INCOMING AND OUTGOING PARTNERS Chapter V (Ss 31 to 38) of the Indian Partnership Act

S 31 contains the following provision about the 'introduction' of a partner into an already existing partnership firm.

> **31. Introduction of a partner.- (1) Subject to contract between the partners and to the provisions of s 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.**
>
> **(2) Subject to the provisions of s 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.**

Sub-section (1) deals with the modes of introduction of a partner whereas sub-section (2) talks about his liability.

Modes of introduction of a partner

A new partner can be introduced into a firm in the following ways:

1) With the consent of all the existing partners;
2) In accordance with a contract between the partners;
3) In accordance with the provisions of s 30.

1) **Introduction with the consent of all the partners**
   The relationship between the partners is based upon mutual confidence and trust. For the harmonious working of a partnership, it becomes necessary that a new partner should not be introduced without the consent of all the partners. This section, therefore, provides the general rule that no person shall be introduced as a partner into the firm without the consent of all the existing partners.

2) **Introduction in accordance with a contract between the partners**
   The rule stated above is subject to contract between the partners. If a contract between the partners permits the introduction of a new partner even without the consent of all the existing partners, that can possibly be done. For example, the contract provides the majority of the partners shall be competent to admit a new partner or anyone of them may nominate a partner or appoint his successor, a new partner could be introduced accordingly.

   In such cases, even if some of the partners are unwilling to the introduction of some particular person, they will be bound by their contract and the introduction will be valid. The position as explained in Lovergrove v Nelson,[1] is: "To make a person a partner with 2 others, their consent must clearly be had, but there is no particular

[1] (1834) 3 My & K 120.

mode or time required for giving that consent; and if three persons enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of one retiring, it is clear that this would be a valid contract which the court must recognise and the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name."

In Byrne v Reid,[2] A, B, C and D were four partners and they, in their partnership deed, authorised A to admit his son, S into partnership when S had attained the age of twenty-one years. After S attained the age of twenty-one years, A nominated him as a partner in accordance with the partnership deed and he accepted the nomination, but the other partners refused to recognize him as a partner. It was held that the son on accepting the nomination had become a partner.

3) **A minor admitted to the benefits of partnership becoming a partner**
A minor admitted to the benefits of partnership can become a partner according to the procedure mentioned in s 30 (5). When a minor was admitted to the benefits of partnership, he may make an election, within 6 months of his attaining the majority or obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, and give a public notice whether he became a partner or not. If he opts to become a partner by such notice, he becomes a partner of the firm. If he fails to give such notice within the abovestated time, then on the expiry of such time, he automatically becomes a partner. It may be noted that in case of such a minor becoming a partner, the consent of other partners is not required.

Liability of an Incoming Partner

It has already been observed that according to s 25: "Every partner is liable… for all the acts of the firm done while he is a partner." S 31 (2) confirms this rule and states an incoming partner "does not thereby become liable for any act of the firm done before he became a partner." It is clear that as a general rule the liability of an incoming partner begins from the date of his joining the firm.

Nothing can, however, prevent a partner from agreeing to be liable for the acts done before his admission. If he makes such an agreement with his co-partners, the same will be binding only between him and the co-partners and the third parties cannot take advantage of such an agreement. The creditors can make him liable if they can show that the incoming partner had agreed with them, expressly or impliedly, for being liable towards them for the acts done before his admission. The basis of liability for the past acts in such a case will be the agreement rather than the fact of his admission as a partner.

[2] (1902) 2 Ch. 735.

In Central Bank of India v Tarseema Compress Wood Mfg. Co.,[3] after a 4th partner was admitted to a partnership firm, which earlier consisted of only three partners, all of them gave the following undertaking to the bank:

> "We are jointly and severally responsible to the bank for the liabilities of the firm with the bank. The bank may recover its claim and dues from any or all of the partners of the firm and the assets of any deceased partner."

