a Particular Partnership

This kind of Partnership made for a prosecution of single adventure as well as for the conduct of continuous business

- where person becomes partner with other in any particular adventure or undertaking the Partnership is called Particular Partnership

- It is dissolved by the completion of the adventure or undertaking

b General Partnership:

- where a Partnership is constituted with respect to the business in general it is called a general Partnership

General Partnership differs from Particular Partnership. Particular Partnership is liability of the partners extends only to that particular adventure or undertaking but is not so in the case of General Partnership.

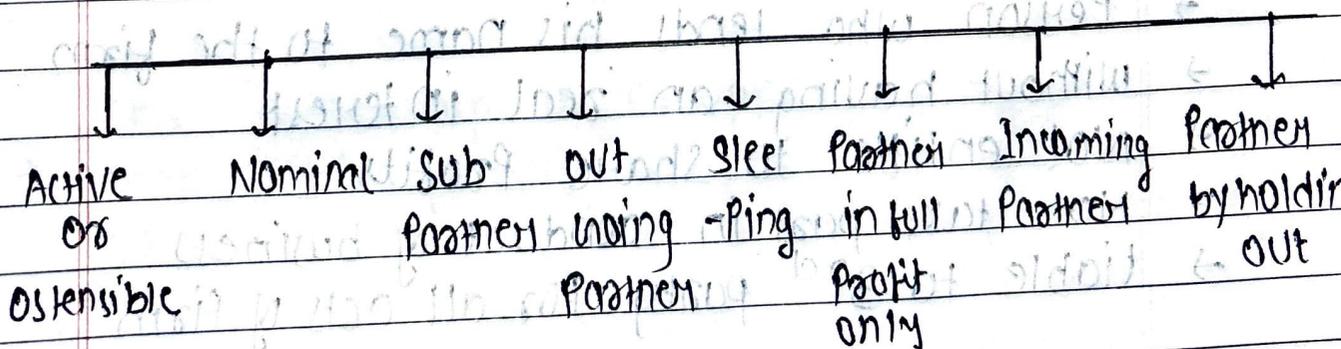
* Partnership Deed

The written document containing the various terms and condition as to the relationship of the partners to each other is called "Partnership Deed".

* Partnership deed contains following info :-

- I Name of the Partnership firm
- II Name of all the partners
- III Nature and place of business firm
- IV Date of commencement of Partnership
- V Capital contribution
- VI Profit sharing Ratio

Types of Partners



1 Active Partner:

- Becomes Partner by agreement
- actively participates in the conduct of P'ship
- Acts as agent of other partners
- must give a Public Notice before or at the time of retirement
- he will not be liable for acts done by other partners after his retirement.

2 Sleeping or Dormant Partners:

- Partner by agreement
- not actively participate in business
- entitled to share profits and held liable to the third party for all acts of firm
- Not required to give Public Notice of their retirement.

3 Nominal Partner

- Person who lends his name to the firm
- without having an real interest
- Not entitled to share profits
- Not take part in conduct of business
- Liable to 3rd party for all acts of firm

4 Partners in Profits only

- entitle to share Profits only
- Not liable for the losses
- Liable to the 3rd party for all acts of the profits only.

5 Incoming Partner

- Admitted as a partner into already existing firm with the consent of all the existing partners
- Not liable for any act of firm done before his admission as a partner.

6 outgoing Partner

- who leaves a firm in which rest of partners continue to carry on business
- liable to third party for all acts of the firm until public notice is given of his retirement.

7 Partners by holding out

- aka Partnership by estoppel
- man holds himself out as a partner or allows other to do it. he is then stopped from denying the character he was assumed and upon the faith of which creditors may be presumed to have acted
- He is liable like a partner in the firm.

* Relation of Partners to one another

1. General duties of Partners: Section 9:-

Partners are bound to carry on the business of the firm to the greatest common advantage

To be just faithful to each other and to render true accounts and full information of all things affecting the firm to any Partner or his legal representative

2. Duty to indemnify for loss caused by fraud: Section 10:-

Every Partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

An act of a Partner imputable to the firm or the Principal of agency which is a fraud on his co-Partners entitles co-Partners to throw the whole consequences upon him

3. Determination of rights and duties of Partners by contract between the Partners: Section 11

The mutual right and duties of Partners of a firm may be determined by contract between the Partners and such contract may be

implied or express by a course of dealing

→ Such contract may vary by consent of all the partners, consent may be express or implied by course of dealing.

→ Agreement in restraint of trade: a partner shall not carry on any business other than that of the firm while he is a partner.

