Partnership is in fact, a union of hearts. How weak or strong this union is depends on the degree of mutual trust between the partners. There is no room for sharp practices or underhand dealings. Partnership thus draws on the best in human nature and makes it a class by itself. The other feature that distinguishes it is the freedom allowed to partners to fix their mutual rights and obligations. Every partner has full opportunity for the display of his genius. All are equal. None is inferior. May be, some at times are more than equal. At the same time, rashness or adventurism is kept in bridle.¹

3.1 Prologue

Sanctified with structural sturdiness of a company and the operational simplicity of a partnership, it is observed that the partner in case of a LLP is the one who conceives the very idea of proposing a business and thereafter making it prosperous. The sovereignty available with the partners to decide the relations inter-se give them the opportunity to play full length on the pitch of corporate entity under the legislative umbrella of the LLP Act, making it a blue eyed corporate vehicle of one’s choice in the global business environment.

3.2 Partners: Qualifications

Any individual or body corporate may be a partner in a LLP.² The word ‘individual’ means a natural person or human being where as ‘body corporate’ means an incorporated association of persons competent to hold property, having perpetual succession, a common seal, a legal entity different from the members constituting it and the right to sue and being sued in its own name. The term individual is not defined under the LLP Act. However, the term body corporate is defined under the LLP Act as:³

---

² Section 5, The LLP Act, 2008.
³ Section 2(1)(d), The LLP Act, 2008.
“Body corporate” means a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) and includes—

(i) a limited liability partnership registered under this Act;

(ii) a limited liability partnership incorporated outside India; and

(iii) a company incorporated outside India,

but does not include—

(i) a corporation sole;

(ii) a co-operative society registered under any law for the time being in force; and

(iii) any other body corporate (not being a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf;

The analysis of the Section is done hereunder:

### 3.2.1 Status of Body Corporate as a Partner

The aforesaid term, ‘body corporate’ includes a company, a foreign company and also a LLP, whether incorporated within or outside India. A LLP itself is an incorporated body falling within the meaning of the term ‘body corporate’, meaning thereby a LLP can itself be a partner of another LLP.⁴

But legally speaking, the body corporate cannot utilize its funds for those purposes which are not certified by the statutory document(s) like Memorandum of Association / Articles of Association. If it employs the funds going beyond these statutory credentials then it will attract the doctrine of *ultra vires*.

Additionally, as a body corporate is an artificial entity, therefore, in case body-corporate is a partner,⁵ then it will be required to nominate any person (natural) as its nominee for the purpose of the LLP.

---


⁵ *Supra* note 2.
3.2.2 **Status of a Corporate Sole as a Partner**

A corporate sole is a single individual constituted as a corporation in respect of some office held by him or functions performed by him. The King, Crown and Bishop under the English Law are the examples of this type of corporation. A corporate sole continues to exist even though the human beings keeps on changing, the concept of a corporate sole is best manifested in the following maxim, which states that despite the death of an individual the corporate sole still survives:

> The King is dead, long live the King.

A ‘corporate sole’ is a legal person capable of holding property but is expressly deburred from becoming a partner under the LLP.

3.2.3 **Status of a Co-operative Society as a Partner**

It is submitted that the main objective of a co-operative society is to promote the economic interests of its members in consonance with the co-operative principles.

A co-operative society registered under the Societies Registration Act, 1860 is not a body corporate, though such society is a legal person capable of holding property and as such has been excluded from the definition of the ‘body-corporate’ for the purpose of the LLP Act. Moreover, a co-operative society is not a ‘public authority’ on the basis of supervision and control by Registrar of Societies.

---

7 The original phrase was translated from the French, ‘Le roi est mort, vive le roi’. It was first declared upon the accession to the French throne of Charles VII after the death of his father Charles VI in 1422. The phrase arose from the law of ‘le mort saisit le vif’ - that the transfer of sovereignty occurs instantaneously upon the moment of death of the previous monarch. ‘The King is dead’ is the announcement of a monarch who has just died. ‘Long live the King!’ refers to the heir who immediately succeeds to a throne upon the death of the preceding monarch.
8 *Supra* note 3.
10 *Dattaprasad Co-operative Housing Society Ltd. v. Karnataka State Chief Information Commissioner*, AIR 2009 Karn. 1.
3.2.4 Status of Trust as a Partner

The term ‘trust’ literally means a confidence which one reposes in another. In India, the creation of a Trust is regulated by the Indian Trusts Act, 1882.\(^{11}\)

A “trust” is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner: the person who reposes or declares the confidence is called the author of the trust; the person who accepts the confidence is called the trustee; the person for whose benefit the confidence is accepted is called the beneficiary; the subject-matter of the trust is called trust-property or trust-money; the beneficial interest or interest of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the instrument of trust.\(^{12}\)

Accordingly, the basic objective of the trust is the benefit of beneficiary. Only an individual or body corporate can be partner in the LLP and the definition of body corporate does not include trusts in its ambit.\(^{13}\) However, the Trustee can become a partner in the LLP but only in his individual capacity.

3.2.5 Status of Partnership Firm as a Partner

Under the Indian Partnership Act, 1932, the partnership firm registered under the Act is neither a person nor a legal entity. It is merely a collective name for the individual members of the partnership.\(^{14}\) Partnership firm is the creation of law and sans a distinct entity.\(^{15}\) Even under the Income-tax law a partnership firm is a unit of assessment by special provisions, but it is not a full person.\(^{16}\) Similarly, partners of a partnership firm can sue and be sued in the name of the partnership firm.\(^{17}\)

---

\(^{11}\) Act No. 2 of 1882.

\(^{12}\) Section 3, The Indian Trusts Act, 1882.

\(^{13}\) N.T.P.C. v. Canara Bank, (1999) 97 Comp. Cas. 930 at 937-38; it was held that the trusts created under the Indian Trusts Act, 1882 are not legal entities as public trusts registered under the Societies Registration Act are.

\(^{14}\) Mahabir Cold Storage v. CIT, AIR 1991 SC 1357.


\(^{16}\) CIT v. Chidambaram Pillai, AIR 1977 SC 489.

\(^{17}\) Order XXX, Rule 1, The Code of Civil Procedure, 1908.
Not being a distinct legal entity apart from the partners constituting it, a partnership firm neither falls within the ambit of individual nor body corporate. Hence, it cannot be a partner in the LLP. Even so there is nothing in law to bar any or all the partner(s) of the partnership firm in his/their individual capacity can hold partnership in LLP.

3.2.6 Status of Hindu Undivided Family as a Partner

A joint Hindu family is the creation of Hindu law. A joint Hindu family is generally headed by the senior most male member of the family, called *Karta* or Manager, a HUF is the result of status which is accorded by the operation of law. Immediately on the birth of a child in the family, without waiting for him to attain the age of majority, a new member is accredited to the kitty of joint Hindu family and with no limit to the maximum number of members, its endurance continues till it is divided. In this fluctuating body of individuals, the right to manage the joint Hindu family business vests with the *Karta*, who is the only representative of the family business and revering the seniority and status of the *Karta*, the members of a joint family business dare not to ask him for accounts of past dealings except at the time of partition. *Karta* has the authority to contract for the family business which is binding on the members. As a joint Hindu family is governed by the Hindu law, the business does not require any registration and the liability of *Karta* alone is unlimited and rest all other members are liable only to the extent of their share in the family business.

A HUF is not a juristic person capable of entering into a partnership and it cannot become a partner directly or indirectly. The HUFs/Kartas of such families cannot become partner in the LLP. But there is no bar on the *Karta* (head) or the coparceners of the family, in their individual capacity, from entering into as a partner in the LLP.

---

18 Section 4, *The Indian Partnership Act*, 1932: ‘Partnership’ is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. *Malabar Fisheries Co. v. CIT*, (1979) 120 ITR 49 = 2 Taxman 409 (SC).
3.2.7  **Status of Non-Banking Financial Companies as a Partner**

The Non-Banking Financial Companies (NBFCs) are prohibited from contributing capital to any partnership firm or to be partners in partnership firms. In this connection certain clarifications are being made including that the Partnership firms mentioned above will also include the LLPs. Further, the aforesaid prohibition will also be applicable with respect to association of persons; these being similar in nature to partnership firms. The NBFCs which had already contributed to the capital of a existing LLP/association of persons or was a partner of a LLP/association of persons are advised to seek early retirement from the LLP/association of persons.

3.3  **Partners: Disqualifications**

The disqualifications of partners are again provided in the LLP Act in the form of provision which runs as:

An individual shall not be capable of becoming a partner of a limited liability partnership, if:

a) he has been found to be of an unsound mind by a court of competent jurisdiction and the finding is in force;

b) he is an undischarged insolvent or

c) he has applied to be adjudicated as an insolvent and his application is pending.

It is observed that the above stated provision is part of the Section 5 and enlists the various disqualifications which innately refrains an individual to take over as a partner keeping his chore in the backdrop.

3.4  **Partners: The Number Game in the Limited Liability Partnership**

As in the preceding chapter, a running reference was given to the fact that for the incorporation of the LLP, there is a statutory requirement of minimum of two partners -

---

23 Vide CC No. 214/03.02.002/2010-11 dated March 30, 2011.
24 DNBS.PD/CC.No. 328/03.02.002/2012-13 dated June 11, 2013, issued by the RBI.
25 [2013] 114 CLA (St.) 169.
26 Ibid.
27 Supra note 2.
natural or artificial\textsuperscript{27} to ovulate with no limit of maximum number of partners. The statutory provision, enshrined under the LLP Act, with respect to minimum number of partners runs as under:\textsuperscript{28}

\textbf{Minimum number of partners}- (1) Every limited liability partnership shall have at least two partners.

(2) If at any time the number of partners of a limited liability partnership is reduced below two and the limited liability partnership carries on business for more than six months while the number is so reduced, the person, who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the limited liability partnership incurred during that period.

It is analyzed that on the one hand, Section 6 solicits that every LLP must necessarily, and at all times, maintain a minimum of two partners, on the other hand it warns of the penal consequences, which are dealt in detail under the subsequent part of this Chapter in case the number of partners falls below two.