The fourth partner in this case had undertaken liability which existed prior to his joining the firm and he was, therefore, held to be jointly and severally liable in respect of such liability.

The position of a minor becoming a partner under s 30 is, however, different. His liability towards third parties does not commence from the date of his becoming a partner, but it relates back to the date of his admission to the benefits of partnership.[4]

Introduction of a new partner- Liability of incoming partner in respect of pre-existing debts

New partner could be held liable if he had assumed liability and creditor had accepted him as debtor. Documents on record showed that new partner had acknowledged pre-existing liability and was also trying to clear the dues. Act of Bank in not withdrawing facilities of newly constituted firm proved that Bank wished that it should assume the liabilities. Therefore, new partner was liable to pay the pre-existing debts. The fact that new partnership deed did not provide for assumption of such liability was immaterial.

OUTGOING PARTNERS

Ss 32 to 38 deal with different ways in which a partner may cease to be a partner and his rights and liabilities thereafter. These provisions pertain to situations when the outgoing partner ceases to be a partner, but the firm is not dissolved and it continues with the remaining partners. A partner may cease to be a partner in the following ways:

a) By retirement;
b) By expulsion;
c) By insolvency;
d) By death.

a) Retirement of a Partner (S 32)

Retirement here means voluntary withdrawal of a partner from the firm, as opposed to expulsion, when a partner is made to quit. It covers such cases where on the withdrawal of a partner from the firm, the firm is not dissolved but the business of the firm is continued with the remaining partners.

[3] AIR 1997 Bom. 225.
[4] S 30 (7) (a).

Retirement of partner.- Use of the word 'retire' in s 32 of the Partnership Act, 1932 is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. Where a partner withdraws from a firm by dissolving it, it shall be dissolution and not retirement. Retirement of a partner from a firm does not dissolve it, in other words, it does not determine partnership inter se between all the partners. I only serves the partnership between the retiring partner and continuing partners, leaving the partnership amongst the latter unaffected and the firm continues with the changed constitution comprising of the continuing partners. S 32 provides for retirement of a partner but there is no express provision in the Act for the separation of his share and the intention appears to be that it would be determined by agreement between the parties. S 37 deals with rights of outgoing partners. Although the principle applicable to such cases is clear but at times some complicated questions arise when disputes are raised between the outgoing partner or his estate on the one hand and the continuing or surviving partners on the other in respect of subsequent business. Such disputes are to be resolved keeping in view the facts of each case having due regard to ss 37 of the Act. S 48 deals with the mode of settlement of accounts between the partners after dissolution of the partnership firm. The plaintiff had retired from the firm on 5.4.1971 after selling his share in the partnership firm. Once he had retired from the partnership firm, he had no right to claim any further share in the profits of the firm. A finding of fact is also recorded that the defendants had not paid the value of the share of the plaintiff pursuant to the agreement for retiring from the firm. If the defendants have failed to pay the value of the share of the plaintiff as agreed to, it has become a debt on the defendants and the plaintiff is entitled to recover the same with interest. After the retirement from the partnership firm and particularly when the firm was reconstituted with new partners, there was no question of using the plaintiff's share for earning profit in the reconstituted firm. The High Court, despite specific request by the counsel for the plaintiff in A.S. No. 481 of 1979 to give a direction regarding the date on which the valuation of the plaintiff's share shall be arrived at, did not give a direction but directed the trial court to make inquiry into valuation and decide the date taking into account that his share was not paid till then. There is no nexus or reason to say that the relevant date for valuation of the share of the plaintiff is the date when the Commissioner valued his share, that too after a long lapse of time and taking note of the events that the plaintiff had retired from the firm on 5.4.1971 having sold his share and the firm had been reconstituted with new partners. When the plaintiff retired from the partnership firm on 5.4.1971. His share could be valued as on that which stands to reason. Once the valuation is made as on that date, for any delay in payment he is to be compensated by awarding interest as is evident from section 37 of the Act itself. The value of the share of the plaintiff on the date of his retirement from the firm could be regarded as apure debt with effect from the date on which he ceased to be regarded as a pure debt with effect from the date on which he ceased to be a partner as per the agreement entered into between the parties. Otherwise, the result would be that he was deemed to have been continued as partner of the firm even after he retired from the firm by selling his share. If consideration was not paid as per the agreement, he could enforce it as per law. However, mere non-payment of consideration does not take away the legal effect of retirement from the partnership firm. The cause of action of the plaintiff arose on the date of his retirement from the partnership firm and on which date the liability of the defendants also arose. In this view, the plaintiff could certainly claim the value of his share as on 5.4.1971 with interest till the payment was made.The view of the trial court that the relevant date to value the share of the plaintiff is as on the date of the commissioner's report cannot be accepted, as there was no nexus between the date of retirement of the plaintiff from the firm and the date of the commissioner's report. The date of the commissioner's report may be fluctuating, i.e., it could be earlier or later in the absence of any time-frame. In this view, the High court was right and justified and justified in passing the impugned order upsetting the order of the trial court.

