CHAPTER II – THE NATURE OF PARTNERSHIP

4. Definition of partnership, partner, firm and firm name

5. Partnership not created by status

6. Mode of determining existence of partnership

7. Partnership at will

8. Particular partnership

4. Definition of partnership, partner, firm and firm name

Persons who agree to share the profits of a business carried on by all or any of them acting for all shall be partners, collectively a firm, and shall carry on business under the firm name.

> "Partnership" 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. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name".

Section 4 of the Indian Partnership Act, 1932 defines partnership as a relation, and it exists only when four elements are present together. First, there must be an agreement between two or more persons, because partnership arises from contract and not from status; members of a Hindu Undivided Family running a family business are therefore not partners merely because they belong to the family (s. 5). Second, the agreement must be to carry on a business, which includes every trade, occupation and profession (s. 2(b)). Third, the parties must agree to share the profits of that business, although sharing of losses is not essential to the definition. Fourth, the business must be carried on by all of them or by any of them acting for all. This element of mutual agency is the real test of partnership: each partner is a principal bound by the acts of the others and also an agent able to bind them by acts done in the ordinary course of the firm's business. Sharing of profits alone is not conclusive, since under s. 6 the existence of a partnership depends on the real relation between the parties, judged from all relevant facts taken together, as was also held in the English case of *Cox v Hickman* (1860). Accordingly, a lender, an employee or a landlord who is paid out of profits does not become a partner for that reason alone. The section also supplies the terms used for the parties: the individuals are

"partners", together they are a "firm", and the name under which they carry on business is the "firm name". A firm in India is not a separate legal person but only a collective name for the partners. For example, if A, B and C agree to run a garment shop called "Fashion Point" and to divide the profits equally, each being entitled to buy stock and deal with customers on behalf of all, they are partners, together they form a firm, and "Fashion Point" is the firm name; if A orders stock from a supplier in the ordinary course of the business, B and C are equally bound to pay for it, because A acted for all. By contrast, if D lends ₹2 lakh to the shop and is repaid out of its profits but has no authority to act for the business, D is not a partner, because there is no mutual agency; similarly, two brothers who inherit and run their father's shop as members of an HUF are not partners unless they agree to become partners.

5. Partnership not created by status

Partnership shall arise only from a contract, and not from status.

> The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business.

Section 5 of the Indian Partnership Act, 1932 follows from s. 4, which 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. Because that definition rests on agreement, a partnership exists only where the persons concerned have actually agreed to become partners. Birth, marriage or family relationship does not create one, even where people share the profits of a common business. The section gives two examples. The first is members of a Hindu undivided family (HUF) carrying on a family business. They get their interest by birth under Hindu law, so they are coparceners, not partners. That is why the business is managed by the karta, a minor can hold an interest from birth, the death of a member does not dissolve the business, and coparceners other than the karta are not personally liable for business debts beyond their share in the joint family property. All of these differ from the rules for partners under ss. 25, 30 and 42. The second example is a Burmese Buddhist husband and wife carrying on business together, whose relationship came from their marital status

under their personal law. That example is a relic from when Burma was part of British India. Section 5 does not stop family members from becoming partners by a genuine agreement. A karta may also enter into a partnership with outsiders, or with family members in their individual capacity, though the HUF itself does not become a partner (*CIT, West Bengal v. Kalu Babu Lal Chand*, AIR 1959 SC 1289). For example, R, the karta of an HUF, runs the ancestral cloth shop, and his two adult sons and minor grandson share its income as coparceners. None of them is a partner, because their rights come from birth and not from agreement, and the business continues unaffected when one son dies. But if R's two adult sons sign a deed with an outsider, T, to run a new garment business and share its profits, a partnership arises from that contract. The sons then hold rights and liabilities as partners in their personal capacity under the Act.

6. Mode of determining existence of partnership

Whether a group of persons is a firm, or a person is a partner, shall be determined by the real relation between the parties as shown by all relevant facts taken together.

> In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.
>
> Explanation 1. 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 persons partners.
>
> Explanation 2. The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business; and in particular, the receipt of such share or payment
>
> (a) by a lender of money to persons engaged or about to engage in any business,
>
> (b) by a servant or agent as remuneration,
>
> (c) by the widow or child of a deceased partner, as annuity, or
>
> (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business.

