

INDIAN

PARTNERSHIP

ACT


LL.B. II Sem.

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. What tests should you apply for determining partnership ?

Ans. Introduction.—The question as to whether a partnership exists or not is often a difficult one for decision. It is neither a pure question of law nor a pure question of fact. As a matter of fact, it is a mixed question of law and fact. This question is to be decided by the intention of the parties to be judged from the contents of the written instruments, if any and the words and the conducts of the parties.

According to Section 4 of the Act '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. In order that persons may be partners, it is essential that :—

1. There must be an agreement, entered into by all the persons concerned ;
2. The agreement must be with a view to sharing the profits of a business ; and

3. The business must be carried on by all or any of the persons concerned acting for all.

All these essentials must be present before persons can become partners. "These three elements may appear to overlap, but are nevertheless distinct. The first element relates to the voluntary contractual nature of partnership, the second gives the motive which leads to the formation of firms, i.e. the acquisition of gain; and the third shows that the persons of the group who conduct the business do so as agents for all the persons in the group, and are, therefore, liable to account to all." (*Kundan Lal v. Dadon*, AIR 1956 Hyd 27).

The true test.—The true test, therefore, in determining whether a partnership exists is to see whether the relation of principal and agent exists between the parties and not merely whether the parties share in the profits and the business carried on for the benefit of all. It is this relation of agency which distinguishes a partnership from simple co-ownership on the one hand and the agreement to share profits on the other. And this relation is to be gathered from the real intention or agreement of the parties and circumstances of the case. So following the rules in *Cox v. Hickmen* Section 6 of the Act lays down thus : "In determining whether a group of persons is or 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." Partnership does not mean that the partners should necessarily divide the profits at any time. Each may leave his share in the business. The real test is whether he has power to withdraw it. The question of partnership is a question of intention which must be decided on a consideration of the conduct of the parties and of all the surrounding circumstances. Participation in profits though not conclusive is a cogent piece of evidence which must be given due weight in the light of other circumstances.

An arrangement to share in the profits does not necessarily show that the person who shares in such profits is a partner of the firm but this fact will have to be considered along with the evidence relating to other characteristics of a partnership such as sharing of losses, etc. in arriving at a conclusion whether the parties intended to carry on the business in partnership (*Davis v. Commissioner*, AIR

1959 SC 719). But if the participation in profits is only one among other circumstances to be considered, it is wrong then to say that the participation in profits raises a presumption of partnership which has to be rebutted by something else in such a case. All the circumstances must be considered in order to ascertain the real intention of the parties before any conclusion is drawn. [*Mallow March and Co. v. The Court of Wards*, 1872 LR 2 (P 417)].