

## LECTURE III

### THE NATURE OF PARTNERSHIP

#### I. Definitions of Partnership.

Definition of partnership in I. P. A.— derivative meaning of partnership. I. P. A. compared with E. P. A. Section, if an improvement on the English Statute.

Nineteen definitions of partnership in four languages—distinction between a partnership and a firm. Sir Frederick Pollock's definition in his Digest of Partnership. The wording in I.P.A. based on Kent's definition. A departure from the old definition in the new Act, definitions of partnership considered.

Elements of partnership found by the Special Committee—elements as propounded by Hon'ble Mr. Justice Sir Ashutosh Mukerjee<sup>1</sup>

#### II. Essentials of Partnership.

Analysis of the definition in the Indian Partnership Act IX of 1932<sup>2</sup>.

##### A. Contractual Relation between Persons.

##### B. The business to be carried on by all or any of them acting for all.

##### C. Agreement to share the profits of a business—third requisite.

As to A. **Contractual relation between persons.**

(a) Persons—natural and artificial.

(b) Competency of contract—persons capable of entering into contracts of partnership.

##### *Disability.*

(1) In case of natural persons.

(i) Minors.

(a) If a minor in India has a right to become a partner by contract<sup>3</sup>;

(b) if he could be admitted to the benefits of partnership<sup>4</sup>;

(c) if Section 184 of I. C. A. violated by admitting a minor to partnership<sup>5</sup>;

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(1) William Rowe v. Lewis Pugh 39 C. L. J. 537 at p. 552.

(2) Pooley v. Driver 15 Ch. D. 472.

(3) Sannyasi Charan Mondal v. Krishnadhan Banerjee  
49 I. A. 108, 114-15.

(4) Jaffar Ali Bhaloo v. Standard Bank of South Africa  
30 Bom. L. R. 762.

(5) The Official Assignee of Madras v. Palaniappa  
41 Mad. 824, 827.

- (d) if admission makes a minor a partner<sup>1</sup>;
  - (e) reasons why a minor may be admitted to partnership;
  - (f) can a guardian enter into partnership for a minor<sup>2</sup>;
  - (g) a minor's position in the firm<sup>3</sup>;
  - (h) minor's position before and after attainment of majority<sup>4</sup>;
  - (i) if a minor can be adjudged insolvent for partnership debts<sup>5</sup>;
- (ii) Lunatics.
- (a) lunacy at the time of entering into contract of partnership—contract, if void<sup>6</sup>—English law<sup>7</sup>;
  - (b) effect of subsequent lunacy;
  - (c) burden of proof in case a plea of lunacy taken<sup>8</sup>.
- (iii) Idiots—  
if competent to be partners.
- (iv) Alien enemies—
- (a) Competency of contract of partnership with alien enemies.
  - (b) Effect of subsequent declaration of war on already existing partnerships—subsequent performance, if discharged<sup>9</sup>.
  - (c) If nationality or place of residence or of carrying on of business is the test of enemy status - recent cases<sup>10</sup>.
  - (d) Commercial transactions carried on by British-subjects in enemy country how treated<sup>11</sup>.
- (v) Foreign sovereigns and ambassadors—
- (a) Competency of partnership contract with them.
  - (b) Remedies if available against them<sup>12</sup>.
- (vi) Foreign subjects.

