

Can two limited Companies Form a Partnership?

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Companies want to come together for strategical advantage. For this partnership is an option. In USA, Corporation has power to be partner. Supreme Court of India observed that companies can form partnership. However in the light of High Court observation, Company Law Department through circular no. 1/81-CL-V clarified that corporation has no power to become partner in the absence of very special articles. Till the time requirements of very special articles is not clarified by CLB or Government, in the absence of clear position it is dangerous for company to form a partnership because at any time it may be declared ultra vires.

Introduction

When a person wants to do business he can do in four ways 1) sole trading concern 2) partnership 3) Company 4) LL.P. The main disadvantages of doing business in the first two forms are unlimited liabilities and joint and several liabilities. A partnership has no existence apart from its members. The main advantage to doing business in the form of company and LL.P is limited liability. In a recent empirical study of small businesses, it was discovered that, topmost reason given by the respondents for the formation of a company was the advantage of limited liability.¹ The outstanding feature of company is its independent corporate existence. Main disadvantage of these forms of business is strict control of government through various laws.

Companies want to come together to do business. It helps them to take strategical advantage and to use infrastructure and resources of other company. For this companies may use instrument of merger and acquisition or form a partnership. If a company decides to go for merger and acquisition, company has to follow a very technical and lengthy process. Other disadvantage of merger and acquisition is that some time it becomes difficult to handle Human Resource of company. For example on the acquisition of Sun Microsystems by Oracle Corporation some developer of Sun Microsystems formed new Document Foundation.² Many companies consider that partnership is the best way to use infrastructure of other companies and gain strategical advantage. For example, on February 11, 2011, Nokia and Microsoft announced plans to form a broad strategic partnership that would use their complementary strengths and expertise to create a new global mobile ecosystem.³

In present business environment it is essential to examine that two or more companies can form partnership or not. In USA, Corporation generally has the power to be a partner, Arizona statutory provisions expressly permit a corporation to become a partner in a partnership. While in other hand in India, a corporation has no power to become a partner with individual or other corporations in the absence of express statutory or charter authority. According to Company Law Department, circular *prima facie* a company entering into a partnership with some other person or some other company would be *ultra vires* and will be against the principle that a particular company or an incorporated body cannot lawfully employ funds for purposes not authorized by its constitution but it is possible to form a partnership if memorandum and articles of association contain any very special provision.⁴

In India, partnership firm cannot be registered as a member of company.⁵ Under Indian law firm is not a person while in some systems of law separate personality of firm apart from its members has received full and formal recognition. For example in Scotland "a firm is a legal person distinct from the partners of whom it is composed. Partnership Act, 189 (Scotland), Section 4(2), says "In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief pro rata from the firm and its other members."

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Therefore it is essential to examine the question in detail that under which circumstances companies can form a partnership and what is the jurisprudential aspect of present law. It is also essential to examine that present law on this point needs any modification or not.

Need for Business Vehicle other than Company

It is important that there should be a range of legal vehicles available to meet the needs of businesses at all levels. A company has many advantages, including a clear structure which separates ownership from management, a highly developed legal framework and limited liability for shareholders. However, the existence of the structure requires rules for the protection of shareholders and the existence of limited liability requires rules designed to protect creditors and other third parties. The result is that company law is complex and incorporation as a company involves incurring many obligations which a small firm may see as excessively bureaucratic and burdensome.

Recent empirical research by *Andrew Hicks* and *Judith Freedman* suggests that many businesses have been incorporated for reasons other than to obtain limited liability. Hicks found that limited liability was a reason for incorporation for 61% of his respondents while Freedman and Godwin's research found the figure to be 66%. In Hicks' study only half of the 61% promoters of companies think that the objective of limited liability was more than fairly important. When asked about incorporating a new business today, only 40% said limited liability would be relevant. This research suggests that there is significant proportion of companies for whom limited liability is not as critical as one might have thought. In any event limited liability is often only partially achieved. In Freedman and Godwin's research, 54% of respondents said that directors currently provided personal guarantees, mainly to banks. Hicks' research was that 54% had borrowings from a bank and of these 63% had given personal guarantee. This amounts to a major inroad into limited liability as the banks are likely to be the company's major creditor. Where limited liability is not required, or is not practically available, and owner has sufficient fund there is scope for owner managed businesses to use a less regulated structure. It is clearly important that small businesses should have available to them a business structure which is less formal, less regulated and less cumbersome than the existing form of company.⁶

