CHAPTER 2

Company: Origin, Meaning, Features, and Nature

- History of Company
- Meaning and Definition of Company
- Characteristics of Company
- Lifting of Corporate Veil
  Formation of Company
- Classification of Companies
- Promoters
- Pre-incorporation Contracts

ORIGIN OF COMPANY

The concept of Mercantilism is as old as human existence, but there was no formal express or rule of sovereign, except mutual trust, common objective and moral forces.

Under Roman Law

The seed of company can be seen with the term 'corporation', the genesis of Latin word 'Corpus' which means a 'body' or 'body of people'. The concept of corporation was deep rooted in the time of Justinian (527–565). Under the Roman Law we can find certain entities under '*universitas, corpus or collegium*', which possess some rights and liabilities such as right to own property and perhaps make contract, sue and be sued. It seems they perform the act backed by the current law through representatives. It is also an amazing fact that Romans donate an idea of corporation with certain power and capacities, which was enjoyed by a group or collective people, but failed to give birth to any jurist personality which had rights and duties similar to a modern company. But still it was the foundation for modern company.

The concept was carried forward in the Maurya periods as well. Later on, when the Church became the centre of power during the medieval period, it started supporting the financial services industry and representing its interest other than its function of local authority under the City of London Corporation. The Stora Kopparberg, mining community in Falun Sweden, obtained a charter from King Magnus Eriksson in 1347 and alleged the oldest commercial corporation in the world.

The Companies Act, 2013

The Companies Act, 2013 replaced the previous Companies Act, 1956 and was notified on 12 September 2013.

THE COMPANIES (AMENDMENT) ACT, 2015

The Companies (Amendment) Bill, 2014, was passed by the parliament to amend the Companies Act, 2013, and received the assent of the President of India on May 25, 2015 and called the Companies (Amendment) Act, 2015 ("Amendment Act"). The provisions of the Amendment Act have come into force from May 29, 2015 (except sections 13 and 14 of the Amendment Act which will come into force on such date as will be notified by the Central Government).

The Companies Act, 2013 is certainly a chief piece of legislation, most of the gap-fillings in the Act were left in the hands of a subordinate legislation which was supposed to be introduced in the form of Rules, empowering the MCA to mould the law of the land at its discretion. With most of the determining factors left to be decided by way of Rules, in spirit, the Act itself became a subordinated law.

MEANING OF COMPANY

In section 2(20) of the Companies Act, 2013, 'company' means a company incorporated under this Act or under any previous company law.

The section does not give any legal or technical meaning but signifies that any company registered under the Act is considered to be a company. The word 'incorporated under this Act' perhaps denotes the compliance of the said Act. The clinical research of the section shows that it is open-ended, which does not create any periphery for the definition, but intends to recognize a company which will comply with all the provisions of said Act. The reason behind this open-ended definition is that the company is not only a group of persons or a legal or jurist personality, but promulgates social and commercial structure; infiltration to it could destroy the social balance and economic framework.

Chief Justice Marshall in Trs. of Dartmouth Coll. *v.* Woodward, 17 U.S. (4 Wheat.) 518 (1819) discussed the meaning of corporation as 'A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law. Being a mere creature of law, it possesses only those properties which the character of its creation of its creation confers upon it either expressly or as incidental to its very existence'.

Black's Law Dictionary *defines "corporation" as an "entity having authority under law to act as a single person distinct from the shareholders who own it."*

Creature of Law

Hon'ble Supreme Court in State Trading Corporation of India Ltd. *v.* C.T.O, held:

Under the English Common Law which formed the foundation of the Indian jurisprudence, a company or a corporation aggregate is a national of the State in which it is incorporated and is clothed with a personality given by the law of the land, capable of exercising rights and entitled to protection abroad.

Association of Person

The literal meaning of company draws from the Latin word Com = with or together; panis = bread, means come together for a meal. It referred to an association of persons who come together with a common objective of taking their meals together.

As far as the Companies Act is concerned it defines the company as: 'A company formed and registered under this Act or an existing company.' An 'existing company' means a company formed and registered under any of the former companies acts. This definition does not reveal the real distinctive characteristics of a company. Perhaps a clear definition of the company is given by Lord Justice Lindley:

> By a company is meant associations of many persons who contribute money or money's worth to a common stock and employs it in some trade or business, and who share the profit and loss as the case may be arising therefrom. The common stock so contributed is denoted in money and is the capital of the company and the persons who contribute it, or to whom it belongs, are called as members. The proportion of capital to which each member is entitled is his share which is always transferable although the right to transfer them is more or less restricted. A company thus may be defined as an incorporated association which is an artificial person, having a separate legal entity, with a perpetual succession, a common seal, a common capital comprised of transferable shares and carrying limited liability. It is called an artificial person because of its very nature that law alone can give birth to a company and law alone can put it to an end.[4]

Commercial Objective Tool

Is it easy to conceive that a company is a combination of people who are coming together for their meal? The answer is not strongly affirmative; the company is a legal device for the attainment of any social or economic behaviour or both. It seems to be a combination of social, legal, political, and economic device, which exhibits the commercial conduct of society.