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- (1) *Lowell and Christmas v. Beauchamp* (1894) A. C. 607, 611.
  - (2) *Inspector Singh v. Kharak Sing I. L. R.* 50 All. 776, 785.
  - (3) *Shankar v. Daooji Missir* 58 I. A.
  - (4) *Goode v. Harrison* (1821) 106 E. R. 1147.
  - (5) *Exparte Jones* (1888) 48 Ch. D. 109, 119, 123, 125.
  - (6) *Jagat Chandra Bhattacharjee v. Gunny Hajee Ahmed*  
53 Cal. 24, 226, 235.
  - (7) *Drew v. Nunn* (1871) 4 Q. B. D. 661, 666, 668.
  - (8) *Hall v. Warren* 32 E. R. 738.
  - (9) *Madhoram v. G. C. Sett.* 21 C. W. N. 670.
  - (10) *Ertel Bieber v. Rio Tinto* (1918) 260, 273-274, 277, 279-283  
etc. ;  
*Rodriguez v. Speyer Bros* (1919) A. C. 59;  
*Hugh Stevenson & Sons v. Aktiengesellschaft* (1918) A. C.  
239.
  - (11) *Johnstone v. Pedlar* (1921) A. C. 263.
  - (12) *In re Bolivia Syndicate* (1914) 1 Ch. 139, 142, 150 and S. 84-  
87 C. P. C.

**(viii) Women—**

Femi-sole and married women.

- (a) If an Indian woman has a right to enter into a contract of partnership.
- (b) If a married woman in India can be a partner with her husband<sup>1</sup>.
- (c) Her position under the English law with regard to her separate property<sup>2</sup>.
- (d) If a married woman can be adjudicated insolvent on her independent contract in England and India.
- (e) The law of partnership is not applicable to Burmese Buddhist husband and wife<sup>3</sup>.
- (f) Pardanashin ladies—if can be dormant or active partners<sup>4</sup>.

**(viii) Convicts and felons—outlaws.**

- (2) In case of artificial persons.
  - (i) Corporations—companies.
  - (ii) Idols and Thakurs etc.
- (3) Quasi-legal persons.
  - (i) Firms.
    - (a) Partnership between a firm and other persons if possible under the new Act<sup>5</sup>.
    - (b) Partnership between firms and a joint Hindu family<sup>6</sup>.
    - (c) Legal consequence of such combination<sup>7</sup>.
    - (d) If the old cases are good law under the new Act.
  - (ii) Unregistered associations.
  - (iii) Clubs.
  - (iv) Castes etc.—if can enter into partnership.

**(c) Relation between Persons.**

- (x) Difference between relation of persons and association.
  - (i) Import and derivation of the word “relation”.
  - (ii) Why the Indian statute retained that word.
- (y) Relation between persons recognised by law<sup>8</sup>.
- (z) The relation means business relation.  
Business the first requisite.

(1) *In re Ambalal Sarabhai* A. I. R. 1924 Bom. 182.  
 (2) *Butler v. Butler* B. D. 376  
 (3) *U. Pe v. U. Maung* 63 M. L. J. 167 P. C.  
 (4) *Gokuldas v. Sashimukhi* 16 C.W.N 29.  
 (5) *Mt. Basanti v. Babulal* A. I. R. 1931 A. 225 ; *Watson v. Haggit* (1928) A. C. 127.  
 (6) *Sheodoyal v. Jaharmull* I. L. R. 50 Cal 549.  
 (7) *Kader Bux v. Bukt Behari* 36 C. W. N 489.  
 (8) *Louis Dreyfus & Co. v. Purusottam Das Narayan Das* I. L. R. 47 Cal. 29.

- (i) Relations, or associations between persons whose object is not business are hereby excluded.
- (ii) Instances of associations thus excluded.

As to **B. The business to be carried on by all or any of them acting for all.**

- (a) "**Business**"—**what it means.** Its definition in the I. P. A. and E. P. A.<sup>1</sup>  
Marshall's definition of business. Definition in the Income Tax Act.
- (b) Management.
  - (1) Responsibility for the supply of capital and labour and their co-ordination.
    - (i) Capital subscribed, advanced and borrowed by partners<sup>2</sup>.
    - (ii) Labour supplied wholly or partly by partners themselves specially for management.
- (c) **Management joint or common.**
  - (i) Difference between the two. True *test* of a common business carried on by all or on behalf of the alleged partners.<sup>3</sup>
  - (ii) Relation between persons created for management of business<sup>4</sup>.
  - (iii) Dormant or sleeping and active partners<sup>5</sup>.  
Difference between a dormant partner under Eng. Ltd. Part. Act. and under the Indian Law.