How can a partner retire:

According to section 32(1),a partner may retire-

a) With the consent of all the other partners,
b) In accordance with an express agreement by the partners, or
c) Where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

a) With the consent of all the other partners

As a general rule, no partner can retire whenever he likes. The partnership business depends upon the continued support from all the partners. The retirement of a partner might mean a serious dislocation ofawhole business. Apartner can, therefore, retire with the consent of all the other partners. Such consent may be express or implied.

In accordance with express agreement by the partners

In case the agreement between the partners themselves condones the requirement of the consent of them all. A partner may retire accordingly. For instance, the partnership deed provides that a partner may retire with the consent of the majority of other partners or by giving one year's notice, a partner can retire in accordance with such an agreement.

In partnership at will by a notice to others

In case of partnership at will, a partner may retire by giving anotice in writing to all the other partners of his intention to retire. In a partnership at will, a partner has also a right to get the firm dissolved by giving a notice in writing to all other partners of his intention to dissolve the firm.

In a partnership at will, a partner may retire by giving a notice in writing to all the other partners of his intention to retire by giving a notice in writing to all the other partners of his intention to retire.

The need for such a notice arises when all other partners either do not agree to the retirement of a partner or they are not readily available to give their consent for the retirement of a partner.

In case of partnership at will, a partner could also retire either under s 32 (1) (a) with the consent of all the other partners or under s 32 (1) (b) in accordance with an express agreement by the partners.

Firms not dissolved on retirement of a partner

On retirement, a partner ceases to be a partner but the other partners can still continue to carry on the business of the firm, and the partnership between the remaining partners can still continue. So that the partnership between the remaining partners can continue after the retirement of a partner, it is necessary that after such a retirement there must be at least two remaining partners between the firm has to be dissolved.[5] The Supreme Court in Vishnu Chandra v Chandrika Prasad,[6] held that the expression 'if any partner wants to dissociate from the partnership business', in a clause of the partnership deed which was being construed, comprehends a situation where a partner wants to retire from the partnership. The expression clearly indicated that in the event of retirement, the partnership business will not come to an end. Such provision conferred a right on the partner to retire from the partnership as envisaged by s 32 (1) (b).

The law, as now settled with regard to retiring partners, may be viewed as a compromise between the strict doctrine of English Common Law, which refuses to see anything in the firm, but a collective name for individuals carrying on business in partnership, and the mercantile usage which recognises the firm as a distinct person or quasi corporation.[7]

His position after retirement. -The question arises regarding liability of a retiring partner for the acts of the firm done-

1) Before his retirement,
2) After his retirement.

