Drafting of Deed of Partnership

Before we proceed for drafting of any Deed of Partnership, it is necessary to know the following laws:

1. The Indian Partnership Act
2. The Income Tax Act
3. The Contract Act
4. The Stamp Act

What are the elements of Partnership?

The definition of Partnership contains three elements.

1. There must be an agreement entered into by all the persons concerned
2. The agreement must be to share profits as well losses of a business
3. The business must be carried on by all or any of the persons concerned, acting for all.

Section 4 of Indian Partnership Act defines Partnership –

Section 5 states that the relation of partnership arises from contact and not from status and in particular members of Hindu Undivided Family carrying on the family business as such or Burmish Buddhist husband and wife carrying on business as such are not partners in such business.

Section 6 deals with the mode of determining existence of partnership and the main ingredient is that regard should be held the real relations between the parties, as shown by all relevant facts taken together.

Section 7 deals with Partnership At Will – where no provision is made by contract between the partners for (a) duration of their partnership or (b) for determination of their partnership – is partnership at Will. Such a partnership can be dissolve by any partner at will by giving notice.

Section 8 deals with particular partnership – a person may become a partner with another person in particular adventures or undertakings, in such a case the partnership comes to an end or determines on the completion of the adventure or the undertaking.

Section 9 deals with general duties of the partner. – the main ingredient is that each partner is to be just and faithful to each other, to render true accounts and full information of all things affecting the firm to any partner, his heirs or legal representatives.

Section 10 deals with duty to indemnify for loss caused by fraud in the conduct of the business of the firm.

Section 11 deals with the rights and duties of the partners

Section 12 deals with the conduct of the business which is always subject to the contract between the partners, (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 the business (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of partners, an every partner shall have a right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all partners. (d) every partner has a right to have excess to and inspect and copy any of the books of the firm and (e) in the event of the death of the partner, his heirs or legal representatives or duly authorized agents shall have a right of access to inspect and copy any of the books of the firm.

Section 13 deals with mutual rights and liabilities which is also subject to the contract between the partners (a) a partner is not entitled to receive remuneration for taking part in the conduct of the business (b) the partners are entitled to share equally in the profits earned and shall contribute 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 the profits. (d) a partner making for the purpose of the business any payment or advance beyond the amount of capital he has agreed to subscribed, is entitled to interest thereon @ 6% per annum. (e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him in (i) in ordinary and proper conduct of the business and in doing such act in an emergency for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence in his own case under similar circumstances and (f) the Partner shall indemnify the firm for any loss caused to act by willful neglect in the conduct of the business of the firm

Under Section 18 a partner is an agent of the firm for the purpose of the business of the firm.

Section 19 deals with the implied authority of partner as an agent of the firm. (1) Subject to the provisions of Section 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.

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

(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 bank account on behalf of the firm in his own name

© compromise or relinquish any claim or portion of a claim by the firm

(d) withdraw a suit or proceeding filed on behalf of the firm

(e) admit any liability in a suit or proceeding against the firm

(f) acquire immoveable property belonging to the firm or

(g) transfer immoveable property belonging to the firm or

(h) enter into partnership in behalf of the firm

Chapter 5 deals with the incoming and outgoing partners

Under Section 31 subject to the contract between the partners and to the provisions of Section 30, no person shall be introduced as a partner into a firm without consent of the existing partners and under Section 80 the incoming partner does not become liable for any act of the firm done before he became a partner subject to the contract to the contrary.

Section 32 deals with retirement of partner

The partner may be retired (a) with the consent of all the partners (b) in accordance with the express agreement by the partners or (c) where the Partnership is at will by giving notice in writing to all the partners of his intention to retire.

Also speaks of giving public notice of retirement otherwise the retiring partner and the partners shall continue to be liable as partner to the third parties for any act done by any of them which would have been an act of the firm if done before the retirement.

Section 33 deals with the expulsion of the partner. – a partner may be expelled from a firm by any majority of the partners save in the exercised in good faith of the powers conferred by contract between the partners, in such a case the provisions of section 32, 2, 3 and 4 shall applied to an expelled partner as if the retired partner.

Section 34 deals with the insolvency of a partner.

Section 35 deals with liability of estate of deceased partner

Section 36 deals with the rights of outgoing partner to carry on competent business (1) An outgoing Partner may carry on a business competing with that of the firm and he may advertise such business but subject to 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 the ceased to be a partner

(2) Agreement in restraint of trade – A partner may make an agreement with his partners that on 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 and notwithstanding anything contained in section 27 of the Indian Contract Act 1872 such agreement shall be valid if the restrictions imposed are reasonable.

Section 37 deals with rights of outgoing partner in certain cases to share subsequent profits.

Chapter 6 deals with dissolution of the firm.

A firm may be dissolved in the consent of all the partners or in accordance with contract between the partners

A firm is also dissolved compulsorily by the adjudication of all the partners or of all the partners but one as insolvent or by happening of an event which makes it unlawful for the business of the firm to be carried on or for the partners to carry on in partnership. This is however not applicable with the firm carries on several adventures and undertakings and one of them ceases to carry on by happening of such an unlawful event.

Subject to the contract between the partners, a firm is dissolved, (1) if constituted for a fixed term by the expiry of the term the if constituted to carry on one or more adventures or undertakings by completion thereof. (2) By the death of the partner (3) adjudication of a partner as an insolvent

a partnership at Will is dissolved by giving notice in writing to all the other partners of intention to dissolve firm,.

A partnership will dissolved by the court if the suit is filed by a partner on the ground set out in section 44.

Under Chapter 7 the partnership firm is required to be registered with the Registrar of Firms

Under Section 69 as applicable to Maharastra a firm is required to be compulsorily registered and if not registered the following are the consequences.

Article 47 of the Bombay Stamp Act deals with the stamp duty payable on a Deed of Partnership. The stamp duty payable is as under;

An Instrument of Partnership where there is no share of contribution in partnership or where such share contribution brought in by way of cash does not exceed Rs.50,000/- the stamp duty payable is Rs.500/-;

Where such share contribution brought in by cash is in excess of Rs.50,000/- for every Rs.50,000/- or part thereof the stamp duty payable is Rs.500/- subject to maximum of Rs.5000/-.

Where such share contribution is brought in by way of property excluding cash, the stamp duty is as is leviable on Conveyance under clause (a), (b), (c) or (d) as the case may be of Article 25 on the market value of such property.

In case of dissolution of partnership or retirement of partner, stamp duty is taken as share by a partner other than a partner who brought in that property as his share of contribution in the partnership, the stamp duty is leviable as on a conveyance under clause (a), (b), (c) or (d) of Article 25 on the market value of such property subject to a minimum of Rs.100/-.

In any other case Rs.200/-

Stamps to be used :- Non Judicial stamp paper, rule 6 or special adhesive stamp paper rule 10(2).

The Partnership is also required to be registered under Section 184 of the Income Tax Act. Section 10(2)(a) and 28(v) of the Income Tax Act deal with the tax payable on partnership.

The above provisions are to be kept in mind before venturing upon the drafting of the Partnership Deed. Further a minor can not be a partner in the firm but can be admitted to the benefits of the partnership and is not liable for the losses or the liabilities of the firm,