\textbf{3.5 Partners: Initial and Subsequent}

On incorporation of LLP, the persons who subscribe their names to and sign the incorporation document they are initial partners of the incorporated LLP and subsequently any other person may become a partner of the LLP by and in accordance with the LLP Agreement.\textsuperscript{29} The LLP Act defines partner as:\textsuperscript{30}

‘Partner’ in relation to a Limited Liability Partnership means any person who becomes a partner in the Limited Liability Partnership in accordance with the Limited Liability Partnership Agreement.

The LLP Act provides flexibility to device the LLP Agreement as per the choice of partners and the relationship between the partners, including any admission to\textsuperscript{31} and cessation

\textsuperscript{27} Ibid.
\textsuperscript{28} Section 6, The LLP Act, 2008.
\textsuperscript{29} Section 22, The LLP Act, 2008.
\textsuperscript{30} Section 2(1)(q), The LLP Act, 2008.
\textsuperscript{31} Ibid.
from the LLP, is primarily governed by the LLP Agreement entered into between the partners and filed with the Registrar, and in default, by the rules contained in the First Schedule to the Act.

3.6 Changes in Partner(s)

The LLP being a perpetual entity, there is every possibility that partner(s) may board on or board off during the life of the ongoing concern which will bring changes in partner(s) also called as ‘reconstruction’ or ‘reconstitution’ of the LLP. When a partner is admitted into the business fold he is often termed as ‘incoming partner’ and when an existing partner leaves the business he is termed as ‘outgoing partner / former partner’. Such possible change in partner(s) is discussed hereunder:

3.6.1 Admission of Partner

As per the provisions of the LLP Act, any person eligible to become a partner can be admitted as a partner in the LLP, according to the LLP Agreement. In the absence of the LLP Agreement or if the LLP Agreement is silent on the admission of partner, the First Schedule will govern the admission. And of-course, the consent of existing partners is material to admit a new partner.

The incoming partner is bound to provide all the particulars as provided in Form 6 along with his willingness under Form 4 to take over as a partner in the LLP.

3.6.2 Resignation of Partner

Any partner of the LLP may resign under the following circumstances:

a) on happening of any event as provided in the LLP Agreement; or

---

34 Section 23(2), The LLP Act, 2008.
35 Section 23(4), The LLP Act, 2008.
36 Supra note 4.
37 Supra note 33.
38 Ibid.
40 Section 24(1), The LLP Act, 2008.
by giving a notice in writing of not less than thirty days to the other partners of his intention to resign as partner. The notice of resignation by a partner has to given in Form 13.41

3.6.3 Retirement of Partner

It is submitted that although, there is no provision for retirement of a partner under the LLP Act and under the LLP Rules yet, the retirement of a partner from a LLP can not be ruled out if it is provided under the LLP Agreement. Consequently, a partner of LLP may retire if any provision is imbibed in the LLP Agreement which may provide retirement of a partner:42

a) on attaining a particular age;

b) by the consent of all partners (express or implied);

c) on happening of any event as provided in the LLP Agreement.

Hence, a partner’s right to retire solely banks upon the contents of the LLP Agreement.

3.6.4 Expulsion of Partner

It is observed that a partner can be expelled, if any ground of expulsion is embraced in the LLP Agreement. But if there is no ground prescribed in the LLP Agreement then no majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.43 More so, it is analyzed that even if such a power is conferred by the LLP Agreement, the majority of the partners have to act in good faith in the interest of the LLP while exercising it. However, the First Schedule nowhere mentions that the majority of partners have to exercise in good faith, but an expulsion which sans good faith can be challenged before the court of law.

42 Section 23, The LLP Act, 2008 expressly provides that the mutual rights and duties of a LLP and its partners shall be governed by the LLP Agreement between the partners, or between the LLP and its partners.
3.6.5  **Cessation of Partner**

Under the LLP Act, a person robotically ceases to be a partner of a LLP under the following situations:44

a) on his death or dissolution of the LLP; or

b) if he is declared to be of unsound mind by a competent court; or

c) if he has applied to be adjudged as an insolvent or declared as an insolvent.

Accorded with the personality, the LLP is blessed with perpetual succession and as such the death, unsoundness of mind or insolvency of any partner is not at all going to hamper the longevity of the ongoing concern.45

A corporate body has no soul to be saved or body to be kicked. This epigram is believed to be of considerable antiquity.46

An interesting illustration to explain the perpetual existence (though it was cited with reference to a Company but as Limited Liability Partnership draws a parlance with Company on the issue of perpetual succession, it is accordingly imported here) is that during the 1939-1945 war all the members of one private company, while in general meeting, were killed by a bomb. But the company survived; not even a nuclear bomb could have destroyed it.47 From this it is analyzed that the only impact of death/unsoundness/insolvency of a partner is that deceased partner ceases to have any interest in the LLP.

Where a person has ceased to be a partner of a LLP, the ceased partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless:48

a) the person has notice that the former partner has ceased to be a partner of the LLP; or

44 Section 24(2), The LLP Act, 2008.
45 Supra note 4.
48 Section 24(3), The LLP Act, 2008.
b) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

The cessation of interest of a partner does not assume effect until the ceased partner has given either actual notice (to the parties concerned) or constructive notice (to the Registrar), of his cessation. Also, the cessation of partnership interest is only prospective and cannot be retrospective in nature.\(^{49}\)

The ceased partner is also entitled to file a notice of his cessation with the Registrar if he has reasonable cause to believe that the LLP may not do so. In that situation the cessation becomes effective only upon receipt of a confirmation by the Registrar from the LLP or completion of 15 days, whichever is earlier and even on cessation, the ceased partner continues to be responsible for the obligations undertaken prior to the date of cessation.\(^{50}\)

Unless otherwise provided in the LLP Agreement, the ceased partner or his legal heirs is/are entitled to receive back the actual (capital) contribution made and also the share in profits (if any, after adjusting losses) till the ceased partner continued in the LLP and is liable to contribute towards any accumulated losses at the time of cessation of interest.\(^{51}\) Needless to say, the ceased partner or his legal heirs have no right to interfere in the management and affairs of the LLP henceforth.

However, as per the LLP Act, any change in the partners of a LLP does not affect the existence rights or liabilities of LLP.\(^{52}\) Implying that change in partners is often called as ‘reconstruction’ or ‘reconstitution’ is altogether different from the statutory notion of dissolution of business entity. It is analyzed that as in case of former the LLP continues to exist but with a structural alterations in the composition of its partners whereas in case of later the business of LLP ceases altogether to exist with the lifespan of the LLP coming to an end.

More so, it is submitted that the LLP Agreement can contain comprehensive provisions pertaining to rights of / (reasonable) restrictions on an outgoing partner with respect to right of competition, soliciting customers of the LLP, etc. The most important fact

\(^{49}\) Ibid.

\(^{50}\) Section 25(6), The LLP Act, 2008.

\(^{51}\) Section 24(5), The LLP Act, 2008.

\(^{52}\) Section 3(3), The LLP Act, 2008.
to be taken care of is that if a LLP consists of only two partner and one of them ceases to be a partner for the reason of either resignation, retirement, expulsion or cessation then the LLP is left out with only one partner. In such crisis, state will put a big question mark on the very existence of the LLP as it requires atleast two partners to exist.

3.7 Statutory Compliance for Changes in Partner(s)

In order to keep a track on partners who are legislatively blessed with limited liability, it is provided that every partner shall inform the LLP of any change in his name or address within a period of fifteen days of such change\textsuperscript{53} and partner shall intimate change in his name or address to the LLP in form 6.\textsuperscript{54} If any partner contravenes this provision, such partner shall be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty-five thousand rupees.\textsuperscript{55}

The registration of changes in partner’s particulars besides, the admission/ resignation/ retirement/ expulsion/ cessation of a partner are to be filed by the LLP, under the signatures of designated partner, with the Registrar in Form 4 within 30 days of cessation of a partner, along with the requisite fee as provided in Annexure ‘A’.\textsuperscript{56} If the LLP flouts this provision, the LLP and every designated partner of the LLP shall be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty-five thousand rupees.\textsuperscript{57}

The admission/ resignation/ retirement/ expulsion/ cessation of a partner in LLP will also call for a change in the LLP Agreement and the amended LLP Agreement is to be filed with the Registrar in Form 3 within 30 days of amendment in the LLP Agreement, along with the requisite fee as provided in Annexure ‘A’ in order to sanctify such admission.\textsuperscript{58}

\textsuperscript{53} Section 25(1), \textit{The LLP Act}, 2008.
\textsuperscript{54} Rule 22(1), \textit{The LLP Rules}, 2009.
\textsuperscript{55} Section 25(5), \textit{The LLP Act}, 2008.
\textsuperscript{56} Section 25(2), \textit{The LLP Act}, 2008 read with Rule 22, \textit{The LLP Rules}, 2009. However, as per Section 25(6), \textit{The LLP Act}, 2008 any person who ceases to be a partner of a LLP may himself file with the Registrar the notice if he has reasonable cause to believe that the LLP may not file the notice with the Registrar. Para 3A, as inserted, after para 3, vide the Limited Liability Partnership (Amendment) Rules, 2012, (F.1/1/2011-CL-V dated June 5, 2012 issued by the Ministry of Corporate Affairs) provides the fee of Rs. 50/-.
\textsuperscript{57} Section 25(4), \textit{The LLP Act}, 2008.
\textsuperscript{58} \textit{Supra} note 34 read with Rule 21, \textit{The LLP Rules}, 2009.
3.8 Designated Partners

The LLP is controlled by the designated partners who are parallel to the position of directors of a company. According to the LLP Act the term designated partner means:59

‘Designated partner’ means any partner designated as such pursuant to Section 7.