Liability for acts done after retirement [s 32 (2)]

Every partner is liable for all acts of the firm done while he is a partner.[8] If liability has arisen during the period while a person was a partner, such liability does not come to an end by his retirement. According to s 32 (2), however, there is a possibility of discharge of the outgoing partner from liability for the past acts. S 32 (2) is as follows:

[5] S 41 (a).
[6] AIR 1983 SC 523.
[7] CIT v AW Figgis & Co AIR 1953 SC 455, para 7.
[8] S 25.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

The above mentioned procedure for discharge of a retiring partner from liability is by way of novation. Novation means substitution, with the creditor's consent, of a new debtor for an old one. This is done by substituting a new contract in place of an old one, thereby discharging the liability of the original debtor and creating that of a new one in his place. It is essential that the creditor must agree to such a substitution. For example, X has a right of action against the partners A,B& C. A retires and then X agrees to make only B & C liable. A is thereby discharged from his liability. In partnership when the creditor accepts the security of continuing partners in discharge of that of the former partners, the outgoing partner is thereby discharged from his liability towards such creditor. Sub-sec (2) to s 32 requires that for the proper discharge of the retiring partner from liability, there should be a contract between all the three parties viz., the outgoing partner, the members of the reconstituted firm and the creditor. Mere agreement between the outgoing and the continuing partners that only the continuing partners will be liable for all the past acts does not discharge the outgoing partner from his liability towards the creditor. The concurrence of the creditor also must be there to such a contract. Such an agreement need not always be express, it may be implied by a course of dealing between such third party (creditor) and the reconstituted firm after he had knowledge of the retirement.

In Evans v Drummond,[9] A and B, the two partners in a firm executed a bill in favour of a creditor X. A retired and thereafter on the due date the bill was not paid to X but a new bill signed only by B was given to X, who fully knew of the change in the firm. It was held that by accepting the new bill signed only by the continuing partner, the creditor had relied on his sole security, and had discharged the retiring partner from liability.

The decision in K.J. George v State Bank of Travancore,[10] is another example of novation whereby the retiring partner was discharged from his liability towards the creditor bank. In this case, the respondent bank granted overdraft facility and medium term loan to a partnership firm which included defendant as the partner. While the amount still remained unpaid to the bank, the defendant retired from the partnership firm on 10th March 1983. The notice of the retirement of the partner was duly sent to the said bank.

Thereafter revival letters in respect of the loan and a subsequent agreement was entered into between the bank and those partners who continued the business. The retiring partner was not a party to the revival agreement entered by the bank with the firm after his retirement. Moreover, the entire liability towards the bank was taken over by the continuing partners. The bank also never required the defendant, i.e., the retiring partner to sign the revival agreement.

[9] 4 Esp. 89: Reed v White (1804) 5 Esp. 122.
[10] AIR 2000 Ker. 214.

It was held that the bank had accepted that the partners of the reconstituted firm alone will be liable for the debts of the firm. The retiring partner was, therefore, discharged from his liability towards the respondent bank.

Liability for acts done after retirement [S 32 (3) & (4)]

S 32 (3) and (4) contain the following provisions on the subject:

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement: Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

By retirement a person ceases to be a partner. The third parties can still presume mutual agency between the outgoing and the continuing partners until a public notice of retirement is given. S 32 (3), therefore, provides that in the absence of a public notice, the outgoing partner and the continuing partners continue to be liable for the act of each other towards third parties. In order to avoid such liability, it is in the interests of both the retiring and the continuing partners that public notice is given. It has, therefore, been provided in sub-sec. (4) that such a notice may be given either by the retired partner or any partner of the reconstituted firm.

Public Notice

According to s 72, a public notice means a notice in the Official Gazette, in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and if the firm is registered, to the Registrar of Firms concerned. Therefore, merely publication of the notice in a local newspaper is not sufficient, and such anotice does not absolve the outgoing partner from liability towards a third person.

The liability stated above which arises in the absence of public notice is nothing but the application of the doctrine of holding out. There is a presumption that a person who was known to be a partner continues to be so known to the third parties until the notice of retirement is given.