Common management involves

- (i) Responsibility to all and mutual.
- (ii) Liability for fraud and wilful neglect.
- (iii) Observance of due diligence.
- (iv) Liability to render true account and full information.
- (v) Duty to be just and faithful.
- (vi) Greatest common advantage to be kept in view.

Partnership constituted when parties have agreed to carry on business and to share in profits in some way in common.<sup>6</sup>

Acting for all—what it means<sup>7</sup>—each partner to be a principal as well as agent<sup>8</sup>.

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(1) *Smith v. Anderson* 5 Ch. D. 158, 247.  
 (2) *Jaffer Ali v. Standard Bank* 47 C. L. J. 292 P. C.  
 (3) *Amba Das v. Kasabai* 89 I. C. 283.  
 (4) *Rowe v. Wood* 2 Jact & W. 558.  
 (5) *Holme v. Hammond* (1872) L. R. Ex. p. 233.  
 (6) *Pooley v. Driver* (1876) 5 Ch. D. 458; *Mallow, March and Co. v. Court of Wards* (1872) 10 B. L. R. 312, 18 W. R. 384 P. C. and *Ramanath v. Pitamber* 21 C. W. N. 632 at p. 634.  
 (7) *Protap Chandra v. Mallow, March & Co.* 12 W. R. 58 on appeal to P.C. 18 W. R. 384.  
 (8) *Cox v. Hickman* 8 H. L. C. 268.

## Distinction between

- (i) a partner and a manager ;
  - (a) if a manager may be a partner as well<sup>1</sup>.
- (ii) Between a partner and a working partner.
- (iii) Between a partner and a gomastha.
  - (a) When a gomastha may be a partner<sup>2</sup>.
  - (b) If partners can agree to draw a salary instead of a share in the profits<sup>3</sup>.
- (iv) Distinction between a partner and a creditor sharing in the profits.
  - (a) When a creditor may be a partner.
  - (b) Large powers of control, if enough.
  - (c) Power to direct transaction, if essential<sup>4</sup>.
  - (d) Partner assuming the cloak of a creditor and creditor assuming the cloak of a partner—how to be determined<sup>5</sup>.
  - (e) If it may be used to evade other laws<sup>6</sup>.
  - (f) True nature of Muthalalis in a Labbai or Ejman partnership in Madras Presidency, if creditors<sup>7</sup>.
- (v) Distinction between a partner and a landlord sharing in profits.
  - (a) When a landlord can be a partner<sup>8</sup>.
- (vi) Assignment of a share in business, if creates partnership<sup>9</sup>.
- (vii) Partnership in benami, if possible in India.
- (x) Ostensible partnerships.
- (y) Holding out and rights and liabilities therefor<sup>10</sup>.
- (z) If it creates partnership<sup>11</sup>.

As to **C. Agreement to share the profits of a business—third requisite.**

- (a) Significance of the word "Share".
1. Relation constituted by agreement and not by status<sup>12</sup>.
    - (a) Hindu undivided family business has many but not all the elements of a partnership<sup>13</sup>.

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(1) *Ramdoyal v. Junmejoy* I. L. R. 14 Cal. 793.  
 (2) 44 I. C. 283.  
 (3) *Raghunandan v. Harmasji* I. L. R. 51 Bom. 342.  
 (4) *Nutus v. Irving* (1824) Turn and R 496, 525.  
 (5) *Bhagugal v. De Gruyther* I. L. R. 4 All. 74.  
 (6) *Bloxham v. Pell* 1 W. M., Blacks 999.  
 (7) In the matter of *Abdul Rahiman Sahib & Co. (insolvents)* I. L. R. 51 Mad. 308.  
 (8) *Sree Munjari Dasse v. Poorsottum Das* 9 W. R. 499.  
 (9) *Redpath v. Wigg* L. R. 1 Ex. 335.  
 (10) *Harrison v. Delhi and London Bank* 4 All. 437.  
 (11) *Waugh v. Carver* 14 R. R. 845.  
 (12) *Haji Noor Mahomed v. Macleod* 9 Bom. L. R. 274.  
 (13) *Samabhai v. Som swar* I. L. R. 5 Bom. 38.