The LLP Act requires that every LLP must have at all times at least two formally appointed designated partners and at least one of them shall be a resident in India. If at any time there happens to be fewer than two designated partners then every partner of the limited liability is considered as a designated partner. Further it is elaborated that where all the partners are individuals or bodies incorporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.60

A partner can act as designated partner in the following circumstances:

a) In case of a LLP in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least 2 individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.61

b) If the incorporation document states that each of the partners from time to time of LLP shall be designated partner then every such partner shall be a designated partner.62

c) In accordance with the LLP Agreement, any partner may become a designated partner and also cease to be the same.63

When the HUFS/Kartas of such families cannot become partner in the LLP, there is no question of them taking over as a designated partner.64

59 Section 2(1)(j), The LLP Act, 2008.
60 Section 7(1), The LLP Act, 2008.
61 Ibid.
62 Section 7(2)(i)(b), The LLP Act, 2008.
63 Section 7(2)(ii), The LLP Act, 2008.
64 Supra note 16.
3.8.1 *Changes in Designated Partner(s)*

A partner may cease to be a designated partner in accordance with LLP Agreement.\(^{65}\)

A LLP may appoint a designated partner within thirty days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of Section 7 shall apply in respect of such new designated partner:\(^{66}\)

Provided that if no designated partner is appointed or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.\(^{67}\)

3.8.2 *Partner and Designated Partner: A Differentiation*

With the concurrence and conformity of all other partners, a partner may become a designated partner at any time.\(^{68}\) It is observed that the designated partners have the same rights and duties towards the LLP as any other partner. But the law also places extra responsibilities on the shoulders of the designated partners. Over and above a partner, the responsibility of a designated partner includes:\(^{69}\)

\(\text{a) filing incorporation document and statement in form 2};^{70}\)

\(\text{b) signing and notifying the information with respect to the LLP Agreement including any changes if any therein to the Registrar in form 3};^{71}\)

\(\text{c) signing and notifying to the Registrar the appointment of partner/designated partner and changes if any among them intimating DPIN (now DIN) by LLP and consent of partner to become partner/designated partner in form 4};^{72}\)

\(\text{d) signing and intimating the change of name of LLP in form 5};^{73}\)

---

\(^{65}\) Section 7(2)(ii), *The LLP Act*, 2008.


\(^{67}\) Ibid.

\(^{68}\) Section 7, *The LLP Act*, 2008.

\(^{69}\) Section 8, *The LLP Act*, 2008.


\(^{72}\) Rules 8, 10(8), 22(2) and 22(3), *The LLP Rules*, 2009. In Annexure ‘A’ of the said Rules, Para 3A, is inserted, after para 3, \textit{vide} the Limited Liability Partnership (Amendment) Rules, 2012, (F.1/1/2011-CL-V dated June 5, 2012 issued by the Ministry of Corporate Affairs) which provides the fee of Rs. 50/- along with Form 4.

e) intimating the particulars of name and address of partner(s) and changes if any therein in form 6; 74
f) signing and filling the Statement of Accounts and Solvency to the Registrar in form 8; 75
g) filing the consent to act as Designated Partner in form 9; 76
h) signing and filling of annual accounts and annual return of the LLP to the Registrar in form 11; 77
i) signing and intimating other address for service of documents in form 12; 78
j) signing an application and statement for conversion of a private limited company/unlisted public company into LLP in form 18; 79
k) applying for striking off the name of the LLP in form 24; 80
l) applying for compounding of offences in form 31; 81
m) intimating the changes in particulars of Designated Partner in form 4; 82
n) appointment of an auditor; 83
o) preserving and producing all books and papers of the LLP or any other entity, which are in their custody or power before an inspector; 84
p) acting on behalf of the LLP and fulfilling procedural formalities in case of winding up and dissolution; 85
q) accountable for failing to carry out these or any other statutory responsibilities. 86

---

74 Supra note 54.
76 Rule 7 and 10(8), The LLP Rules, 2009.
78 Rule 16(3), The LLP Rules, 2009.
82 Rules 8, 10 and 22, The LLP Rules, 2009.
83 Rule 24(11), The LLP Rules, 2009.
84 Section 47, The LLP Act, 2008.
85 Supra note 69.
liable for penalties imposed under the LLP Act for contravention of the provisions of the Act and pay the monetary fine imposed.\textsuperscript{87}

The above stated responsibilities bring the designated partners on a workaholic footing as compared to that of other partners.

\subsection*{3.9 Residency Requirement for Partner and Designated Partner}

The LLP Act defines address in relation to a partner as:\textsuperscript{88}

‘Address’, in relation to a partner of a limited liability partnership means-

(i) if an individual, his usual residential address; and

(ii) if a body corporate, the address of its registered office.

There is no residency requirement for the partners but out of the two designated partners at least one designated partner shall be resident in India. The term ‘resident in India’ means a person who has stayed in India for a period of not less than one hundred and eighty-two days during the immediately preceding one year.\textsuperscript{89} Residential status of each designated partner needs to be updated by filing form 4.\textsuperscript{90}

The researcher analyzed that the logic behind the residency requirement is to ensure that at least one partner is available in India for at least six months for regulatory compliance requirements. However, the LLP is free to appoint more than one designated partner who is resident in India. But LLP being a distinct entity can not altogether escape its liability for regulatory or other compliances.

\subsection*{3.10 Role of Partners}

It is submitted that the partners of the LLP play a dynamic role in the functioning of the LLP. The researcher endeavors to reflect the dynamism as under:

\begin{itemize}
\item \textsuperscript{86} Ibid.
\item \textsuperscript{87} Section 10, \textit{The LLP Act}, 2008. Like, liability for non-compliance with the directions of the Central Government for change of name under Section 17; liability for non-maintenance of books of accounts, non-filing of accounts, audit of accounts \textit{if necessary} under Section 34; liability for non-filing of the annual return of the LLP with the Registrar under Section 35 etc.
\item \textsuperscript{88} Section 2(1)(a), \textit{The LLP Act}, 2008.
\item \textsuperscript{89} Explanation attached to Section 7(1), \textit{The LLP Act}, 2008.
\item \textsuperscript{90} Rule 8, \textit{The LLP Rules}, 2009.
\end{itemize}
a) Contribute innovative ideas and other inputs: The partners of the LLP can always contribute innovative ideas and provide other inputs which can help the LLP work effectively and efficiently to achieve its business goal.

b) Participate in the management and affairs: The partners of the LLP have the exclusive right to participate in the affairs and management of the LLP business and this right of partner cannot be fettered at all.91

c) Party to the decision making process: Each and every partner of the LLP has the right to be a party to the policy decision making process pertaining to day to day functioning as well as long term planning.92

d) Work as an agent of the LLP for business purpose: The partners being the agent of the LLP owe the role to work with reasonable care and skill for the advancement of the business of the LLP, to upkeep the interest of LLP, to surrender the personal petty interests, to give true and fair accounts and not to make any secret profit.93 However, the judicial pronouncements by the honorable courts will further widen the role of partners in the times to come.

e) Act as Whistle blower: The term ‘whistleblower’ has its origin from the practice of British Bobbies94 who used to blow their whistles as and when they noticed the commission of a crime.

A whistle blower is a person who raises a concern about the wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways: for example, a violation of law, rule, regulation and/or a direct threat to public interest, such as fraud, health/ safety violations and corruption.95

---

91 In Peacock v. Peacock, [1809] 16 Ves Jur 49; 170 ER 1076 (NP), Lord Eldon observed, “good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition so that each may see that the other is carrying it for their mutual advantage.” In Naghe v. Feildev [1966] 2 QB 633 at 634, Lord Denning, MR observed, “A man’s right to work at his trade or profession is just as important to him, perhaps more important then his right to property.”

92 However, there is no concept of formal set of meetings unlike the Companies Act, 1956.

93 Section 26, The LLP Act, 2008.

94 British Bobbies were the first professional police force, created in 1829 by the visionary Robert Peel (who subsequently served as the Prime Minister of England for two terms). He was instrumental in passing of the Metropolitan Police Act. As the founder of the police force, the men on patrol became known popularly as “bobbies”.


121
Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private. Whistle Blowing Laws have been enacted by the USA, the UK and Australia amongst other countries to check the globally growing malaise of corruption. Sensing the importance, the LLP Act gives due protection to the whistle blowers, the statutory provision runs as under:

**Whistle blowing** (1) The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee of a limited liability partnership, if it is satisfied that—

(a) such partner or employee of a limited liability partnership has provided useful information during investigation of such limited liability partnership; or

(b) when any information given by any partner or employee (whether or not during investigation) leads to limited liability partnership or any partner or employee of such limited liability partnership being convicted under this Act or any other Act.

(2) No partner or employee of any limited liability partnership may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his limited liability partnership or employment merely because of his providing information or causing information to be provided pursuant to sub-Section (1).

This provision is identified as ‘accused-turned-approver’ at the instance of prosecution in criminal procedure, and to a great extent is parallel to Section 635B of the Companies Act relating to protection of employees during investigation or pendency of proceedings before Court or NCLAT.

---


97 Section 806, *The Sarbanes-Oxley Act*, 2002 grants whistleblower protection for employees of publicly traded companies against retaliation in fraud cases.

98 The Public Interest Disclosure Act, 1998 (PIDA) grants whistleblower protection to individuals who make certain disclosures in good faith and in the public interest and allows these individuals to bring action in respect of victimization besides protecting them from being dismissed.

Comply with the provisions of the LLP Act and the LLP Agreement: It is the ethical and moral role of the partner of a LLP to comply with all the provisions enshrined under the LLP Act and also the LLP Agreement.\textsuperscript{100}

3.11 Contribution by Partners and the Transactions with Limited Liability Partnership

The contribution by partners of the LLP will be as per the golden lines of LLP Agreement only and a creditor of the LLP may enforce the original obligation against such partner. A partner’s contribution towards the capital pool of the LLP may consist of both tangible and/or intangible, movable and/or immovable property and/or any other benefit to the LLP including cash, promissory note or kind and contract for service.\textsuperscript{101}

The interesting thing to be observed here is that contribution is neither a pre-requisite for the formation of a LLP nor for being a partner in the LLP but, the incorporation cost for the LLP is determined on the basis of amount of contribution.

Although, there is no minimum contribution prescribed but ensuring transparency, yet the monetary value of contribution of each partner is formally reflected and duly accounted for and disclosed in the accounts of the LLP along with the nature of contribution and amount thereof and the contributions of a partner are to be valued by a practicing Chartered Accountant or by a practicing Cost Accountant or by approved valuer from the panel maintained by the Central Government. Also, the contributions of one partner may vary from the contributions of other partners either in cash or in kind.\textsuperscript{102}

It is observed that there is no express restriction under the LLP law on withdrawal of contribution and payment of interest on contribution. Therefore, if LLP Agreement provides for the withdrawal and payment of interest then the partners can avail the option of withdrawing and that of getting interest on contribution respectively.