The principle was thus explained in Scarf v Jardine[11]:

> "The principle of law, which is stated in Lindley on Partnership is inconvertible, namely, that 'when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred; and the principle on which they are entitled to assume is that of

[11] (1882) 7 AC 345.

the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the person to whom he has accredited him, by reason of any secret revocation.' Of course, in partnership, tthere is an agency. One partner is agent of another; and in the case of those who under the direction of the partners for the time being carry on the business according to the ordinary course, where a man has established such an agency, and has held it out to others, they have a right to assume that it continues until they have notice to the contrary."

Retirement of a dormant partner

Proviso to s 32 (3) states that "a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner."

If a dormant partner (i.e., a person who is not known to be a partner), retires, he is not liable for the acts of the firm done after his retirement even though no notice of retirement has been given. The basis for this provision is that if a person was not known to be a partner to a third party, there is no need of notifying to such third party about his retirement either. The need for notice arises if a person who was known to be a partner and his creditor does not know about his retirement but still continues to believe that he is a partner and gives credit on that belief.

A person who is not known to be a partner in a firm cannot be said to owe any duty to give notice of his retirement to persons who do not know that he has been a partner. The proviso to s 32 (3) is to the effect that even where there is a failure to give public notice, a retired partner will not be liable to a third party who did not know of such person being a partner and deals with the firm after such retirement.

The case of Tower Cabinet Co. Ltd. V Ingram,[12] explains this point. In that case Ingram and Christmas were partners in a firm known as Merry's. The partnership was dissolved but Christmas carried on the business in the same firm name. Public notice of the dissolution of the firm was not given. Christmas placed an order on the old notepaper for the purchase of some furniture from Tower Cabinet Co. Tower Cabinet Co. sued Ingram to make him liable on the basis of holding out. It was held that Ingram was not liable as Tower Cabinet Company had no knowledge that Ingram was a partner before the date of dissolution. The mere fact that the retiring partner did not see to the destruction of the old notepapers bearing his name could not make him liable to the creditors with whom communications were made on one such notepaper.

b) Expulsion of a partner (S 33)

It has been expressly provided by s 33 that **"a partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners."**

According to the provision, the expulsion of a partner is possible, in exceptional cases, when the following two conditions are satisfied:

[12] (1949) 2 KB 397.

1. The power to expel has been conferred by a contract between the partners, and
2. Such a power has been exercised in good faith.

No expulsion is possible unless a power to that effect has been conferred by a contract. This power must be exercised in good faith for the general interest of the whole firm. If the power to expel has been exercised bona fide the same cannot be challenged in a court of law. In Blissett v Daniel,[13] according to the partnership agreement two-third or more of the partners were empowered to expel a partner by a notice, without assigning any reason for the same. Two-third of the partners signed and served a notice of expulsion on one of them. It was found that the real reason for such a notice of expulsion was not to protect any commercial interest of the firm but that the partner sought to be expelled had opposed the appointment of a co-partner's son as co-manager with his father. It was also found that the offended father was instrumental in managing the expulsion. It was held that notice of expulsion given under the circumstances was void.

Expulsion of a partner, who has been held guilty of an offence, has been considered to be justified. In Carmichael v Evans,[14] the power to expel existed against any partner who was addicted to scandalous conduct detrimental to the partnership business or was guilty of any flagrant breach of duties relating to a partnership business. One of the partners was convicted for travelling without a ticket, and he was given a notice of expulsion by the other partner. It was held that the notice of expulsion given under these circumstances was justified.