4 The conduct of the Business: Section 12

a every partner has a right to take part in the conduct of the business

b every partner is bound to attend diligently to his duties in the conduct of business

c any difference arising as to ordinary matters connected with the business may be decided by majority of partners and every partner shall have the right to express his opinion before the matter is decided but no change may be made in the nature of business without the consent of all partners

d every partner has a right to access to and inspect & copy any of the books of firm.

e In the event of death of a partner his heirs or legal representative or their duly authorised agent shall have a right of access to and to inspect and copy of the books of firm.

5 Mutual Rights and Liabilities : Section 13

a A partner is not entitled to receive remuneration for taking part in the conduct of business.

b The partners are entitled to share equally to the losses sustained by the firm.

c Where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits.

d A partner making for the purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe is entitled to interest thereon even at the rate of 6% per annum.

e The firm shall indemnify a partner in respect of payment made and incurred liabilities by him

f in the ordinary and proper conduct of the business.

In doing such act, in an emergency, for the purposes of protecting the firm from loss, as would be done by a person of ordinary prudence in his own case under similar circumstances.

F A partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of business of the firm.

Partnership Property: Section 14

All property rights & interest which partners may have brought into the common stock as their contribution to the common business	↓	All property right & interest acquired or purchased by or for the firm or for the purpose & in the course of the business of the firm	↓	Goodwill of the business
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Goodwill

As per Sec 14, the goodwill of the business is subject to a contract between the Partners and to be regarded as property of the firm.

Section 14 does not define the Goodwill.

However, it is defined as the value of the reputation of a business house in respect of profits expected in future over and above the normal level of profits earned by undertakings belonging to the same class of business.

When a partnership firm is dissolved every partner has a right in the absence of any agreement to the contrary to have the goodwill of business sold for the benefit of all the partners.

Goodwill is a part of a firm's property of firm.

It can be sold separately or along with the other properties of the firm.

Any partner may upon the sale of the goodwill of a firm make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits.

Now notwithstanding anything contained in Sec 27 of ICA 1872

Such agreement shall be valid if the restrictions are reasonable.

Property of a Partner:

Where the property is exclusively belonging to a person, it does not become a property of the partnership merely because it is used for the business of the partnership.

Such property will become property of the partnership if there is an agreement.

Application of the property of firm: Sec 15

Subject to contract between the partners the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Personal Profit earned by Partners

Section 16:

a. Subject to contract between the parties for himself from any transaction of firm or from the use of the property or business connection of the firm or the firm name, he shall account for that profit & pay it to the firm.

b If a partner engages on any business of the same nature as and competing with that of the firm he shall account for and pay to the firm all profits made by him in that business

Right & Duties of Partners after change in the firm : Section 17

Following are the situations when there is a change in the constitution of the firm

- 1 Admission of new Partner
- 2 Death or retirement of a partner
- 3 Partnership carries on business other than original one
- 4 Fixed Period Partnership, continued on even after expiry of fixed period.

Partner to be Agent of the firm

Section 18:

Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of firm

Implied Authority of Partner as Agent of the firm : Section 19

The authority of a partner to bind the firm conferred by this section is called his "implied Authority"

Subject of the provision of sec 22: The act of a partner which is done to carry on in the usual way, business of the kind carried on by the firm, binds the firm

2 In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to -

a Submit a dispute relating to the business of the firm to arbitration

b Open a banking account on behalf of the firm in his own name

c Compromise or relinquish any claim or position of a claim by the firm

d Withdraw a suit or proceedings filed on behalf of the firm

e Admit any liability in a suit or proceeding against the firm

f Acquire immovable property ^{on behalf of} belonging ~~to~~ the firm

g Transfer immovable property belonging to the firm

h enter into partnership on behalf of the firm

Mode of doing act to bind firm:

Section 22.

In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name or in any other manner expressing or implying an intention to bind the firm.

Extension & Restriction of Partner's

implied Authority: Sec 20

- The implied authority of a partner may be extended or restricted by contract between the partners.
- Under the following condition, the restriction imposed on the implied authority of a partner by agreement shall be effective against 3rd party.
 - 1) The 3rd Party knows about the restriction
 - 2) The 3rd party does not know that he is dealing with a partner in a firm.

Partners Authority in an Emergency

Section 21: A Partner has an authority,

In an emergency,

To do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence in his own case acting under similar circumstances and such acts bind the firm

Minors Admitted to the benefit of

Partnership : Section 30

Rights

→ A minor partner has a right to his agreed share of the profits of the firm

→ He can have access to inspect and copy the account of the firm

→ He can sue the firm partners for account or for payment of his share but only when severing his connection with the firm and not otherwise

→ On attaining majority, he may within 6 months elect to become a partner or not to become a partner.

→ If ^{he} elects to become a partner, he is entitled to the share to which he was entitled as a minor.