Although there have been suggestions for the introduction of new, simpler forms of companies with limited⁷, or even unlimited, liability for members⁸. Even if a new simpler form of company were to be incorporate, there would be a need for ordinary partnerships to continue to be available which is the least formal, least regulated business associations⁹. In UK 568,0007 partnerships are doing business which gives a combined turnover of £137,000 million (excluding VAT)¹⁰, this shows utility and popularity of partnership.

Company Versus Partnership

In contrast to the company, the other main type of business association is partnership. This is an unincorporated association, where two or more persons associate for the purposes of business. No other separate legal personality is brought into existence on the formation of the partnership, and the business and all its assets remain the property of the partners. The Partnership Act 1890 (UK Act) Section 1(1) defines partnership as 'the relation which subsists between persons carrying on a business in common with a view of profit' Section 1(2) specifically excludes the relationship which exists between the members of a company. Section 4 of Indian Partnership Act, 1932 says "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Each partner is an agent for the others and, hence, can affect the legal rights and obligations of other. Partnerships can be formed by deed or quite informally and, in contrast to companies, can be formed simply in writing, orally or even by conduct. It is good but not mandatory, to have a partnership agreement which sets out the terms on which the partners are associated. In the absence of any agreement to the contrary, when one partner wishes to leave or retire, the partnership has to be dissolved and then perhaps re-formed among remaining partners. Furthermore, when a new partner wishes to join, there has to be unanimous consent of the existing partners.

A share in partnership reflects the partner's priority interest in partnership assets. The assets are jointly owned by partners. In the case of company it is not the shareholder but the company that owns the corporate assets and the concepts of share serves somewhat different function. In the first place it is a fraction of capital, denoting the holder proportionate financial stake in the company. Secondly it is a measure of the holder's interest in the company.¹¹

The Nature of Partnership

Partnership is a common vehicle in India for carrying on business activities of small or medium scale. A partnership is the relationship which exists between persons carrying on business in-common with a view to profit. It involves an agreement between two or more parties to enter into a legally binding relationship. It is essentially contractual in nature. *Tindal CJ in Green v Beesle*¹² observed that 'I have always understood the definition of partnership to be a mutual participation ...', yet the participants don't create a legal entity when they create a partnership. *James LJ in Smith v. Anderson*¹³ observed "An ordinary partnership is a partnership composed of definite individuals bound together by contract between them to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another."

Section 4(2) of the Indian partnership Act 1932 says "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the "firm name".

Supreme Court in *Dulichand Lakshminarayan v. The Commissioner of income-tax, Nagpur*¹⁴ MANU/SC/0037/1956 observed that Section 4 of the Indian Partnership Act clearly requires the presence of three elements namely (1) that there must be an agreement entered into by two or more persons; (2) that the agreement must be to share the profits of a business; and (3) that the business must be carried on by all or any of those persons acting for all.

Supreme Court in *The Commissioner of Income-tax v. Kalu Babu Lal Chand*¹⁵ MANU/SC/0102/1950 observed that under the Partnership Act only "persons" can join as partners. An association of persons is not a person within the meaning of that expression in the Partnership Act. The definition of "Person" in the Income.

Section 5 of the Partnership Act says that the relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying business as such, are not partners in such business.

Partnership Firm as a Registered Member of a Company

A partnership firm cannot register as a member of a company. A firm is not a person in the eyes of the law in *Dulichand Lakshminarayan v. The Commissioner of income-tax, Nagpur*¹⁶ MANU/SC/0037/1956 it was held that firm is not an entity or "person" in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. According to Companies Act, 1956 only a person can be a member of company.

Section 41 of the Companies Act, 1956 defines member according to this section membership of company is open for 'person' only. This section says "(1) the subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members; (2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall be a member of the company. (3) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

Section 12 of the Companies Act, 1956 says that "Any seven or more persons, or where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability." Section 41 read with Section 12 suggest that only a person can be a member of company.