Liability of an expelled partner

As regards liability towards third parties for act of the firm done either before or after expulsion, the position of the expelled partner is exactly the same as that of a retired partner. It means that:

i) He continues to be liable for the acts of the firm done before his expulsion, unless he is discharged from liability by following the procedure mentioned in s 32 (2); and
ii) He can be made liable towards third parties for the acts of the firm done after expulsion unless a public notice of the expulsion has been given.[15]

c) Insolvency of a partner (s 34)
According to s 34 (1):

> **'Where a partner in a firm is adjudicated an 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"**

An insolvent is not allowed to continue as a partner and, therefore, a person who is adjudicated insolvent ceases to be a partner on the date on which order of adjudication is made. Whether on adjudication of a partner as insolvent, the firm is also dissolved

[13] (1853) 10 Hare 493.
[14] (1904) 1 Ch. 486.
[15] S 33 (2).

or not depends upon the contract between the partners. According to s 42 (d), unless the partners agree otherwise, a firm is dissolved by the adjudication of a partner as insolvent.

His liability after adjudication

According to s 34 (2), where the firm is not dissolved on the adjudication of a partner as insolvent and the other partners agree to continue the business, the estate of the insolvent partner is not liable for an act of the firm after the date of adjudication. In his case, he is absolved from liability for future acts even though no public notice of his being adjudicated insolvent is given. His position is, therefore, different from the retired or the expelled partner, whose liability for the acts of the firm continues unless a public notice of retirement or expulsion is given. The reason why such a notice has been dispensed with is that insolvency is itself a notorious fact which is not required to be notified to anybody.

d) **Death of a partner (s 35)**
Although on the death of a partner, a firm isdissolved but, if the other partners so agree, the firm may not be dissolved[16] and the business of the firm may be continued with remaining partners.

As regards the liability of his estate for the acts of the firm done after his death, the position is the same as in the case of an insolvent partner. If the firm is not dissolved on the death of a partner, the estate of the deceased partner is not liable for acts of the firm done after his death.[17]

No public notice is required to be given on the death of a partner.

RIGHTS OF OUTGOING PARTNER

After a partner ceases to be a partner, the question of the following rights of the outgoing partner or his legal representatives generally arises:

1) Rights to carry on a competing business, and
2) Right to share subsequent profits until the amount due to him has been paid.

1) Right to carry on a competing business

[16] S 42 (c).
[17] S 35.

According to s 36:

36. Right of outgoing partner to carry on competing 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 he ceased to be a partner.
(2) Agreements 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 a specified local limits; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872 (9 of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

This section deals with the right of the outgoing partner with regard to some other business which he may like to carry on. Sub-sec (1) states that an outgoing partner, whether he leaves the firm by retirement, expulsion or insolvency, has a right to carry on a business competing with that of the firm. He may also advertise such business. This right to carry on the competing business is, however, subject to three restrictions:

1. He cannot use the name of the firm for his business.
2. He cannot represent himself as carrying on the business of the firm and, therefore, he is not allowed to mislead the public by misrepresenting that he is still carrying on the firm's business.
3. He cannot solicit the customers or persons who were dealing with the firm. He cannot approach the old customers to persuade them to be diverted towards his business. It has been noted that he can advertise his own business and if the old customers of themselves prefer to come to him, there is no bar to his attending to them.

The abovestated restrictions on the outgoing partner are necessary to protect the interest of the firm which he leaves. The restrictions are similar to those which are imposed on a person who sells the goodwill of his business.[18] When a partner leaves the firm, he gets his share of the assets. Such share generally includes payment for his share of the goodwill also. Outgoing partner is presumed to have sold the goodwill to the remaining partners and, therefore, restrictions as stated above are applicable to him. These restrictions are subject to contract between the outgoing and the other partners.

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[18] S 55 (2).

Restriction on competing business

It has been noted that ordinarily ‘an outgoing partner may carry on a business competing with that of the firm and he may advertise such business although subject to certain restrictions which have been discussed above. The remaining partners may sometimes like to have greater protection of their interest rather than merely imposition of the abovesaid restrictions on the outgoing partner. In view of this position, s 36 (2) permits an agreement being made between the outgoing partner and the continuing partners whereby the outgoing partner be restrained from carrying on business similar to that of the firm. Such an agreement has been declared to be valid and constitutes an exception to the rule contained in s 27, Indian Contract Act which declares an agreement in restraint of trade as void. It is, however, necessary that:

i) The agreement restraining the outgoing partner from carrying on a similar business should stipulate that such a business will not be carried on for a specified period or within specified local limits, and
ii) The restriction imposed should be reasonable.