→ If he does not, then his share is not liable for any acts of the firm after the date of the public notice served to that effect.

2. Liabilities:

Before attaining majority

- The liability of the minor is confined only to the extent of his share in the profits and property of the firm.
- Minor has no personal liability for the debt of the firm incurred during his minority.
- Minor cannot be declared insolvent but if the firm is declared insolvent his share in the firm vests in the official Receiver / Assignee.

After Attaining Majority :

Within 6 Months of his attaining majority or on his obtaining knowledge that he had been admitted to the benefit of partnership whichever date is later the minor partner has to decide whether he shall remain a partner or leave the firm

Where he has elected not to become partner he may give public notice that he has elected not to become partner & such notice will determine his position as regards the firm

If he fails to give such notice, he shall become partner in the firm on the expiry of the said 6 months

a when he becomes Partner

- I He becomes personally liable to third parties since he was admitted
- II his share in the property and the profits of the firm remains the same

b when he elects not to become a partner :

- I his rights and liabilities continue to be those of a minor upto the date of giving public notice
- II his share shall not be liable for any acts of firm done after the date of the notice
- III He can sue partners for his share of the property and profit. He shall give notice to the Registrar that he has or has not become a partner.

Effect of Admission by a partner

Section 23: An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm if it is made in the ordinary course of business all liable.

Effect of Notice to Acting Partner: Sec 24

Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm except in the case of fraud on the firm committed by or with the consent of that partner.

Liability of a partner for act of firm:

Section 25: 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.

Liability of the firm for wrongful act of a partner: Section 26

where the wrongful act or omission of a partner

- a In the ordinary course of business of firm
- b with the authority of the partners loss or injury is caused by

Liability of the firm for misapplication by Partner: Sec 27

- a where a partner acting within his apparent authority receives money or property from a third party and misapplies it

[OR]

- b where a firm in the course of its business receives money or property from a third party and money or property is misapplied by any of the partners when it is in the custody of the firm, the firm is liable.

to make good ~~to~~ the loss

Right of transferee of a partner's interest : Sec 29

- 1 A transfer by a partner of his interest in the firm either absolute or by mortgage or by the creation by him of a charge on such interest does not entitle the transferee during the continuance of the firm to interfere in the conduct of the business or to require accounts, or to inspect the books of the firm but entitles the transferee only to receive
- 2 The firm is dissolved or if the transferring partner ceases to be a partner the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled and for the purpose of ascertaining that share to an account as from the date of the dissolution

Introduction of a Partner: Section 31

1. Subject to contract between the partner and to the provision of Sec 31: NO person shall be introduced as a partner into a firm without the consent of all existing partner.

Retirement of a Partner: Sec 32

1. A Partner may Retire:
 - a. with consent of all other partners
 - b. in accordance with an express agreement by partner
 - c. where partnership at will, by giving notice in writing to all other partners of his intention to retire.
2. A Retiring partner may be discharged from any liability to any 3rd party for acts of the firm doing before his retirement by an agreement made by him with such 3rd party and the partners of the reconstituted firm and such agreement may be implied by a course of dealing between the 3rd party and the reconstituted firm after he had knowledge of retirement.

3. Retiring partner and Remaining partner continue to be liable as partners to third parties for any act done by any of them.

Expulsion of a partner: Sec 33

- I The power of expulsion must have existed in a contract between the partners
- II The power has been exercised by a majority of the partners
- III It has been exercised in good faith

If all these conditions are not present then the expulsion is not deemed/considered to be in real/genuine interest of business firm. Expulsion will be null or void if partner is expelled without for the above condition.

Insolvency of a Partner: Sec 34

→ where a partner in a firm adjudicated as insolvent he ceases to be a partner on the date on which the order of adjudication is made whether or not the firm is hereby dissolved.

where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent.

the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent done after the date on which the order of adjudication is made.

Liability of estate of deceased partner :

Section 35 : where under a contract between the partner, the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

Right of outgoing partner to carry on competing business : Sec 36

An outgoing partner may carry on business competing with that of the firm and he may advertise such business but subject to contract to contrary, he may not

- a use firm name
- b represent himself as carrying on the business of the firm
- c solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

Agreement in restraint of trade :(2)

A partner may make an agreement with his partner that on ceasing to be a partner he will not engage on any business similar to that of the firm.

Notwithstanding anything contained in sec 27 of ICA 1872 such agreement shall be valid if restriction imposed are reasonable.

Right of outgoing partner in certain cases to share subsequent profit.

Section 37: Right to share subsequent profit subject to contract

- I claim over profit proportionate to the share or
- II Interest @ 6% per annum

Revocation of continuing guarantee by change in a firm Sec 38

A continuing guarantee given to a firm or to third party in respect of the transaction of a firm is in the absence of an agreement to the contrary, revoked as to future transaction from the date of any change in constitution of the firm.