- (b) Joint trade in a Burmese Buddhist family<sup>1</sup>—
  - (i) partnership between husband and wife when constituted by agreement<sup>2</sup>;
  - (ii) if English law allows such partnership<sup>3</sup>.

2. Agreement as defined in the Indian Contract Act.

It requires

- (a) promises express or implied<sup>4</sup>
- (b) competency of parties
- (c) lawful consideration
- (d) free consent.

3. Legality of business.

- (i) *What constitutes illegal partnership.*
  - (a) forbidden by law<sup>5</sup>;
  - (b) if permitted, would defeat the provisions of any law<sup>6</sup>;
  - (c) to defraud people;
  - (d) if involves or implies injury to the person or property of another<sup>7</sup>;
  - (e) for immoral purposes;
  - (f) against public policy<sup>8</sup>;
  - (g) prohibited by government notification<sup>9</sup>;
  - (h) prohibited by rules of a government office<sup>10</sup>;
  - (i) partnership for carrying on trade with an alien enemy<sup>11</sup>;
  - (j) public policy opposed to trading with enemy<sup>12</sup>.
- (ii) *Some partnerships on the border line.*
  - (a) partnership to take license to conduct a toddy shop<sup>13</sup>;
  - (b) partnership amongst bookmakers<sup>14</sup>;
  - (c) partnership to execute government contract<sup>15</sup>.
- (iii) *Some partnerships not illegal at the outset may be so afterwards.*
  - (a) partnership *ipso-facto* dissolved when one of the partners becomes an alien enemy<sup>16</sup>.

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- (1) *Ma Paing v. Maung* 5 Rang 296 (F. B.) and the decision of the Judicial Committee in *U. P. v. U. Maung* 63 M. L. J. 167 thereon.
  - (2) *In re Ambalal* 1924 Bom. 182.
  - (3) *Butler v. Butler* 16 Q. B. D. 374.
  - (4) *Mirza Mal Bhagwan Das v. Rameswar* I. L. R. 51 A. 827.
  - (5) *Mirza Mal Bhagwan Das v. Rameswar* I. L. R. 51 All. 827.
  - (6) *Behari Lal v. Jagadish* I. L. R. 31 Cal. 798.
  - (7) *Everet v. Williams* (1787).
  - (8) *Nalam v. Seth Badrinath* 35 Mad. 582.
  - (9) *Fazal Muhammad v. Ata Mahammad* 11 Lah. S.
  - (10) *Sahib Ram v. Nagernul* 63 P. R. 1884
  - (11) *Janson v. Driefontein* A. C. 484, 505.
  - (12) *In re Hithes* (1917) 1 K. B. 48
  - (13) *Narayan v. Subrahman* 114 I. C. 655.
  - (14) *Jeffrey v. Bamford* (1921) 1 K. B. 351 and *Leicester v. S. P. Mullick* 27 C. W. N. 442
  - (15) *Mukala Venkatanandam v. Immudisetty Dhanuraju* A. I. R. 1919 Mad. 689.
  - (16) *Rodriguez v. Speyer Bros.* (1919) A. C. 59.

4. **Consideration** for partnership :

- combining (i) property  
(ii) labour or  
(iii) skill

in some business<sup>1</sup>—the indicia of it<sup>2</sup>.