2) Right to share subsequent profits
When a partner ceases to be a partner by retirement, expulsion, insolvency or death, his share in the property of the firm may not be immediately paid to him and the firm may continue the business without any final settlement of accounts between the outgoing partner or his estate and the others. S 37 gives an option to the outgoing partner or the representative of the deceased partner, who has not been paid his share of the property, either:
   i) To claim such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm, or
   ii) To claim an interest at the rate of 6% per annum on the amount of his share in the property of the firm.

For the purpose of ascertaining the share of a retiring or an outgoing partner, the relevant date is the date on which he ceased to be a partner.

If an arbitration award grants interest at the rate of 9% per annum instead of 6% per annum, it is an error apparent on the face of the award, and therefore, this part of the award will not be enforceable.[19]

In K.S. Rao v Venkateswarlu,[20]one of the partners left the firm and the firm was reconstituted with the remaining partners. The share of the outgoing partner continued to be utilised by the reconstituted firm. The earlier partnership deed had provided that a partner would get 12 % interest on the capital brought in by him. The outgoing partner claimed interest of 12% on his share remaining in the business after he left the firm.

[19] Nirmalabhai v Girjabhai, AIR 1986 SC 338.
[20]AIR 1997 AP 331.

It was held that on such sum remaining in partnership firm, the outgoing partner could claim interest of 6% p.a. as stated in s 37 and not any higher interest. The only other option available to an outgoing partner is to claim such share of profits as may be attributed to the use of his share of the property of the firm.

This is subject to contract between the partners to the contrary.

The abovestated option can be exercised by the outgoing partner or on behalf of the deceased partner when subsequently the profits are calculated. He can then exercise this option the way he finds the same to be more beneficial to him. But once the option is made, it becomes binding on the person making it.

Where by a contract between the partners, thee surviving or the continuing partners purchase the share of the outgoing or the deceased partner, the right of sharing profits as discussed above is lost. If, however, the partner who was to purchase such share of the outgoing or the deceased partner does not comply with the terms of the contract of purchase in all material respects, he is liable to account for the right of the outgoing or the deceased partner as stated above.

Revocation of continuing guarantee (s 38)

In any contract of guarantee, it is necessary that subsequent to the making of the contract, the terms should not be varied. Any variance in the terms, without surety's consent, discharges the surety from liability as to future transactions. Similarly, in a contract of continuing guarantee[21] between a partnership firm and any third party, it is expected that the constitution of the firm will remain the same during the continuance of such a contract. If there is a change in the constitution of the firm either by the introduction of a new partner to the firm or by a partner ceasing to be one, any continuing guarantee, given to the firm or to th third party in respect of the transactions of the firm, is automatically revoked as to future transactions unless there is an agreement to the contrary. The basis of the rule is that when there is continuing guarantee given to the firm or to the third party by the firm that is always with the assumption that the same persons who are partners at the time of such guarantee, shall continue to be there for the whole period of such guarantee. Therefore, such a guarantee continues to be operative so long as there is no change in the constitution of the firm, but upon such a change the guarantee is revoked as regards future transactions. This point can be explained by referring to the case of Neel Comul Mookerjee v Bipro Das Mookerjee.[22] In that case, a guarantee was given for the conduct of the cashier of the firm known as "N.C. Mookerji." Subsequently, there was a change in the constitution of the firm and its name was also changed to 'N. Mookerji & Son.' It was held that on this change the guarantee was revoked and the surety was not liable for the conduct of the cashier subsequent to such change.

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[21] S 129, Indian Contract Act.
[22] (1901) 28 Cal. 597.