Registration of firms

Application for Registration sec 58

Statement in the prescribed form starting the following is to be filled with registrar of firms

Firm's name

Place of business

Name of place where business carried on

Date when partners joined the firm

Full name + address

Duration of partnership

Registration: Sec 59

When the registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry in the register which is called register of firms and shall file the statement

Then he shall issue a certificate of registration

Late Registration on payment of Penalty

If the statement of any firm is not sent or delivered to the Registrar within the specified time then firm may be registered on payment to the Registrar of a penalty of one hundred rupees per year of delay

Consequences of Non registration

- I NO suit can be filed by firm or other co partners against third party
- II No relief to partner to set off of claim
- III Aggrieved partner cannot bring legal action against other partner or the firm
- IV Third party can sue the firm

Dissolution of firm

Section 39 Discontinuance of partnership between all the partners of the firm is called as dissolution of the firm

Differences

Dissolution of FIRM

- I It involves discontinuance of business in partnership
- II It involves winding up of the firm & requires realization of asset

Dissolution of Partnership

- It does not effect continuation of business
It only reconstitution of firm
- It involves only reconstitution and requires only revaluation of asset & liabilities of the firm.

3	A firm may be dissolved by the order of the court	Dissolution of partnership is not ordered by the court
4	It necessarily involves dissolution of partnership	It may or may not involve Dissolution of firm
5	It involves final closure of books of the firm	It does not involve final closure of the book of the firm

* Modes of Dissolution (Sec. 40-44)

- 1 Dissolution by agreement (Sec. 40)
- 2 compulsory Dissolution (Sec. 41)
- 3 contingent Dissolution or dissolution by operation of law (Sec. 42)
- 4 Dissolution by notice (Sec. 43)
- 5 Dissolution by court (Sec. 44)

1 Dissolution by agreement Sec. 40

May be dissolved with the consent of all the partners or in accordance with a contract between the partners

Depends on contract

2. Compulsory Dissolution

Section 41

Happening of an event - making partnership business unlawful or partnership unlawful

Example :- A firm is carrying on the business of trading in a particular chemical and law is passed which bans on the trading of this particular chemical

Hence, the business of the firm becomes unlawful and so the firm will have to be compulsory dissolved.

3. Dissolution on the happening of certain contingencies

Section 42 :- Subject to contract between the partners a firm is dissolved

- If constituted for a term by expiry of term
- If constituted for one or more adventures by the completion of that adventure
- By the death of partner, unless contrary contract
- By the adjudication of a partner as an insolvent

3 Dissolution by NOTICE

Sec 43. Dissolution by NOTICE in partnership at will

- 1 Any partner can communicate his intention for dissolution of the firm
- 2 The effective date of dissolution is the date which is mentioned and if no date is given the effective date would be the date of communication

4 Dissolution by court (Section 44)

- a Partner becomes of unsound mind: 44(a)
- b Permanent incapacity: 44(b)
- c Guilty of conduct which affects carrying on the business: 44(c)
- d Wilfully or persistently commits breach of agreement: 44(d)
- e Transfer of whole of his interest in the firm to the third party
- f Loss in the business
- g Any other ground which makes dissolution just and equitable

consequences of Dissolution (Section 45-55)

- 1 Liability for the acts of the partners done after dissolution (Section 45)

until public notice for dissolution has been given the partners and the firm continues to be liable

towards the third party

1. The estate of a deceased partner, partner not known to the third party dealing with the firm (dormant partner), insolvent partner would not be liable for subsequent acts even if no notice of dissolution is given

2. Notice can be given by any partner

2. Right to have business wound up after dissolution (Sec 46)

Right to clear the debts and appropriate the surplus among partners or their representatives

3. continuing authority of partners for the purpose of winding up (Sec) 47

It is held - a mere dissolution does not bring about a complete extinction of the firm, which continues till the liability of the firm are not paid, no partner can claim any particular property of or his share in assets

4 Mode of Settlement of account between Partners (Sec 48)

a losses, including deficiencies of capital, to be paid

Payment first by profit • capital • Personal asset in proportion to share

b The asset of the firm to be applied as:

- Third party entitlement • Partner's entitlement apart from share contribution • Towards entitlement as per capital of the partners • The residue is to be divided among the partners in PSR

5 Payment of firm debts and separate debts - Sec 49

1 Property of the firm shall be applied in payment of firm debt and if any surplus is there, then share of each partner shall be applied to the payment of his separate debt

2 Separate property of any partner shall be applied first in the payment of his separate debt and if any surplus it should be used for payment of firm debt.