Firm is not a person in the eyes of law. Therefore registration of firm as a member of company is not possible. Company Law Department has clarified the position regarding registration of firm as a member of company through Circular No. 4/72 dated, March 9, 1972. This circular says-A firm not being a person cannot be registered as a member of a company except where company is licensed under Section 25 of Companies Act, 1956. Company which has firm registered as a shareholder should be advised to take rectifies the position within the specific time. In the case irregularity persists despite of warning necessary action can be taken under

Section 150(2). Section 150(2) of the Companies Act says that if default is made in complying with Sub-section (1), the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

Whether Two or More Partnership Firm Can Constitute partnership?

Section 4 of the Partnership Act clearly requires that to constitute a partnership three condition must be fulfilled (1) there must be an agreement entered into by two or more persons (2) the agreement must be to share the profits of a business (3) that the business must be carried on by all or any of those persons acting for all.

Partnership Act doesn't define the word "person". However The General Clauses Act, 1897, Section 3 (42) says that "person" shall include any company or association or body of individuals whether incorporated or not". In *The Commissioner of Income-Tax v. Kalu Babu Lal Chand*¹⁷ MANU/SC/0102/1959 Supreme Court has observed that an association of persons is not a person within the Partnership Act. Therefore refused to accept the application of the Section 3(42) of The General Clauses Act, 1897, on Partnership Act and assigned a different meaning to expression "Person" given in Partnership Act and The General Clauses Act, 1897.

The Code Of Civil Procedure, 1908, Order XXX corresponding to rules of the English Supreme Court Order XLVIII-A ,makes provision to institute suits by or against firms and persons carrying on business in names other than their own. Rule 1 of CPC says that any two or more persons claiming or being liable as partners and carrying on business, in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action,...." The law of procedure has gone to the length of allowing a firm to sue or be sued by another firm having some common partners or even to sue or be sued by one or more of its own partners as Order XXX, Rule 9 of the Code of Civil Procedure says that this Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners, in common.

Again in taking partnership accounts and in administering partnership assets, the law has, to some extent, adopted the mercantile view and the liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met and discharged by the firm out of its assets. The creditors of the firm are, in the first place, paid out of the partnership assets and if there is any surplus then the share of each partner in such surplus is applied in payment of his separate debts, if any, or paid to him. Conversely, separate property of a partner is applied first in the payment of his separate debts and the surplus, if any is utilized in meeting the debts of the firm. Section 49 of the Indian Partnership Act, says "Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm."

It is clear that the English law as well as Indian law, has, for some specific purposes, some of which are referred to above, relaxed its rigid notions and extended a limited per-personality of a firm. Nevertheless, the general concept of partnership, firmly established in both systems of law, still is that a firm is not an entity or "person" in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership.¹⁸

*Salmond on Jurisprudence*¹⁹ says: "A firm is not a person in the eyes of the law; it is nothing else than the sum of its individual members. There is no legal entity standing over against the partners, as a company stands over against its shareholders." We can also add to these features the right of perpetual succession which Section 34 confers on a registered company, showing that it is a legal person different from its shareholders, whereas a partnership is only a compendious method of describing its component."

Section 11 of the Companies Act prohibits association or partnership consisting of more than ten persons for the purpose of carrying on the business of banking and twenty in case of any other business. Section 11(5) says that "every person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine which may extend to [ten thousand rupees]²⁰"

Company as a Partner in Partnership Firm

The Companies Act recognized that a company can be a partner in partnership firm. Under Schedule VI of the Act, under subhead “loan and advances” this act says advance and loan to a partnership firm in which company or its subsidiaries is a partner has to be disclosed separately. Thus it is possible for a company to be a partner in firm as company is person in the eyes of the law. The object clause of memorandum of association must contain a power enabling a company to enter into partnership with any person or company.