- (a) It is in the definition in the I. C. A. Reason for omission in the new Act.  
(b) Nature of contribution of each partner.  
(c) If each partner need contribute each of the three<sup>3</sup>.  
(d) Contribution of capital, labour and skill by different partners, if permissible<sup>4</sup>.

5. **Free consent.**

Consent not free when caused by

- (a) fraud,  
(b) misrepresentation,  
(c) undue influence,  
(d) coercion, and  
(e) mutual mistake as to facts in partnership contracts.

6. **Grounds for avoiding agreement of partnership.**

- (a) Partnership without consideration, if void.  
(b) An agreement without any stipulation to share profits, if void.  
(c) Agreement to bear losses merely but no profit, if partnership<sup>5</sup>.  
(d) If parties to determine sufficiency of consideration<sup>6</sup>.

7. **Essentials of partnership agreement**—view of the Special Committee. Some cases<sup>7</sup>.

1. Formal agreement, if necessary<sup>8</sup>.
2. Carrying on of a business in the absence of a written agreement, if enough<sup>9</sup>.
3. Parol agreement, if sufficient.
4. In case of large and complicated undertakings, if partnership agreement to be drawn up.
5. Relations of the parties how to be governed in the absence of a written agreement.

(1) *In re Ambalal* 25 Bom. L. R. 1225.

(2) *In re Exparte Dalhousie*.

(3) Halsbury Vol. 22 p. 4, para 2.

(4) *Ghure Ram Nure Ram v. Mohanumad Yusuf A. I. R.* 1928 All. 549.

(5) *Raghunandan v. Hormasji I. L. R.* 51 Bom. 342.

(6) *Dale v. Hamilton* 71 R. R. 127.

(7) *William Rowe Rae v. Lewis Pugh* 39 C. L. J. 537 at p. 552 and *Vadhval v. Khusal I. L. R.* 27 Bom. 157.

(8) *England v. Curling* 8 Bead. 129.

(9) *Lakshmi Sankar v. Matiram* 6 Bom. L. R. 1106.

*Essex v. Essex* 109 R. R. 490.  
*Forster v. Hale* 4 R. R. 128.

6. If specific performance of an agreement to enter into partnership granted by Court against unwilling person<sup>1</sup>.
8. **Articles of partnership** - how to be drawn up—usual clauses in a partnership deed.
9. **Forms of partnership agreement.**  
Stamp necessary for such a deed—registration if necessary—registration if enough under the new Act.
10. **Articles how may be varied.**
  - (a) Variation if may be implied by a course of dealing in the absence of a written agreement ;
  - (b) instances of such variation<sup>2</sup>.
11. **Duration of partnership.**
  1. Duration of partnership, if to be fixed by articles.
  2. Partnership may be for
    - (a) a single adventure or undertaking,
    - (b) particular adventures or undertakings,
    - (c) a continued business for several years.
  3. Automatic cessation of partnership.
  4. Procedure for determining partnership.

### III. **Mode of determining the existence of partnership.**

1. *Distinction between a co-owner and co-partner*<sup>3</sup>.
  - (i) *Sharing*
    - (a) gross returns<sup>4</sup>
    - (b) net profits
 if constitutes partnership.
  - (ii) Co-owners of a ship when partners<sup>5</sup> or and when not<sup>6</sup>.
  - (iii) An agreement to share trees in a forest, if constitutes partnership<sup>7</sup>.
2. *Receipt of a share of profits of a business if evidence of partnership*<sup>8</sup>.—Lord Lindley's view—
  - (a) A money-lender sharing profits in lieu of interest in a business, if a partner<sup>9</sup>.

(1) *Scott v. Raymond* 7 Eq. 112.

(2) *Sk. Peer Mahomed v. Nckjan* 25 W. R. 49 and *Karamali v. Vora* 19 C. W. N. 337 P. C.

(3) *French v. Styring* 140 E. R. 455.

(4) *Suflon & Co. v. Grey* (1894) Q. B. 285, 291.