\textsuperscript{100} supra note 69.
\textsuperscript{101} Section 32(1), The LLP Act, 2008.
The contribution by partners is abridged in the flowchart hereunder:

The total contribution of the LLP can be increased or decreased as per the provisions provided in the LLP Agreement. There is no statutory requirement under the LLP Act except filing of Form 3, within 30 days with the Registrar for the amendment in the particulars of the LLP Agreement.\(^{103}\) It is analyzed that in case of increase, the difference of amount between

---

\(^{103}\) Section 21(1), *The LLP Act, 2008*. Form 3 of *the LLP Rules, 2009* deals with the information required to be furnished with regard to the LLP Agreement and changes, if any, made therein.
the fee payable on the increased contribution and the fee paid on the preceding contribution is to be paid whereas in case of decrease, only the normal filing fee is to be paid.

Also, a partner can finance money in the form of loan and transact any other business with the LLP and shall have the same rights and obligations with respect to the loan advanced or such other transactions as any other person have who is not a partner.104

3.12 Assignment and Transfer of Partnership Rights

Chapter VIII of the LLP Act facilitates the Assignment and Transfer of Partnership Rights. A partner’s economic rights (i.e. rights of a partner to a share in the profits and losses of the LLP and to receive distribution at the time of winding up) in the LLP is transferable either wholly or in part.105 However, such transfer does not ipso facto entitle the assignee or transferee to participate in the management or conduct of the LLP’s activities or to access information concerning the LLP’s transactions. Therefore, the transferee will not be deemed to be a ‘partner’ of the LLP just because a partner has transferred him the ‘economic rights’ as for becoming a partner of LLP, the manner specified in the LLP Agreement or the provisions of the LLP Act, as discussed formerly, are the only route to be followed.106 It is interesting to pin-point here that such assignment and transfer is neither going to cause disassociation of partner nor dissolution of the LLP.

The coherent behind this that the mutual trust, faith and understanding is the forte of LLP, as appropriately said by George MacDonald, ‘to be trusted is a greater compliment than being loved’107 and when partners joined hands their intention was to have business relation between them only. Therefore, it is submitted that no alien can be introduced into the LLP without the consent of all the existing partners in order to upkeep the harmonious and congenial business ties for the larger interest of the LLP.

107 MacDonald (December 10, 1824 - September 18, 1905) was a Scottish author, poet, and Christian minister. He was a prolific novelist and is now known particularly for his poignant fairy tales and fantasy works, and their influence on later authors.
3.13 **Manner of Service of Documents on the Partner / Designated Partner**

A document can be served on LLP or a partner or designated partner by sending it by post under a certificate of posting, or by registered post or by any other manner, as may be prescribed, at the registered office and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.\(^\text{108}\)

3.14 **Partners and their Relations**

Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them.\(^\text{109}\)

The researcher analyzed that the trust and confidence are the root of mutual relations of partners and the beauty of the LLP Act is that the law understands that it is necessary to consider ‘the mutual rights and duties of the partners of the LLP’ as well as ‘the mutual rights and duties of the LLP and its partners.’

In tune with providing the much sought after autonomy the LLP law offers enormous organizational flexibility to the LLP and its partners in deciding the mutual rights and duties. The mutual rights and duties of the partners of a LLP and the mutual rights and duties of a LLP and its partners are governed by the LLP Agreement between the partners or between the LLP and its partners.\(^\text{110}\) Portraying a simple as well as bespoke regulatory structure to standardize internal affairs of the LLP, this provision is in absolute parity with the idea of giving the greatest possible freedom in determining the mutual rights and duties. The partners are free to draw and elaborate the LLP Agreement as per the requirement and consensus. There are no hard and fast rules for drafting the LLP Agreement except that the spirit of the LLP Act and the basic structure of the Constitution of India are duly respected. In this milieu, the nature and extent of the mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners are a matter of articulation and drafting of the LLP Agreement.

---

However, in the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the LLP and the partners are determined by the provisions relating to that matter as are set out in the First Schedule of the LLP Act. The First Schedule contains provisions regarding matters relating to mutual rights and duties of partners and LLP and its partners applicable in the absence of any agreement on such matters. The provisions of the First Schedule run as follows:

1) The mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined, subject to the terms of any limited liability partnership agreement or in the absence of any such agreement on any matter, by the provisions in this Schedule.

2) All the partners of a limited liability partnership are entitled to share equally in the capital, profits and losses of the limited liability partnership.

3) The Limited Liability Partnership shall indemnify each partner in respect of payments made and personal liabilities incurred by him:
   a) in the ordinary and proper conduct of the business of the limited liability partnership; or
   b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership.

4) Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership.

5) Every partner may take part in the management of the limited liability partnership.

6) No partner shall be entitled to remuneration for acting in the business or management of the limited liability partnership.

7) No person may be introduced as a partner without the consent of all the existing partners.

111 Supra note 25.
112 Provisions regarding matters relating to mutual rights and duties of partners and LLP and its partners applicable in the absence of any agreement on such matters.
8) Any matter or issue relating to the limited liability partnership shall be decided by a resolution passed by a majority in the number of the partners, and for this purpose, each partner shall have one vote. However, no change may be made in the nature of business of the limited liability partnership without the consent of all the partners.

9) Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes within thirty days of taking such decisions and are kept and maintained at the registered office of the limited liability partnership.

10) Each partner shall render true accounts and full information of all things affecting the limited liability partnership to any partner or his legal representatives.

11) If a partner, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.

12) Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership or from any use by him of the property, name or any business connection of the limited liability partnership.

13) No majority of the partners can expel any partner unless power to do so has been conferred by an express agreement between the partners.

14) All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred to for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).

It is submitted that through these provisions relating to mutual rights and duties coupled with bare minimum public disclosures, the virtues of secretiveness and litheness, which were considered as hallmarks of a traditional partnership are also marinated in the regime of LLP. But the cautious note here is that, firstly the First Schedule does not cover
vital issues comprehensively such as the details about handling of administration, mechanism of supervision, decision making powers, provision of remuneration, extent of authority given to individual partner, how the details of partner’s entitlements are reached out in case they cease to be a partner or the LLP is liquidated etc. Secondly, the contents of First Schedule are applicable only when the LLP Agreement is silent on any or all of the above stated subjects. Therefore, in case any LLP proposes to exclude any or all of the provisions of the First Schedule to the LLP Act, then it would have to enter into a LLP Agreement, specifically excluding applicability of any or all provisions of the First Schedule.

The researcher submits that in the above avowed context and also when the vibrant business environment is changing with the click of clock as well as of mouse, it is desirable that the LLP Agreement contains a provision that it can be altered by a resolution passed by a specified majority of partners. In the absence of such a provision, any alterations will need approval by all partners which may affect the operational flexibility plank of the entity.

3.14.1 **Fiduciary Duties and the Nature of Limited Liability Partnership**

The word ‘fiduciary’ is derived from the Latin word *fiducia* which means trust or confidence.\(^{113}\) In Roman law, *fiducia* was a pactum,\(^{114}\) an "appendage to a conveyance".\(^{115}\) Basically a fiduciary is a person who agrees to upkeep the interest of another person and it is primarily used as a direction to the holder of property concerning that person’s obligations in relation to the property. The duties which are usually characterized as fiduciary arise\(^{116}\):

a) a fiduciary must not to put himself in a position of conflict\(^{117}\) without informed consent;

b) a fiduciary must not to make a profit from his position without informed consent;


\(^{114}\) As a noun - a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scruples of good faith and candor which it requires, or a person having duty created, by his undertaking, to act primarily for another's benefit in matters connected with such undertaking.


\(^{117}\) Between duty to the principal and self-interest or duty to two principals.
c) a fiduciary must act in the best interests of the beneficiary; and
d) a fiduciary must act in good faith.

In business environment, fiduciary generally mean someone who has specific duties, such as those that attend a particular skilled role and responsibility. In Indian context, the First Schedule in the absence of the LLP Agreement casts the general duties of good faith and fiduciary duties of loyalty and due care on all partners. These duties are an exemplification and extension of the general duties of partners specified in Section 9 of the Indian Partnership Act, 1932\(^\text{118}\) but the jurisprudence of the same will be reflected in the judicial interpretation put onto the present provisions of the First Schedule.

Conceivably the most celebrated judicial expression of fiduciary duties is Justice Cardozo’s lines from *Meinhard v. Salmon*:\(^\text{119}\)

> Joint adventurers, like copartners, owe to one another, while the enterprise continues the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions (citation omitted). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Fiduciary duties are a valuable tool, but they are subject to misuse. Courts often have been beguiled by Justice Cardozo’s colorful language in *Meinhard*’s case into using fiduciary

\(^{118}\) Section 9, *The Indian Partnership Act*, 1932 - Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

\(^{119}\) 164 N.E. 545, 546 (N.Y. 1928), is a widely cited case in which the New York Court of Appeals held that partners in a business owe fiduciary duties to one another where a business opportunity arises during the course of the partnership.
analysis whenever they are confronted with an issue that is not easily resolved in other ways. Meinhard’s dictum still seems to be applied broadly.\textsuperscript{120}

No doubt, the LLP is a hybrid of a partnership and a company. Does the law impose any fiduciary duties on members of a LLP? To what extent can features of partnership law be applied to LLP as being based on general principles?\textsuperscript{121} The Indian law being in infancy stage, so it may take couple of years to get judicial pronouncements on this but this question arose before the England & Wales High Court in \textit{Barthelemy v. F&C Alternative Investments (Holdings) Ltd.}\textsuperscript{122}

The Court held that a member of a LLP does not as such owe fiduciary duties to other members. The Court held that the LLP Act established a wholly new form of entity, which “may be expected to have its own corporate governance structures”. Referring specifically to Section 1(5) of the LLP Act 2000, the Court held that the general law of partnerships does not apply to LLPs at all, unless specifically stated to apply. Insofar as the question of fiduciary duties was concerned, the Court relied on the classic paragraph in \textit{White v. Jones}\textsuperscript{123} where Lord Browne-Wilkinson explains how fiduciary duties arise:

The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B’s affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. Thus, a trustee assumes responsibility for the management of the property of the beneficiary, a company director for the affairs of the company and an agent for those of his principal. By so assuming to act in B’s affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties (including duties of care) will vary from case to case some duties (including a duty of care) arise in each case. The importance of these considerations for present purposes is that the special relationship (i.e. a fiduciary relationship) giving rise to the


\textsuperscript{121} \text{<http://indiacorplaw.blogspot.in/2011/08/fiduciary-duties-and-nature-of-llp.html> Accessed on February 21, 2013.}

\textsuperscript{122} \text{[2011] EWHC 1731 (Ch).}

\textsuperscript{123} \text{[1995] 2 AC 207.}
assumption of responsibility held to exist in Nocton's case\textsuperscript{124} does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B's affairs. Thus, a trustee is under a duty of care to his beneficiary whether or not he has had any dealing with him: indeed he may be as yet unborn or unascertained and therefore any direct dealing would be impossible..."