In *Steel Brothers & Co. Ltd. v. Commissioner of Income-tax*²¹ MANU/SC/0062/1957 ‘A’ and ‘B’ two companies, were carrying on trade in Burma rice. ‘A’ held all the shares of another company ‘C’ of which ‘A’ was also the managing director. An agreement was entered into between the three companies ‘A’, ‘B’ and ‘C’ for the amalgamated working of the Burma rice business of all three companies under the management of ‘A’, whereby the entire business of the three companies was to be taken over and conducted by ‘A’ in its absolute discretion. At the end of each accounting year the profit and loss of the combination at each place of business, namely, *Rangoon, Bassein, Akyab and Moulmein*, was to be shared in certain proportions, the shares of ‘A’ and ‘C’ being joint and the share of ‘B’, a separate share. A restriction was imposed on ‘B’ and ‘C’ against hiring out their properties, without the consent of ‘A’. Certain specific rights were conferred on B, no special rights were provided to C.

The two partners ‘A’ and ‘B’ signed the required document and filed the Application to Income Tax Officer for registration of firm for the purposes of the Income-tax Act. Income Tax Officer refused registration of partnership on ground that partnership was not constituted of two parties only but was constituted of three parties and third partner’s signature was not present on filed document. High Court held that partnership was a partnership of three companies. Applications were not made by said three companies and deed of partnership did not specify their respective shares therefore registration of partnership was rightly refused. In appeal Supreme Court held that the relationship between A, B and C was that of partners and the fact that no special rights were provided to C of the nature of those conferred on B did not lead to the conclusion that ‘C’ was not a partner along with ‘A’ and ‘B’ in the combination. It will also be observed that the fact that the business of the partnership was to be conducted by ‘A’ alone in its absolute discretion was not destructive of the existence of partnership. Therefore this case indicates that it is possible for two or more companies to constitute a partnership.

Calcutta High Court in *Ganga Metal Refining Co. Pvt. Ltd. v. Commissioner of Income-tax*²² MANU/WB/0002/1966 observed that the entity known as a partnership under the Income-tax Act is not the same entity of partnership strictly within the limits of the Indian Partnership Act. It is therefore essential always to keep clear in the mind that the income-tax entity of partnership under the Income-tax Act is a concept in income-tax law separate from the concept of partnership under the Partnership Act. Income-tax entity of partnership under Income-tax Act may not satisfy the legal requirements of a partnership within the strict meaning of the Partnership Act. Therefore the decision of Honorable Supreme Court in *Steel Brothers & Co. Ltd. v. Commissioner of Income-tax* MANU/SC/0062/1957 has to be understood in relation to registration of firms under the Income-tax Act and not under the formal concepts of the Indian Partnership Act or under the Indian Companies Act.

In above mentioned *Ganga Metal Refining Co.*²³ case Calcutta High Court has given a view that it can be said that three limited companies incorporated under the Indian Companies Act, even if they carry on a venture jointly, cannot be said to form a partnership within the meaning of the Partnership Act. That is why the great authority of Lindley on Partnership, 10th edition, at page 100, formulates the law thus: “There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution. Having regard, however, to this principle, it may be considered as *prima facie ultra vires* for an incorporated company to enter into partnership with other persons.”

Justice P.B. Mukharji in *Ganga Metal Refining* case observed “Section 4 of the Partnership Act says that, ‘Partnership’ is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually ‘partners’ and collectively ‘a firm’ and the name under which their business is carried on is called the ‘firm name’.” Notionally and juristically if two incorporated companies under the Indian Companies Act enter into a partnership, then each company becomes agent for the other and agrees to share the profits. This will create many problems for the two incorporated companies. The two companies will have to be, therefore,

agents for each other in a manner which may not be permissible at all by their own charters, articles and memorandum. It would be difficult to apply the very specific rights and obligations as between partners in the case of companies as partners such as in Chapter III (Sections 9 to 17), Chapter IV (Sections 18 to 30), and Chapter VI (Sections 39 to 55) of the Partnership Act. Then there is need also for the registration of firms and the companies as such partners in a partnership will have to, therefore, obey two masters, the Registrar of Firms and Registrar of Companies. The access of each partner to the other partner's books of accounts will mean that one incorporated company would be entitled to get into the fields of the accounts of the other incorporated company which is its partner. This will make nonsense of the Companies Act. Strangers then will have access to the books, accounts and papers of the companies, whereas under the Companies Act, they are only limited to their own members and shareholders."