Section 6 of the Indian Partnership Act, 1932 tells the court how to decide whether a partnership exists. It is not enough that the parties call themselves partners, or deny being partners, in a document. The court looks at the substance of the relationship, taking all the relevant facts together: the terms of any agreement, how the business is actually run, who shares in profits and losses, and whether the business is carried on by all of them or by any of them acting for all. This last point, mutual agency, is the central test, because s. 4 defines partnership as a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The two Explanations warn against treating profit-sharing alone as proof of partnership. Under Explanation 1, co-owners who share the profits or gross returns of jointly held property, such as joint owners of a building who divide its rent, do not become partners only because of that sharing. Under Explanation 2, receiving a share of the profits of a business, or a payment that depends on or varies with its profits, does not by itself make the receiver a partner. The Explanation gives four common cases: (a) a lender who receives interest linked to profits, (b) an employee or agent paid a commission on profits, (c) the widow or child of a deceased partner receiving an annuity out of profits, and (d) a former owner of the business receiving a share of profits as the price for selling its goodwill. In each case the person shares in profits but is not a partner unless the other facts show a true partnership, especially mutual agency. For example, R lends ₹5 lakh to S and T, who run a garment shop, on the terms that instead of fixed interest R will receive 10% of the yearly profits. R takes no part in the business and has no authority to bind S and T. Despite sharing profits, R is only a lender under Explanation 2(a), not a partner, and is not liable for the firm's debts. If, however, R also took part in managing the shop, signed contracts with suppliers on the firm's behalf, and agreed to bear a share of losses, the facts taken together could show that the business was carried on by all three acting for each other, making R a partner. Similarly, if U and V jointly own a godown and share its rent equally, they are co-owners under Explanation 1, not partners.

7. Partnership at will

A partnership shall be a partnership at will where the partners' contract makes no provision for its duration or for its determination.

> Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is partnership at will.

Section 7 of the Indian Partnership Act, 1932 sets out when a partnership is "at will", meaning it may be ended at the wish of any partner. Two conditions must both be met. First, the agreement must not fix a period for which the partnership is to last, such as five years. Second, it must not provide any mode or event for its determination, such as the completion of a project or the happening of a stated event. If the partners have provided for either, the partnership is not at will. The provision may be express or implied from the terms, conduct and circumstances of the case. The main consequence is that the partnership has no fixed life. Under s. 43(1), any partner may dissolve a partnership at will by giving written notice to all the other partners. Under s. 32(1)(c), a partner may retire from it by giving written notice of an intention to retire. A partnership at will is different from a partnership for a fixed term (s. 17(b)) and from a particular partnership formed for a single venture or undertaking (s. 8), because each of those carries its own limit on duration. A fixed-term partnership that continues after the term expires without a new agreement is presumed to become a partnership at will (s. 17(b)). For example, A, B and C agree to carry on a cloth business in Patna and share the profits equally. Their deed fixes no period and states no event on which the firm will end. This is a partnership at will, so C may dissolve the firm at any time by giving A and B written notice of his intention to dissolve it. If instead the deed said the partnership would last five years, or would end when a particular government supply contract was completed, it would not be a partnership at will, because the parties had provided for its duration or its determination.

8. Particular partnership

A partnership may be formed for a particular adventure or undertaking.

> A person may become a partner with another person in particular adventures or undertakings.

Section 8 of the Indian Partnership Act, 1932 recognises that persons need not join together for a general or continuing business. They may form a partnership only for a single venture or a specific project. This is called a

particular partnership. It is a true partnership within s. 4, so all the ordinary incidents of partnership apply. Each partner is an agent of the firm for acts done in the usual way of carrying on that venture (ss. 18 and 19), and all partners are jointly and severally liable for acts of the firm done while they are partners (s. 25). The partnership is limited to the particular adventure, however, and so is the authority of the partners: an act unconnected with that venture does not ordinarily bind the others. If the partners go on to carry out other adventures or undertakings, their mutual rights and duties in those are presumed to be the same as in the original one, unless they agree otherwise (s. 17(c)). Unless the partners have agreed otherwise, the partnership is dissolved when the venture is completed (s. 42(b)). For example, A and B, who otherwise run separate businesses, agree to jointly build and sell a single residential building on a plot in Patna and to share the profits equally. This is a particular partnership. If A, in the course of that project, buys cement on credit for the building, B is also liable to the supplier, because the purchase falls within the scope of the venture. But if A buys a truck for his own transport business, B is not bound by it. Once the flats are sold and the accounts are settled, the partnership comes to an end under s. 42(b) unless A and B agree to continue.