Noting the principle laid down in this paragraph, the Court in \textit{Barthelemy} nonetheless held that in the context of LLPs, no such general assumption of responsibility could arise. It was also held following the typical reluctance of the common law to impose good faith obligations that there was no duty of good faith owed by the members of a LLP to one another.\textsuperscript{125}

The Court noted the view in Palmer on LLPs that there was a general fiduciary obligation noting (with some understatement) that "\textit{the discussion in Palmer proceeds a little too quickly here}". It was held that the view that ‘as a general rule, members of a LLP owe fiduciary duties to one another’ may not be appropriate. This is because under Section 1(5) of the English LLP Act, the general principles of partnership law cannot be read in to the law governing LLPs. Further, a LLP has a separate corporate personality unlike a typical partnership and the Act leaves open a large window of flexibility for structuring relationships through the LLP form. In such a scenario, the Court held that a general rule would not be appropriate. Thus, the Court seems to leave open the issue that there may be cases where the Agreement between the members is such that an “assumption of responsibility” situation arises: in such cases, based on \textit{White v. Jones},\textsuperscript{126} fiduciary duties may well arises. The Court refusing to lay down a rule of general application held “\textit{it is necessary to look at the specific roles and responsibilities [of the member] arising in the particular context in question in order to assess whether and what fiduciary obligations might arise...}”\textsuperscript{127}

\textsuperscript{125} \textit{Supra} note 77.
\textsuperscript{126} \textit{Supra} note 79.
\textsuperscript{127} \textit{Supra} note 77.
In iCore Networks, Inc. v. McQuade Brennan LLP a partner of a District of Columbia LLP accounting firm moved to dismiss professional malpractice and breach of fiduciary duty claims against him in his individual capacity. In an earlier opinion, the court found that the plaintiff had not sufficiently alleged an individual duty separate and apart from the duty of the LLP, and the partner was protected from vicarious liability by the D.C. LLP statute. The main issue addressed by the court was whether the plaintiff’s amended complaint alleged a duty on the part of the partner that would allow him to be liable in his individual capacity. The court found that it did. The plaintiff was suing the firm for embezzling funds from the plaintiff by overcharging for services, charging for unperformed services, and forging and cashing checks. To conceal the embezzlement, an individual or individuals at the firm created false invoices and made alterations of the plaintiff’s books and records. The firm alleged that one individual carried out the scheme acting alone; however, the plaintiff sought to hold one of the partners, McQuade personally liable. The court reviewed the amended allegations and found that liberally construed, they alleged a duty on the part of McQuade in his individual capacity. The complaint stated that McQuade reviewed the work done by the alleged embezzler and assured the plaintiff that the work had been done properly. The alleged assurances were given at a time when the firm was negotiating a long-term accounting services contract with the plaintiff. The court stated that it may have been reasonable for McQuade to assume that the long-term engagement depended upon the outcome of the check reconciliations and assurances provided by McQuade. Thus, there was a plausible claim that McQuade’s actions violated a duty of reasonable care and led, in whole or in part, to the damages suffered by the plaintiff. The claim for professional malpractice thus survived. The court noted that courts do not generally regard the accountant-client relationship as a fiduciary one, but concluded that the allegations supported a breach of fiduciary duty claim as well.

The decision of the English Court also contains a discussion of the general content of fiduciary obligations in the common law. Even the Supreme Court of Canada has recently reiterated that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

---

129 Supra note 77.
3.14.2 The Law of Agency vis-a-vis Limited Liability Partnership and its Partners

Although one person cannot, as a rule, by contract with another, impose liabilities, nor confer rights, on a third person not a party to the contract, one person may represent another, as being employed by him, for the purpose of bringing him into contractual relations with a third. Employment for this purpose is called ‘Agency’.131

An ‘agent’ is a person employed to do any act for another or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the ‘principal’.132

According to Chitty:133

The basic notion behind the Common Law rules as to agency is expressed in the maxim, *Qui per alium facit per seipsum facere videtur*, He who does an act through another is deemed in law to do it himself, or more shortly, *Qui facit per alium facit per se*, he who acts by another act by himself. The Common Law allows one man to authorize another to contract for and to bind by him an authorized contract, though it does not always permit the performance of contracts by an agent, and the application of agency principles in other parts of the law (e.g. torts, evidence) may involve different considerations from those relevant in contract.

In *Pole v. Leask*,134 it was held that the relation of agency has its genesis in a contract. In the words of Lord Cranworth:

No man can become the agent of the other person except by the will of that other person. His will may be manifested in writing or orally or simply by placing another in a situation in which, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has

---

134 (1860) 54 ER 481.
so placed him, but in every case, it is only by the will of the employer that an
agency may be created.\textsuperscript{135}

In the legal milieu, every person who works or acts for another may seems to be an
agent but is not always an agent. In \textit{Kennedy v. Trafford},\textsuperscript{136} it was held that no other word is
more commonly and constantly abused then the word ‘agent’. The concept of a servant may
although involve an element of agency but on that account a servant is not to be regarded as
an agent and an agent is never regarded as servant. In \textit{C.P. Singh v. The State of Uttar Pradesh}\textsuperscript{137} it was held that the distinction between a servant and agent is that a servant acts
under the control and supervision of the master and is bound to conform to all reasonable
orders given to him in the course of his work whereas an agent though bound to exercise his
authority in accordance with all lawful instructions which may be given to him by his
principal is not subject to the direct control or supervision of the principal. Further, in \textit{Q.S.
Tyabji v. Commr. Excess Profits Tax, Hyderabad}\textsuperscript{138} it was held that the difference between the
relation of master and servant and of principal and agent is that a principal has the right to
direct what work the agent has to do; but a master has the further right to direct how the work
is to be done and also, an agent has to be distinguished on the one hand from a servant and on
the other from an independent contractor. Independent Contractor is the one who merely
undertakes to perform certain specific work and the mode of performance of the task or
supervision is left at his discretion and neither he can represent the principal nor he can bind
him.\textsuperscript{139}

To know whether a person occupies the position of an agent or not, the court has to go
by his functions. The Court has to see the substance of the transaction and not the parties’
terminology.\textsuperscript{140} On this basis it is analyzed that the test for determination of existence of
agency is two-fold: whether the person has the capacity to do anything for the other so as to
bind him and whether the person can enter into contractual relations on behalf of another

\textsuperscript{135} \textit{Ibid. Also see: Samuel v. Whetherby, (1908)1 K.B. 184 and Syed Abdul Khader v. Rami Reddy, AIR 1979 SC 553.}
\textsuperscript{136} [1897] AC 180 at 188.
\textsuperscript{137} AIR 1956 SC 149.
\textsuperscript{138} AIR 1960 SC 1269 at 1271, 1272.
\textsuperscript{139} \textit{Ibid.}
\textsuperscript{140} \textit{Sri Tirumala Venkateshwar Timber v. Commr. Tax Officer, AIR 1968 SC 784.}
person in dealing with third party. If answer to both of the above turns-out to be in positive affirmation then, there is the relationship of Agency.

The law of contract lies at the heart of commercial law and in India, the law of agency is articulated in the Indian Contract Act, 1872 under Chapter X running from Sections 182 to 238, though the Indian Contract Act is considered to be not exhaustive on the rights of the agent against the principal, particularly in the fact of the principles of indemnification as contained under Sections 124 and 125 of the said Act and roped into it by virtue of Sections 222 and 223 of the same Act.

The Indian Contract Act, 1872 while dealing with ‘Agent’s duty in conducting principal’s business’ provides that an agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss is sustained, he must make it good to his principal, and if profit accrues, he must account for it.

Based on the contract of uberrimae fidei, the law of partnership being a branch of the law of agency is having its roots in mutual trust and is carried on by mutual agency. The Indian Partnership Act, 1932 provides that, subject to the provision of this Act, a partner is the agent of the firm for the purpose of the business of the firm. Further, it provides that every partner is liable jointly with all the other partners and also severally for all acts of the firm done while he is a partner.

Section 26 of the LLP Act has put the principle of agency at work differently to say that for the purpose of its business every partner of LLP is its agent but not of other partners. The same is discussed hereunder:

---

142 Section 211, The Indian Contract Act, 1872.
143 A Latin phrase which means ‘utmost good faith’.
144 Sections 18 and 25, The Indian Partnership Act, 1932.
3.14.2.1 Every partner of limited liability partnership is an agent of limited liability partnership: Under the agency, an agent is a person who has capacity to bind his principal by his acts done within the authority granted by the principal. But if the agent acts beyond his authority and the third party dealing with the agents knows that the agent is acting beyond his authority or has reason to believe that he is acting so, and still deals with such agent, then the third party cannot bind the principal for the acts of such agent.

Applying the truism of agency in partnership law, a partner has the capacity to represent partnership and undertake business transactions on its behalf. It is in this background only that the LLP Act firmly states that a partner is an agent of the LLP; but, this agency is restricted for the purpose of business of LLP only. Accordingly, if a partner undertakes a business transactions related to the object/ business of LLP, then the third party can bind the LLP for his acts, conversely, if a partner undertakes a business transaction which is not related to the object/ business of LLP then the third party cannot bind the LLP for the acts of the partner in this regard. It is worth appreciation here that all the partners, not just the designated partners, are agents of the LLP.