In *Ex parte Liquidators of the British Nation Life Assurance Association*²⁴, Lord Justice James observed that "The association was formed for the purposes mentioned in Article 3 of their deed of settlement, such purposes to be carried into effect and the business to be managed by boards of directors and by general meetings in manner there prescribed. *Prima facie* there is nothing more inconsistent with the whole scope and character of such a body than that it should enter into a contract of partnership with any other person or persons in any other business whatever. It would require very clear powers to enable a man's partner or partners, or, in a joint stock company, his delegated officers, or the majority of his co-shareholders, to make him a partner with any other person or a shareholder in any other society. But if the society, in its quasi corporate character, could take shares in another partnership or body, it would in effect be to make every shareholder a partner or shareholder in such partnership or body.....But in truth, the more or less similarity of the objects, or even absolute identity of the objects, does not affect the principle. It is the entering into a new contract of partnership with new persons under a new constitution, which is absolutely *ultra vires* and void, unless specially provided for and authorized."

From above discussion it is clear that in common law, a corporation had no power to become a partner with individual or other corporations in the absence of express statutory or charter authority.

In India the situation is further clarified through Company Law Department Circulation No. 1/81-CL-V dated September 14, 1981 which is based on the observation made by Justice P.B. Mukharji in *Ganga Metal Refining Co. Pte. Ltd. v. Commissioner of Income-tax* MANU/WB/0002/1966. This circular says "A question has been raised whether an incorporated company can enter into a partnership with some other person or some other company. The matter has been examined by this department in consultation with the Department of Legal Affairs and I am directed to say that *prima facie* a company entering into a partnership with some other person or some other company would be *ultra vires* and will be against the principle that a particular company or an incorporated body cannot lawfully employ funds for purposes not authorized by its constitution which would normally be the memorandum and the articles of association. However, a company or an incorporated body, if so authorized by its constitution, can enter into partnership with an individual person or with another company irrespective of nationality and residence. This would, however, require the company to adopt very special articles since many of the provisions of the Partnership Act would be difficult to apply to such a partnership. In view of this, while considering applications for registration of firms with bodies corporate as partners under the Indian Partnership Act, 1932, the State Governments should examine the applications before them and find out whether the memorandum and articles of association of the applicant incorporated companies contain any special articles which authorize the incorporated companies to enter into partnerships and the articles also take care of the possible anomalies which have been pointed in the case of *Ganga Metal Refining Company Pvt. Ltd. v. Income-tax Commissioner West Bengal* MANU/WB/0002/1966."

In short we can say that companies can enter into partnership if they are so authorized by their memorandum of association. Otherwise company entering into a partnership with some other person or some other company would be *ultra vires*. In absence of express provision in the memorandum of association a corporation cannot enter into a partnership either with individuals or other corporations. The term "very special articles" in the memorandum and articles of association is not explained by the High Court or by Company Law Department. Language of the Judgment suggests that special article must be able to remove difficulties which may arise due to application of Chapter III (Sections 9 to 17), Chapter IV (Sections 18 to 30), and Chap. VI (Sections 39 to 55) of the Partnership Act. Government has not issued any guideline that how to remove these difficulties or any draft model Memorandum and Article of association for a company wants to constitute a partnership. In the

absence of clear position it is dangerous for company to form a partnership because at any time it may declare *ultra vires*.

Problem If Company turns into Partnership

It will not be a digression at this stage but an imperative necessity to bear in mind the very specific provisions of the Partnership Act. Section 4 of the Partnership Act says that “Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”.

Notionally and juristically if two incorporated companies under the Indian Companies Act enter into a partnership, then each company becomes agent for the other and agrees to share the profits. This will create many problems for the two incorporated companies. The two companies will have to be, therefore, agents for each other in a manner which may not be permissible at all by their own charters, articles and Memorandum.

It would be difficult to apply the very specific rights and obligations as between partners in the case of Companies as partners such as in Chap. III (Sections 9 to 17), Chap. IV (Sections 18 to 30), and Chap. VI (Sections 39 to 55) of the Partnership Act. For example Section 11(2) of the Act makes a provision that a partner shall not carry on any business other than that of the firm while he is a partner. It is hard to implement these sections if company will be a partner.