(5) *Venamati v. Bollaragadu* I. L. R. 41 Mad. 939.

(6) *Helnee v. Smith* (1831) 7 Bing. 709.

(7) *Abdulla v. Allah Diya* I. L. R. 8 Lah. 310 ; *Reid v. Hollinshed* 4 B. & C. 86 ; *Kēy v. Johnston* 21 Beav. 536 and *Cooper v. Eyre* 2 R. R. 707.

(8) *Cox v. Hickman* (1860) 8 H. L. C. 268.

(9) *Mollores, March & Co. v. Court of Wards* 10 B. L. R. 312, 52 M. L. J. 303.

- (b) Agent or servant receiving a share of the profits as their remuneration, if partner<sup>1</sup>.
  - (c) A servant's remuneration varying with profit, if he be a partner<sup>2</sup>.
  - (d) A manager receiving a salary and commission on net profits, if a partner.
  - (e) Vendor of a business receiving a share of profits for the balance outstanding, if partner<sup>3</sup>.
  - (f) Such a vendor receiving a share of profits in lieu of purchase money, if partner.
  - (g) Widow or child of a deceased partner receiving a share of profits as annuity, if partner<sup>4</sup>.
  - (h) Merchants advancing money or goods to builders for payment out of the profits, if partners<sup>5</sup>.
3. *Sharing of losses as well as profits, if conclusive evidence of partnership*<sup>6</sup>.
- (a) Partnership if possible without sharing losses<sup>7</sup>.
  - (b) Agreement to share losses if essential for partnership<sup>8</sup>.
4. *Intention of the parties is the guiding principle*<sup>9</sup>.
- (a) Real intention of the parties to be gathered from all relevant facts taken together<sup>10</sup>.
  - (b) Intention to be gathered from the contract read as a whole<sup>11</sup>.
  - (c) True test of partnership as laid down by Hon'ble Sir M. N. Mukerji<sup>12</sup>.
  - (d) Evidentiary value of statements filed before Registrar in case of registered firms.
  - (e) Extracts of the Register if evidence.
  - (f) Evidence admissible in case of unregistered firms.
5. *When unregistered partners can prove their right.*
- (a) How partnership to be proved.
  - (b) Facts relevant in such cases.

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(1) *Thomson Bros & Co. v. Amis* (1917) 2 Ch. 211.  
 (2) *Moula Bux v. Muhammad Afzal* 69 I. C. 781.  
 (3) *Hawksley v. Outram* (1892) 3 Ch. 359.  
 (4) *Holyland v. De Munder* 3 Mer.  
 (5) *Kilshaw v. Jukes* 8 L. T. 287.  
 (6) *Walker v. Hirsch* (1884) 27 Ch. D. 460.  
 (7) *Brown v. Tupscott* 9 L. J. Ex. 139 ; *Bond v. Pittard*  
 49 R. R. 638.  
 (8) *Raghunandan v. Hormasji* I. L. R. 51 Bom. 342.  
*Adam v. Newbigging* (1888) 13 A. C. 308 at p. 315.  
 (9) *Kelly's Directories Ltd. v. Gavin and Lloyds* (1902)  
 1 Ch. 630 C. A.  
 (10) *Mollows, March & Co. v. Court of Wards* (1872) + P. C. +19 ;  
*Pooley v. Driver* (1876) L. R. 5 Ch. D. 472.  
 (11) *Raghunmal v. Official Assignee* 28 C. W. N. 34.  
 (12) *Abdul Latif v. Gopeshwar* 56 C. I. J. 177 at p. 178.

- 6 *Legal position of firm under the new Act.*
- (a) Distinction between the status of a firm under the English and the Indian Act.
  - (b) Mercantile view of a firm as distinguished from the legal view.
  - (c) Lord Lindley's view regarding legal position of a firm under the English law.
  - (d) Framers of the Indian Act, if influenced by the Scotch view.