3.14.2.2 A partner is not an agent of the other partners: Mutual agency between the partners is the critical test of traditional partnership or the truism that every partner is an agent of the other partners or as it is sometimes expressed a propositus negotiis societatis and may consequently bind all the other partners by his acts. Owing to this, the notion of joint and several liabilities comes into being which makes each partner jointly and severally responsible for the liabilities of the partnership firm constituted under Indian Partnership Act, 1932 increasing the level of risk of a partner for the acts of the firm and also of other partners and such claim is enforceable against personal assets of the partner. But making a shift from

---

146 Section 226, The Indian Contract Act, 1872 dealing with ‘Enforcement and consequences of agent’s contracts’ states that contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

147 Supra note 55.


149 As laid down in Cox v. Hickman, (1860) 8 HLC 268.

150 Supra note 1, at 192.

151 In Ashutosh v. State of Rajasthan, AIR 2005 SC 3434; it was reiterated that in case of joint and several liability, it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners and he need not necessarily make all the partners parties to the suit.
the traditional partnership, where the agency relationship which is the rule, extends much farther in LLP by virtue of Section 26. A partner of LLP does not act as an agent for other partner(s) of the LLP. Implying that the liability cropping out of any independent or un-authorized acts including wrong done or gross negligence committed by any one of the partners will not traverse to any other partner(s).

It is submitted that the concept of LLP form of organization emerged in the business environment by limiting the liability of the partner to his agreed contribution only and categorically providing that the partner do not have any mutual agency relationship inter-se in case of LLP.

From the above, the researcher summarizes the position of law of agency vis-a-vis LLP and its partners in the following table:

<table>
<thead>
<tr>
<th>Particular(s)</th>
<th>THE LIMITED LIABILITY PARTNERSHIP ACT, 2008</th>
<th>THE INDIAN PARTNERSHIP ACT, 1932</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partner an agent of partnership business</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Partner an agent of the other partners</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>


The very fundamental characteristic of the juristic entity in the form of LLP is the ‘limited liability’.

Conducting business as a non-corporate entity carried the risk of personal liability on the owners / partners. There are large number of business houses which want to do business as ‘closely held’ but have to compulsorily set up ‘Private Limited Company’ to get the shield of ‘limited liability’. Similarly

---

152 Section 18, The Indian Partnership Act, 1932 read with, Sections 25 and 26, The Indian Partnership Act, 1932.
there are large numbers of firms which have to restrict their exposure for finance etc. to avoid risk of direct claim on partner’s properties in the event of business loss. In the recent years the Government of India took the call to resolve the business limitations of firms and thereby tap entrepreneurial skills which would lead to growth in national GDP. 153

At the outset, as the nomenclature ‘limited liability partnership’ speaks loud and clear the liability of partners in case of this form of business entity is limited and there being a separate legal entity, the liability of LLP cannot be construed to be the liability of the partners of the LLP. Thus, the limited liability allows the partners to walk away from corporate millstone when the LLP is not in a situation to swaddle those liabilities. Further, the restricted application of the law of agency 154 insinuate the liability of the partners for the acts of other partners which is another go-ahead feature of the LLP that a partner is not personally liable for the wrongful act(s) or omission(s) of any other partner of the LLP except in case of unauthorized acts, fraud or negligence. This boasting feature is expected to root mushroom growth of a large number of LLPs in India. 155

3.14.4 Tracing Indian Position amongst the Model(s): Limiting the Partners Liability Worldwide 156

Broadly, there are two models of limiting the partner’s liability adopted by the legislatures worldwide. 157 The first is the Texas Model; this model seeks to limit the liability of the partners only in respect of ‘wrongful acts’ but not ‘ordinary business acts’ the partner’s vicarious liability is limited to the wrongful acts of the partnership and not for liability arising in the ordinary course of business. 158 The other model, commonly referred to as the Minnesota/Delaware Model, imposes no ‘personal liability for anything chargeable to the partnership… or other debts or obligations’ on partners of a LLP ‘merely on account of this

---

154 Supra note 55.
155 Chapter V of the LLP Act, containing Sections 26 to 31 deals with the ‘Extent and Limitation of Liability of Limited Liability Partnership and Partners’.
status' where all obligations of the LLP are solely the liability of the LLP and the partners are not personally liable for any action arising in tort, contract, etc.159 The second model is followed more explicitly in New York State.160 There is also a third approach, which is a rather mid-way solution, which is followed in the UK. The UK law imposes upon the members the ‘liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act’ 161

The second model is susceptible to severe criticism in that it may provide a strong disincentive for the partners to act with full devotion as a single unit. Further, there is empirical evidence that most firms collapse for reasons such as insufficiency of business to meet overheads, irresolvable personal disagreements and incentives to open their own or join a different firm and not necessarily for reasons of liability.162

Despite the possible criticism, the Indian LLP Act seems to follow the second model in that Section 28(1) seeks to exclude the personal liability of a partner ‘directly or indirectly for an obligation referred to in Section 27(3) solely by reason of being a partner of the LLP’. Section 27(3) in turn provides that ‘an obligation of the LLP whether arising out of contract or otherwise, is solely the obligation of the LLP.’ Nothing in the LLP Act qualifies Section 27(3) as a reference solely to ‘non-business’ liabilities equating the LLP, with the status of a ‘company’ as under Section 3 of the Companies Act so far the extent of personal liability of its partners is concerned. Whatever the nature of acts giving rise to the obligation in question, a partner (other than the partner who committed a wrongful act) of a LLP cannot be made personally liable.

The following table summarizes the extent of liability exposure of each of the LLP, the concerned partner and the other partners:163

---

160 Setion 26(b), The New York Partnership Law.
<table>
<thead>
<tr>
<th>Particulars</th>
<th>LLP</th>
<th>CONCERNED PARTNER</th>
<th>OTHER PARTNERS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>To the Extent of his share in the LLP</td>
<td>Personal Assets</td>
<td>To the Extent of their share in the LLP</td>
</tr>
<tr>
<td>Lawful acts carried out in the normal course of business</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Wrongful acts in the NORMAL COURSE of business</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Wrongful acts done WITH AUTHORITY</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Acts done WITHOUT AUTHORITY</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

3.14.5 *Extent of Liability of Limited Liability Partnership*

Based on the cardinal principle of agency, the LLP Act provides that if any third party deals with a partner knowing that such partner does not have authority to deal with the subject or that such person is not a partner of the LLP while he is representing so, then such third person cannot make LLP bound by the said deal. The LLP can escape from the liability for the acts of the partner if both the conditions are fulfilled (i.e. absence of authority and presence of knowledge).\(^{164}\) The possible propositions to the above are:\(^{165}\)

\(a\) when the third party consciously and calculatingly transacts with a partner of the LLP who is not having any authority and later on makes the LLP liable for the

\(^{164}\) Section 27, *The LLP Act, 2008.*
\(^{165}\) *Ibid.*
transaction, then LLP cannot be held accountable as the third party did not transact with clear hands;
b) when a person pretends to be a partner of the LLP and third party knows that he is not a partner but still transacts with him knowingly that he is pretending to be a partner, then LLP is not responsible to third party at all.
c) when the partner commits any fraud or any other negligent act while the partner was not having any authority to act for the LLP, then the LLP is not at all liable.
d) when the third party is ignorant about the incapable position of the partner to transact, but it is expected to know the incapacitating fact by virtue of constructive notice or being in public domain or on reasonable enquiry expected from a prudent man, and transacts with him without reasonable enquiry, then again the limited liability partner is not be held liable for the imprudent approach of the third party.
e) when third party is ignorant about the incapable position of the partner to transact and is also not expected to know the incapacitating fact on reasonable enquiry expected from a prudent man, still transacts, then LLP is liable for the acts of such partner.

3.14.6 Liability for Acts of Partners done within Authority in the Course of Business

Further, the LLP is liable for the acts or omissions of its partners done in the course of business and within authority. The LLP Act elucidates that besides the liability of the partner of LLP, the liability of LLP would also exist in a situation where a partner commits a wrongful act or omission in the course of business or with the authority of LLP because each and every partner of the LLP is an agent of the business entity and as such representing his principal and principal is responsible for the acts of his agent i.e. the partner here in case of LLP. In order to protect the interest of third parties, the personal liability of the partner and the liability of the LLP would exist to the same extent for wrongful acts of its partners done in the course of business within the authority given by the LLP depending upon the dimension of the partner’s authority.166

166 Ibid.
The obligation of LLP, whether arising out of contract or otherwise will be solely be the obligation of LLP and they are to be met from the assets of the LLP only as LLP being a juristic personality is competent to hold, acquire and dispose of the property.\textsuperscript{167}

3.14.7 Liability for Pre-Incorporation Transactions

It is observed that the Pre-incorporation transactions are inevitable feature of all upcoming body corporate. These transactions are entered into before the incorporation and LLPs are not unscathed from these transactions. But it is a fundamental requirement of the principles of offer and acceptance, under the law of contract universally, that a party must be in existence in order to crystallize an agreement.

Sensing the vital importance of these transactions, the LLP Act gives due regard to them. It says that, an agreement in writing made before the incorporation of a LLP between the persons who subscribe their names to the incorporation document may impose obligations on the LLP, provided such agreement is ratified by all the partners after the incorporation of the LLP.\textsuperscript{168} Further, for the purpose of Section 23(3), every LLP shall file information with regard to the LLP Agreement referred to in such sub-section, in Form 3 with the Registrar within thirty days of the ratification by all the partners along with the fee as provided in Annexure ‘A’.\textsuperscript{169}

However, the researcher analyzes that the LLP cannot acquire rights or obligations under a pre-incorporation contract because as far as the law of agency is concerned, a person cannot be an agent of a non-existent principal.