Section 12 of the Act makes provision that every partner has a right to take part in the conduct of the business. Section 16 says that if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for any pay to the firm all profits made by him in that business. Under Section 18 of the Act a partner is the agent of the firm for the purpose of the business of the firm. Section 25 of the Act says 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”.

There is need for the registration of firms and the companies as such partners in a partnership will have to, therefore, obey two masters, the Registrar of firms and Registrar of Companies.

The access of each partner to the other partner’s books of accounts will mean that one incorporated company would be entitled to get into the fields of the accounts of the other incorporated company which is its partner. This will make nonsense of the Companies Act. Strangers then will have access to the books, accounts and papers of the companies whereas under the Companies Act, they are only limited to their own members and shareholders

Conclusion

From ancient time business is an essential aspect for society. It is main way of flow of goods and services. Previously structure of society was simple and need of people was limited therefore trade by individuals with the help of their own resources was sufficient enough to meet the need of society and business. With development and industrialization it was not possible for individual to do business without help of others. Therefore it became essential to form partnership to meet the growing demand of business. The membership of each such concern being very large, the management of the business was left to a very few trustees. This resulted in separation of ownership from management. Trustees had opportunity of trading with other people’s money. Consequently, fraudulent promoters had a unique opportunity of exploiting public money. Therefore with dual objective i.e. to protect the investors and facilitate business various Companies laws came in force. At present company law of any nation must take care of following aspects:

1. If government will allow to join large number of people to do business without proper and strict regulation it will provide an opportunity to do fraud. Therefore for strict regulations are essential to reduce opportunity to do any fraud.
2. If government will not allow people to come together and do business then it will be a setback to the expanding trade and commerce.

Government has to care for the increasing need of society. Previously resource of individual was unable to fulfill the requirement of business. Similarly nowadays, resources of companies are unable to fulfill the requirement of business and society. It is demand of time and mandatory for companies to form a partnership

with other company. This helps them to reduce operation cost, take strategical advantage, improve supply chain management and use infrastructure and resources of other company. Therefore companies want to come together to do business. In these circumstances it is duty of government to act as a facilitator in this task if this is not harmful for investors. Companies help to fulfill the basic and advance need of people, society and government. They help in the movement of goods and services. Secondly they are a source of income for government. For example Indian government proposes to collect Rs. 3.01 lakh crore as corporate tax during the 2010-2011.²⁵

Companies Act does not prevent a company to form a partnership with other. The Companies Act recognized that a company can be a partner in partnership firm. The provision given under Schedule VI of the Companies Act, under sub head "loan and advances" says that advance and loan to a partnership firm in which company or its subsidiaries is a partner has to be disclosed separately. This clearly indicates that framer of the Act were willing to allow companies to constitute partnership. Honorable Supreme Court of India in *Steel Brothers & Co. Ltd. v. Commissioner of Income-tax*²⁶ MANU/SC/0062/1957 held that it is possible for companies to form a partnership. However, in *Ganga Metal Refining Co. Pte. Ltd. v. Commissioner of Income-tax*²⁷ MANU/WB/0002/1966 Justice P.B. Mukharji observed that the entity known as a partnership under the Income-tax Act is not the same entity of partnership strictly within the limits of the Indian Partnership Act. The finding of Supreme Court in *Steel Brothers & Co. Ltd. v. Commissioner of Income-tax*²⁸ MANU/SC/0062/1957 is applicable for Income Tax Act only and under partnership Act, Company cannot form partnership firm.

Company Law Department, with its Circular No. 1/81-CL-V dated September 14, 1981 has accepted the finding of Justice P.B. Mukharji and clarified that, in India *prima facie* a company entering into a partnership with some other person or some other company would be *ultra vires* and will be against the principle that a particular company or an incorporated body cannot lawfully employ funds for purposes not authorized by its constitution but it is possible to form a partnership if memorandum and articles of association contain any special provision for this.²⁹

This circular and the judgment of Calcutta High Court have made it difficult for a company to constitute a partnership. Government has not issued any clear guideline that how to remove these difficulties or any draft model Memorandum and Article of Association for a company wants to constitute a partnership. In the absence of clear position it is dangerous for company to form a partnership because at any time it may declare *ultra vires*.

