

The importance of public notice of retirement law company business partnership es...

[Law](#)



Introduction:

This paper seeks to study the various issues relating to the retirement of a partner, focusing largely on novation and the importance of public notice of retirement.

Body:

Partnership is governed by The Indian Partnership Act, 1932. Section 32[1] of the act lays down all the provisions relating to the retirement of a partner.

This section provides for mainly four matters,-The mode in which a partner can retireThe mode of discharging a retiring partner from liability in terms of previous debts and obligations. The mode of discharging a retiring partner from liability in terms of future acts which, if done before his retirement, would have been considered to be the acts of the firmWho may give the public notice of retirement referred to in sub section (3)[2]The modes of retirement contained in S. 32 (1) are concerned with cases of-Partnerships for a specified period, where the retirement is made before the period has expiredPartnerships which are formed for certain adventures of

undertakingsPartnerships at will[3]These three cases are mutually exclusive. In all these cases, as held in Sohanlal v. Bilasray[4], only the retiring partner withdraws from the firm. The other partners continue with the business, without dissolving the firm. As far as partnership at will is concerned, the retiring partner has to give a notice of retirement. In Barwari Lal v. Roop Kishore[5], it was observed that a partner in a partnership at will cannot retire until and unless he has given a notice of writing as per S. 32 (1)(c). In Banarsi Das v. Kanshi Ram[6], the court held that to a partnership at will,

only S. 32(1)(c) of the Indian Partnership Act shall apply. S. 32(1)(a) of the act becomes inoperative and in case of partnership at will, the partners cannot retire even with the consent of all the other partners. The purpose of S. 32(1)(c) is to enable a partner of a partnership at Will to retire, when either all the partners do not agree to the retirement or are not available to give their consent.[7] The notice referred to must be - In writing, Be explicit, and Communicated to all partners[8]. The notice might be prospective. However once it has been issued, it cannot be withdrawn without consent, though it can be waived[9]. If partnership is not a partnership at will, a mere notice of retirement will not be enough. Either the consent of all the partners will be required as per clause (a), or an express agreement as prescribed by clause (b) will be required.[10] The retirement of a partner does not lead to the dissolution of the firm. In *Vishnu Chandra v. Chandrika Prasad Agarwal*[11], clause 18 of the partnership deed contained that a partner could retire from the partnership after serving a one month notice of retirement to the remaining partners. But his retirement will not lead to the dissolution of the firm. S. 32(2) deals with the liability of a retiring partner. A partner who retires does not automatically get discharged from his liability and obligations. Even if the notice of retirement is given, a retiring partner cannot be dissolved from his liability until and unless he has satisfied the court that the creditor has acquiesced in that position and is will to settle his dues with the newly formed partnership firm.[12] His liability can be discharged only by an agreement between him and Such third partners Continuing partners[13] In *Syndicate Bank v. R. S. R Engineering Works*[14], the court held that the retiring partner would be relieved of his

liability only if he made an agreement with the third party and the continuing parties. It was further held that if a creditor wanted to take a new security for the debt from the continuing firm, then is an indication of his intention to carry on dealings with the continuing partners for debts owed by the firm. In absence of such an agreement, a public notice needs to be issued. A distinction has to be made cases, in which a retired partner continues to be liable for debts incurred before his retirement and cases in which he may be discharged from his liability as a result of an agreement amounting to novation.[15] This agreement may be express or may be implied from the dealings between the creditor and the reconstituted firm.[16] However a creditor's right cannot be prejudiced against. A (the retiring partner) will not be discharged from his liability to B (the creditor) by an agreement between A and C (continuing partner), if B is not a party to the agreement. A will only be discharged if B agrees to substitute A's liability with C. This arrangement between A, B and C is known as novation. Lord Selborne has defined novation in *Scarf v. Jardine*[17], as: "Novation, which as I understand, it means this..... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties: the consideration mutually being the discharge of the old contract." [18] He goes on to say that the agreement between the creditor, retiring partner and the continuing partners, in which the creditor agrees to substitute the liability of the retiring partner with that of the reconstituted firm, amounts to a novation. Thus the two essential elements of novation are: Doing away with the original contract Substituting it with a new valid contract [19] Whether there has been a novation or not is usually a

question of fact only or is a question of both fact and law.[20]In *Benson v. Hadfield*[21], it was held that there is no prima facie presumption, that when a partner retires, the creditor will release him from his liability. An agreement to this effect has to be proved. However as held in *Lyth1 v. Ault*[22], the lack of consideration won't render the agreement invalid. *Thomson v. Peroival*[23]laid down that, it is only necessary for the creditor to show that he has accepted the old partners as his sole debtors and has released the retiring partner. If the retiring partner has not been discharged, even the introduction of a new partner will have no effect on his liability, unless the creditor has substituted the liability of the new partner for that of the retiring partner. Substitution does not take place if the new partner was previously liable for the debt. The substitution can be made only by an agreement (express or implied) between the creditor and the retired partner. [24]A retiring partner has the right to be indemnified against the debt of the old firm by appropriation of assets of the partnership, provided there is no agreement to the contrary. If the continuing partners, by an agreement, promise to release the retiring partner from the liability to a creditor, they cannot be forced to make the payment. The retiring partner only becomes a surety, so that if the continuing partners default, he can make the payment to the creditor and as a result becomes the creditor of the continuing partners. If the continuing partners commit a breach, he becomes entitled to the assets appropriated for the payment of the debt, but only after a demand has been made by the creditor.[25]A mere look at the provisions of subsection 3 shows that if a public notice of retirement is not given, then the retiring partner will be liable for all the acts done by the continuing partners

which would have been an act of the partnership if done before his retirement. However, can a retiring partner be held liable, in the absence of a public notice, if the creditor knows that the retiring partner is no longer a partner of the firm? The following points should be considered: If a public notice has been issued, then the retiring partner can escape his liability even though individual notices have not been issued to third parties dealing with the firm. If individual notice has not been issued to the concerned third party and nor has a public notice been issued, then the retiring partner cannot escape liability. If a public notice has not been issued but individual notices have been issued to third parties, then the retiring partner can effectively claim that he is no longer liable for the acts of the continuing parties.

[26] However if the third parties deal with the firm without knowing that the retired partner is a part of the firm, the retiring partner will not be liable, even if a public notice has not been issued. [27] In *Central United Bank v. Venkatarama* [28], Ramachandra Iyer, C. J. observed that: "Section 32(1) provides for a case in which a partner may retire without disturbing the firm. Sub-section (3) to Section 32 puts an end to the partnership between partners qua the retiring partner. The consequence is that rule as to agency of each partner to the rest of the partners would cease to apply in the case of the retiring partner. A strict application of this rule would cause hardship to third parties who were having and continue to have dealings with the firm without knowing that a particular party had retired. Its object therefore is not to impose a statutory liability on the retiring partner but to protect third parties, embodying a rule of estoppel so far as the retiring partner is concerned, for repudiating the agency of others." [29] Subsection 4 says that

the public notice of retirement may be given by-The retiring partner, Any of the continuing partnersConstituted agent of the partner[30]

Conclusion:

Hence it can be said, that a retiring partner is not discharged from his liability until and unless the creditor agrees to substitute his liability with the liability of the continuing partners and that a public notice of retirement has to be issued. If a public notice has not been issued, the retiring partner can escape his liability only if he has intimated the creditor about his retirement.