3.14.8 Extent of Liability of Partner

A partner is not personally liable, directly or indirectly for an obligation of the LLP arising either out of contract or otherwise solely by reason of being a partner of LLP.\textsuperscript{170} However, this is not going to affect the personal liability of a partner for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of

\textsuperscript{167} Section 27(3) and (4), The LLP Act, 2008.
\textsuperscript{168} Section 23(3), The LLP Act, 2008.
\textsuperscript{169} Rule 21(2), The LLP Rules, 2009.
\textsuperscript{170} Section 28(1), The LLP Act, 2008.
any other partner of the LLP.\footnote{Section 28(2), \textit{The LLP Act}, 2008.} Moreover, the partners in their individual capacity may incur personal liability under any of the general law, for example, a professional who is a partner can be personally held liable for his own negligence to the extent of his personal property.

It is submitted that owing to disregard to the existence of law of agency amongst the partners, the principle of joint and several liability is not applicable and a partner is not be personally liable for the wrongful act or omission of any other partner of the LLP.

\subsection*{3.14.9 Liability for Number of Partners falling below Minimum Statutory Limit}

For a LLP, to come into being, there is a requirement of minimum two partners. If at any time the number of partners of a LLP is reduced below the statutory limit of two and the LLP continues with the business for more than six months with such reduced number of partners, \textit{i.e.} the only partner, then the left out partner will be personally liable for all the obligations of the LLP provided that the LLP is carrying on the business beyond six months and he has the knowledge of the fact that he is the sole partner in the LLP.\footnote{Section 6(2), \textit{The LLP Act}, 2008.}

\subsection*{3.14.10 Liability of Ceased Partner}

From the date of cessation, the ceased partner is absolved from all the future liabilities of the LLP provided the third party dealing has the notice of the fact or the notice of the fact is delivered to the Registrar.\footnote{Supra note 32.}

However, the ceased partner continues to be liable for the obligations to the LLP or to the other partners or to any other person, which he incurred as a partner towards the LLP or other partners or to any other third party.\footnote{Ibid.}

\subsection*{3.14.11 Liability for Promissory Notes, Bill of Exchanges and Cheques}

In case, a promissory note or bill of exchange or cheque is drawn by the partner of a LLP and that is not honoured by the LLP because of any fault on the part of the drawer of that
very instrument, then in that case, the partner is liable to the person to whom such promissory
note or bill of exchange or cheque was issued.175

3.14.12 Liability in Tort or Contract

The partners of the LLP owe a fiduciary duty of utmost good faith, trust, care and
responsibility; in case of breach of duty they will be personally liable for the wrongful act(s)
or omission(s).176

3.14.13 Liability for Flouting Sections 7, 8 and 9

Under Section 10 of the LLP Act, if the LLP contravenes the provisions of sub-section
(1) of Section 7,177 then the LLP and all partners are punishable with fine which shall not be
less than ten thousand rupees but which may extend to five lakh rupees. And if the LLP
contravenes the provisions of sub-Section (4)178 and sub-Section (5)179 of Section 7, Section
8180 or Section 9181, the LLP and its every partner shall be punishable with fine which shall
not be less than ten thousand rupees but which may extend to one lakh rupees.


Every LLP shall have at least two designated partners who are individuals and at least one of them shall be
a resident in India:182

Provided that in case of a LLP in which all the partners are bodies corporate or in which one or more
partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or
nominees of such bodies corporate shall act as designated partners.

Explanation - For the purposes of this section, the term “resident in India” means a person who has stayed
in India for a period of not less than one hundred and eighty-two days during the immediately preceding
one year.

3.14.15 Liability in case Of Holding Out

Dealing with liability in the case of holding out, the LLP Act runs as under:183

176 Ibid.
177 Every LLP shall have at least two designated partners who are individuals and at least one of them shall be
a resident in India:

Provided that in case of a LLP in which all the partners are bodies corporate or in which one or more
partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or
nominees of such bodies corporate shall act as designated partners.

Explanation - For the purposes of this section, the term “resident in India” means a person who has stayed
in India for a period of not less than one hundred and eighty-two days during the immediately preceding
one year.

178 Filing with the Registrar the particulars of individuals who have given their consent to act as designated
partner
179 Satisfaction of conditions and requirements by individuals eligible to be a designated partner.
180 Liabilities of designated partners.
181 Changes in designated partners.
182 Section 13(4), The LLP Act, 2008.
Holding out (1) Any person, who by words spoken or written or by conduct, represents himself, or knowingly permits himself to be represented to be a partner in a limited liability partnership is liable to any person who has on the faith of any such representation given credit to the limited liability partnership, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit:

Provided that where any credit is received by the limited liability partnership as a result of such representation, the limited liability partnership shall, without prejudice to the liability of the person so representing himself or represented to be a partner, be liable to the extent of credit received by it or any financial benefit derived thereon.

(2) Where after a partner's death the business is continued in the same limited liability partnership name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the limited liability partnership done after his death.

It is analyzed that the aforesaid provision of holding out is in fact an illustration of the general principle of estoppel by conduct and is similar to that of Section 28 of the Indian Partnership Act 1932.

The principle on the basis of which a person holding out as partner may be liable is illustrated in the following words in *Waugh v. Carver*, as stated by CJ. Eyre:

Now a case may be stated in which it is the clear sense of the parties to the contract that they will not be partners and that A is to contribute neither labour nor money and to go still further, not to receive any profits. But if A will lend his name as a partner he becomes against all the rest of the world a partner not on the ground of real transaction between them, but upon principles of general policy to prevent frauds to which creditors would be liable if they were to suppose they lent their money upon the apparent credit

---

184 14 RR 845; [1793]2 H Blacks 235.
of three or more persons when in fact they lent it to two of them to whom
without the others they would have lent nothing.\textsuperscript{185}

It is submitted that this provision means that where a person who is not a partner of
LLP, intentionally represents himself as a partner of the LLP or permits himself to be
represented as a partner of the LLP either by words (spoken or written) or by conduct then
that person is called as ‘partner by holding out’. If the representation thus made is
unambiguous then the law provides that a partner by holding out is liable to any person who
on the faith of such representation has given credit to the LLP, the former shall be liable to the
latter, irrespective of the fact whether the representation has reached the person giving credit
or not. Accordingly, the researcher concludes the two essential elements of the provision of
holding out are:

\begin{itemize}
\item[a)] there must be representation either by words – spoken or written; or by conduct;
\item[b)] the credit must be given to the LLP on the basis of such representation.
\end{itemize}

The upshot of the doctrine of holding out is that it foists the liability on the person
who represents or let himself to be represented and does not at all give any right to become
partner in the LLP.\textsuperscript{186} Moreover, the liability under the doctrine of holding out arises only
when the third party virtually relies on the representation and is quite ignorant about the
reality.\textsuperscript{187}

In \textit{Seraf v. Jardine}\textsuperscript{188}, a partner retired from a partnership firm and a creditor
continued to give advances to the firm. It was held that the firm as well as the retired partners
was liable to repay the amount advanced by such creditor. A third party may also bring an
action against a partner by ‘estoppel’ or ‘holding out’ only when he has acted on the belief
that the person so representing himself to be a partner. However, where after a partner’s death
the business is continued in the same LLP name, the continued use of that name or of the
deceased partner’s name as a part of thereof shall not of itself make his legal representative or
his estate liable for any act of the LLP after his death. This provision is similar to the

\textsuperscript{187} \textit{Alderson v. Popey}, [1808] 1 Camp 404.
\textsuperscript{188} (1882) 7 AC 345.
corresponding provisions under the general partnership Act. To refer judicial precedents on the point, in *Bengal v. Miller*\(^\text{189}\), it was held that the estate of deceased partner was not liable because the firm did not owe the price of the goods in his lifetime.

It is observed that where any credit is received by the LLP because of such representation, the LLP shall, without prejudice to the liability of the person so representing himself or represented to be a partner, be liable to the extent of credit received by it or any financial benefit derived thereon. The provisions have also been made in the Act to provide that where after a partner’s death the business is continued in the same LLP name, the continued use of that name or of the deceased partner’s name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the LLP done after his death.

### 3.14.16 Unlimited Liability for Fraud

The general rule is that a partner is not personally liable (directly or indirectly) for an obligation of the LLP, solely on the rationale of being a partner. Nonetheless, this liability shield is withdrawn in case of any act carried out with the intention of defrauding the creditors or for any other fraudulent purposes as fraud unravels everything\(^\text{190}\). The relevant provision is reproduced hereunder:\(^\text{191}\)

**Unlimited liability in case of fraud.**—(1) In the event of an act carried out by a limited liability partnership, or any of its partners, with intent to defraud creditors of the limited liability partnership or any other person, or for any fraudulent purpose, the liability of the limited liability partnership and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the limited liability partnership:

Provided that in case any such act is carried out by a partner, the limited liability partnership is liable to the same extent as the partner unless it is established by the limited liability partnership that such act was without the knowledge or the authority of the limited liability partnership.

\(^{189}\) (1903) 2 KB 212.


(2) Where any business is carried on with such intent or for such purpose as mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

(3) Where a limited liability partnership or any partner or designated partner or employee of such limited liability partnership has conducted the affairs of the limited liability partnership in a fraudulent manner, then without prejudice to any criminal proceedings which may arise under any law for the time being in force, the limited liability partnership and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct:

Provided that such limited liability partnership shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the limited liability partnership.

It is analyzed that if with the intention of defrauding the creditors, any act is carried out by the LLP or any of its partners, then the LLP and also its partners who had acted with such intention or for any fraudulent purposes, will be liable to an unlimited extent with respect to all or any of the debts or other liabilities of the LLP. The provision states that where any such act is carried out by a partner, the LLP shall be liable to the same extent as the partner, unless it is established by the LLP that such act was without the knowledge or the authority of the LLP. 192

Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. 193 Fraud avoids all judicial acts, ecclesiastical or temporal. 194 The common law relating to fraud is enunciated in by the House of Lords in Derry v. Peek 195 in which the House of Lords held that in order to establish fraud, it is necessary to prove the absence of any honest belief in the truth of which has been stated. Lord Hurshchell observed, “Fraud is

192 Ibid.
193 As observed by De Grey, C.J. in Rex v. Duchess of Kingston, (1776) 2 Smith LC 687.
194 Chief Justice Edward Coke of England (February 1, 1552 to September 3, 1634).
195 [1889] 14 App Cas 337.
proved when it has been made knowingly or without belief in its truth or recklessly whether it is true or false”.196

The Supreme Court of India has held that the word ‘wilful’ means ‘intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom’.197

The LLP Act provides the punishment to the tune of imprisonment for a term which may extend to two years and with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 5,00,000/- for every person who was knowingly a party to the above fraud. Further it is provided that the LLP or partner or designated partner or employee who has conducted the affairs of LLP in a fraudulent manner, without prejudice to any criminal proceedings, shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct. However, the LLP shall not be liable if the partner or designated partner or employee has acted fraudulently without knowledge of the LLP.198

Fraud and justice never dwell together199 as fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence200 and so unlimited liability is provided for fraud.