Indian law which does not permit (to a large extend) to company to constitute partnership is not working as a facilitator of business on this point.

Recommendations

It would be better to allow to company to constitute partnership, if the objective of partnership is helpful to achieve main object or other objects of memorandum of company.

For this:

- Model 'Memorandum' and 'article of association' for a company wants to constitute partnership should be inserted in Schedule 1 of the Companies Act, 1956, as table G of Schedule 1.
- Schedule I of partnership Act, 1932 prescribes maximum fees for the registration of a partnership. In this schedule one entry should be added which prescribe a higher fee for companies want to constitute partnership.

These amendments will make it clear that company can constitute partnership firm under Indian law, which will facilitate fast growth of the businesses. Secondly this will also generate revenue for nation.

Endnotes

1. See Alternative Company Structures for Small Business, Chartered Association of Certified Accountants (ACCA), Research Report 42, by Andrew Hicks, Robert Drury and Jeff Smallcombe, 1995; Judith Freedman, "Small Businesses and the Corporate Form: Burden or Privilege" (1994) MLR 555
2. WorldTech24, OpenOffice.org offshoot LibreOffice debuts, January 25, 2011, available at

- <http://www.worldtech24.com/software/openofficeorg-offshoot-libreoffice-debuts> (Last visited on July 21, 2011)
3. Microsoft® News Center, Nokia and Microsoft Announce Plans for a Broad Strategic Partnership to Build a New Global Mobile Ecosystem, February 11, 2011, available at <http://www.microsoft.com/presspass/press/2011/feb11/02-11partnership.mspx> (Last visited on July 21, 2011)
 4. Company Law Department, Circular No. 1/81-CL-V dated September 14, 1981
 5. Company Law Department, Circular No. 4/72 dated March 9, 1972
 6. See *Alternative Company Structures for Small Business*, Chartered Association of Certified Accountants (ACCA), Research Report 42, by Andrew Hicks, Robert Drury and Jeff Smallcombe, 1995; Judith Freedman, "Small Businesses and the Corporate Form: Burden or Privilege" (1994) MLR 555
 7. See generally *A New Form of Incorporation for Small Firms* (1981), Cmnd 8171. In 1981, the Department of Trade and Industry (DTI) published proposals by Professor Gower for a new form of incorporation for small firms.
 8. See generally *Alternative Company Structures for Small Business*, Chartered Association of Certified Accountants, Research Report 42, by Andrew Hicks, Robert Drury and Jeff Smallcombe, 1995
 9. See generally *Modern Company Law For a Competitive Economy, The Strategic Framework*.
 10. See generally *REFORM OF PARTNERSHIP LAW, A CONSULTATION DOCUMENT ON THE ECONOMIC IMPACT OF THE LAW COMMISSIONS' PROPOSALS* (UK), April 30, 2004 available at <http://www.bis.gov.uk/files/file23033.pdf> (last visited on July 27, 2011)
 11. A. Ramaiya, *Guide to companies Act 85*, (2004)
 12. (1835) 2 Bing N C 108 at 112
 13. (1880)15CH.D 247 at 273
 14. MANU/SC/0037/1956: 1956 AIR 354
 15. MANU/SC/0102/1959
 16. MANU/SC/0037/1956
 17. Id.
 18. *Dulichand Lakshminarayan v The Commissioner Of income-tax, Nagpur*, 1956 AIR 354
 19. 11th Edn. at page 360
 20. Subs. by Act 53 of 2000, sec. 5, for "one thousand rupees" (w.e.f. December 13, 2000)
 21. MANU/SC/0062/1957
 22. MANU/WB/0002/1966
 23. Id., ¶14
 24. (1878) 8 Ch. D. 679
 25. NDTV Profit, *India's top 100 firms paid 18.7% more advance tax*, June 16, 2010, available at <http://profit.ndtv.com/news/show/indias-top-100-firms-paid-18-7-more-advance-tax-75113?cp> (Last visited on July 21, 2011)
 26. AIR 1958 SC 315
 27. MANU/WB/0002/1966
 28. AIR 1958 SC 315
 29. Company Law Department, Circular No. 1/81-CL-V dated September 14, 1981