3.14.17 Limitation of Partner’s Liability

Liability of partners of LLP is restricted to the extent of the money contributed to the by them. Unless the partners of the LLP have undertaken in the LLP Agreement to contribute certain sum of pecuniary amount at the time of winding up of the LLP then the partners are personally liable as per the signature tune of the said agreement. Conversely, if there is no

196 Ibid. However, in Re London and Globe Finance Corp. [1903] 1 Ch 728, the legal distinction between deceiving and defrauding was highlighted by Buckley J. as, ‘To deceive is, I apprehend, to induce a man to believe that that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: it is deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.’

197 S. Sundaram Pillai v. R. Pattabiraman, AIR 1985 SC 582 at 589.

198 Supra note 191.


understanding between partners to contribute any sum of money then they do not have any liability.\textsuperscript{201}

It is significant to note here that the LLP Act does not intend to restrict or limit the extent of liability if the partners have done any wrongful act under the civil law. A partner is not liable for the wrongful act and omission of any other partner of LLP as each partner is not an agent of other partner but only of LLP.\textsuperscript{202}

3.14.18 Vicarious Liability of Partners

In particular, innocent partners of a LLP are not subject to personal ‘vicarious liability’ for malpractices liabilities of the LLP merely because they are its partners. In the case of \textit{Megadyne Information System v. Rosner, Owens & Nunziato},\textsuperscript{203} the court determined that there was facts issue relating to the personal liability of the partners. The court cited the California LLP provisions for the proposition that partners in a LLP do not have vicarious liability for the torts of another partner, and the court stated that the plaintiff could only hold a partner liable who was “involved in the handling of the matter”.\textsuperscript{204}

3.14.19 Exception to the Limited Liability

Generally the partners of the LLP are accorded the protective umbrella of limited liability. The exception to this protection includes the situation when there is any personal negligence on the part of the partner.\textsuperscript{205}

3.15 English Precedents on the Limited Liability Partnerships

An overview of some of the decisions rendered by the English courts on the nature of a LLP may be useful to be examined. This is for two reasons: \textit{i}) the Indian law \textit{i.e.} the LLP Act draws heavily upon the English LLP Act, 2000; and, \textit{ii}) traditionally, the Indian judges have relied on the wisdom of their English counterparts.\textsuperscript{206}

\textsuperscript{201} Sections 26, 27 and 28, \textit{The LLP Act}, 2008.
\textsuperscript{202} Ibid.
\textsuperscript{205} Supra note 201.
\textsuperscript{206} Supra note 108.
At the outset, it may be useful to visit the general rules for imposing liability for the tort of negligence may be expedient to fully appreciate their (non)-extension to LLPs by the English Court. The principle for imposing the liability for negligence under the English law is the principle of ‘assumption of responsibility’. Although in principle the courts there have laid down a three-prong test of reasonably foreseeable loss, proximity of defendant’s act with the injury suffered and a general enquiry into whether it is ‘just, fair and reasonable’ to impose a duty of care, the courts have been lately using the ‘assumption of responsibility’ justification207 at least after the House of Lords decision in Hedley v. Heller.208 This seems like a sufficient test.209 The liability in tort may exist in addition to the liability under contract.210

The way the liability of the firm and partners for the negligence of a co-partner has undergone substantial change after the enactment of the LLP Act, 2000 in the UK is considered hereunder:211

In Dubai Aluminium Co Ltd v. Salaam and Others,212 one of the partners of a law firm (not a LLP) drew up agreements that were used for a fraud of sham contracts. The other two partners of the firm were personally innocent of any wrongdoing. In answering a claim by the defrauded plaintiff, the co-partners of the defrauding partner paid up part of the compensation to the plaintiff. During the contribution proceedings, the co-partners sought to recover the compensation paid by them. The House of Lords disallowed the relief to the co-partners.

The Dubai Aluminium case213 demonstrates the extent of liability of a general partnership and that of its partners for the acts done by other partners. It was reiterated in this

210 Ibid.
213 Ibid.
case by the House of Lords that acts, though not authorized by his co-partners, could nevertheless be said to be done ‘in the ordinary course of the business of the firm’ if, for the purpose of the firm’s liability to third parties, it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm’s business; such that such acts would be capable of attracting personal liability for the other partners also and vicarious liability for the firm.

In Re, Rogers, a testatrix executed a will under which she appointed the ‘partners in the firm of . . . (a named law firm)’ as its executors and trustees. Subsequently, this named law firm merged with another law firm. The merged entity was constituted and incorporated as an LLP. All the partners of the merged firm became ‘members’ of the LLP. The question before the court therefore was whether this change in the legal status into an LLP and its members, was sufficient to render the words of the will incapable of being carried out.

Even though the court finally gave a ‘common sense’ solution based on the reasoning that the document executed by a commoner who is not expected to precisely understand the difference between a ‘partnership’ and a ‘LLP’, the court observed: 215

There are two hurdles… The first is that a limited liability partnership is a corporate body with a legal personality separate from that of its members: it is not a firm in the sense of a partnership. The second is that its members (whether or not profit sharing) are not partners.

In the matter of Magi Capital Partners LLP, the case stands for the proposition that in matters of dissolution, an LLP is more akin to a company than a partnership since this involves the winding up of a separate legal entity, incorporated under a statute. Being so, an LLP cannot be wound up by an arbitrator. However, for the purpose of fact finding, including bad faith of the members, the matter may be referred to arbitration. The Court observed: 217

It seems to me probable that if this had been an ordinary partnership and not a limited liability partnership, the Applicant, Mr. Banerjee, would have had an absolute right under the Arbitration Act to have the present winding up

---

214 [2006] EWHC 753 (Ch).
215 Ibid.
216 [2003] EWHC 2790 (Ch).
217 Ibid.
petition or the issues in it resolved by arbitration and that the arbitrator would probably have had jurisdiction conferred on him by agreement between the parties under Section 35 of the Partnership Act 1890 to wind up the partnership. But that is not the present case. This is not an ordinary partnership. It is a limited liability partnership. It is accepted that that creates a different entity, which is a creature of statute, and that it is not possible to exclude the statutory right to apply to have the statutory entity wound up by the court.

In *Hailes v. Hood & Others*,\(^{218}\) while discussing the nature of an LLP and the ‘interest’ of a partner in it, the Chancery Division of the High Court of England & Wales observed:

> The legislation proceeds on the basis that a member of an LLP has a ‘share’ and ‘interests’ in the LLP; and it contemplates that the share, or an interest, of a member is (potentially) transferable. There is, however, no definition of a ‘share’ or ‘interest’; nor is there any explicit guidance given as to what a share or interest comprises. Broadly speaking, a member of an LLP will have financial rights and obligations (for instance, a right to share in the profits, and an obligation to contribute capital), and governance rights and obligations (for instance, the right to vote on various LLP business and administrative affairs, and the obligation to comply with certain contractual and statutory duties). Put another way, a member will have an economic interest and a management interest in the LLP. The nature and extent of these rights and interests for any one member may well vary depending on the point in time at which and the context in which they are being considered. The authors suggest however, that the ‘share’ of a member is the totality of the contractual or statutory rights and obligations of that member which attach to his membership; and that an ‘interest’ of a member is one or more of the components of his share.

In *BFI Optilas v. Blyth & Others*,\(^{219}\) defendants 1 and 2 were employees of the claimant. They had entered into agreements in restraint of trade with the claimant whereby the

---

\(^{218}\) [2007] EWHC 1616 (Ch).

defendants 1 and 2, operational until 12 months of the termination of the employment. The defendants 1 & 2 left the job and constituted an LLP (Defendant No. 3) along with another person to render services of the nature they had been employed for with the claimant.

In a petition seeking temporary injunction against each of the defendants, the question before the Queen’s Bench Division in this case was whether any restrictions undertaken by and enforceable against any set of persons under a contract may be extended to and enforced against an LLP, where such persons subsequently constitute themselves into an LLP. The Court, while refusing to grant injunction against the LLP even though the Court granted temporary injunction against Defendants 1 & 2, held.\textsuperscript{220}

The application is also made in respect of the third defendant, a limited liability partnership, created under the Act of 2000. Reliance is placed upon Section 6(1) and 6(4)...

Although this provides for vicarious liability in the event of a wrongful act or omission of a member of the partnership, I cannot accept that this potential liability can form the basis for preventing the third defendant from having dealings with the Companies covered by the first defendant’s restrictions.

Plainly, in my view, the third defendant, as a separate legal entity, would not be prevented by any contractual restriction imposed by the claimant from having dealings with such Companies through, for example, the agency of Mr. Yeo. In my judgment the claimant is only entitled to restrict the activity of its former employees to the extent that it has enforceable covenants against them. In the event that they were found liable to the claimant, or in breach of such covenants, the claimant could then seek redress against the third defendant, but until such has been proved I can see no basis for any relief being granted against the third defendant, and accordingly that application is also dismissed.

The researcher analyzes that these cases clearly demonstrate that an LLP is a multifaceted legal entity, whose status and nature cannot be determined on the basis either of the principles of company law or of partnership. Undoubtedly, there is great potential in this entity; potential both for business as well as litigation. In the eyes of law, partnership is

\textsuperscript{220} \textit{Ibid.}
merely a way of unfolding the cluster of partners who makes up business relations but owing to the suppleness in its structure and operation, it is right to condense that a LLP retained all the benefits of a traditional partnership besides catering to the single, although, sincere desire of bringing about a change in the extent of liability of partners, out shadowing and indeed, tailor-making all others needs and wants, the manner in which the LLP Act limits the liability of the partners, merits adequate space and time.