The synonym of company is corporation which is derived from the Latin word 'corpus' which means "body" which indicates a company is also a person, but not a natural person but an artificial or jurist person, who incurs rights and liabilities like a natural person, to attain a social or economic end.

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4. State Trading Corporation of India Ltd. *v.* C.T.O

Nature and Features of Company

Characteristics of company

The first essential feature of a company comes into existence with the case of Salomon *v*. Salomon and Co. Ltd., (1897) A.C.22, which declared the personality of the Company as Distinct Legal Personality—Jurist Person. The feature underlines the concept 'The right and duty of the company is not the right and duty of the member of the company'.

A principle has been set out in this case that, with a movement the company has been incorporated under the Company Act; it becomes 'a legal person distinct from its members'. It bears its own name and seal. Its assets are separate and distinct from its members: it is also capable of owning property, borrowing money, incurring debts, entertaining contract, sue and can be sued.

The members of the company are its owners but they can be its creditors only, and shareholders can't be held liable for the act of company, because they are not the agent of the company.

The existence of the company arises from a fiction of law. In the case of State Trading Corporation of India Ltd. *v*. C.T.O, it was discussed that:

Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members. An incorporated company has a separate existence and the law recognizes it as a legal person, separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity.

Further, The Corporation really has no physical existence; it is a mere 'abstraction of law'.

In the case of EBM Co Ltd *v*. Dominion Bank it was discussed as:

'the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its action, assets, rights and liabilities on the one hand, and the individual shareholder and their actions, assets, rights and liabilities on the other hand.'

In fact, the managed company in theory retains full legal ownership of its assets and remains "distinct and separate legal entity" as a limited joint stock company. What in effect happens under the managing agency agreement in India is that the managing agent comes to utilize the existing structure of the managed companies organization, to carry on business, earn profits and, in fact, virtually to trade in every possible sphere open to the managed company.[5]

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5. Commissioner of Income-Tax, ... *v*. Kettlewell Bullen & Co. 1962 46 ITR 39 Cal.

Does it mean the company projects the principle of separation?

The concept of distinct legal personality is not the absolute. The right and duty of company could be considered the right of duty of the members of the company when the person behind the company, directors or shareholder uses the company as a tool for their personal benefits contrary to the objective of the company.

However, 'incorporation' is an act which transforms the company into a jurist person, and confers the legal status with rights and obligations. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with the law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law.[6]

Company is a citizen of India?

In the case of State Trading Corporation of India Ltd. *v.* C.T.O it was enunciated as: In numerous cases in this Court it was assumed, without contest, that a company is a citizen of India and competent to enforce fundamental rights under Art. 19(1)(f) and (g) of the Constitution. In view of the fact that a company is invested with important fundamental rights under various other Articles of the Constitution and it is recognised as a person capable of holding and disposing of property and carrying on business, commerce and intercourse, it could not be held that the expression 'citizen' in Art. 19 was intended to be restricted to a natural person. A corporation is, however, distinct from its share-holders and even if all the shareholders are Indian citizens.

Halsbury's Laws of England (Vol. 6, 3rd Edition, pages 113–114, paragraph 235) lays down that on incorporation, a company is a legal entity the nationality or domicile of which is determined by its place of registration. Reference was also made to Vol. 9 of *Halsbury's Laws of England*, page 19, paragraphs 29-30, which says that the concept of nationality is applicable to corporations and it depends upon the country of its incorporation.

There is a rule of English Law that a company or an incorporated corporation has a nationality and this nationality is determined by the law of the country in which it is incorporated.

The word 'citizen' is not defined in the Constitution or the General Clauses Act but the word 'person' is defined in the latter to include 'any company or association or body of individuals whether incorporated or not.' The word 'person' therefore, conceivably bears this extended meaning at least in some places in Part III of the Constitution. But it is not necessary to determine where in the Constitution the word 'person' includes a company, etc., because that word has not been used in Article 19.

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6. Shriomani Gurudwara Prabandhak ... *v.* Shri Som Nath Dass & Ors (Supreme Court of India).

Fundamental rights of company

'The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights' Though the observations quoted above would seem to lend countenance to the contention raised on behalf of the petitioners, they really do not determine the controversy one way or the other. In that case, a shareholder of the Sholapur Spinning and Weaving Company made an application under Art. 32 of the Constitution for a declaration that the Act impugned in that case was void, as also for the enforcement of his fundamental rights by a writ of mandamus against the Government, and the directors of the company, restraining them from exercising any power under the Act.[7]

The ratio of the State Trading Corporation judgment says that though the company is a jurist person, and exists in the eye of law, but it does not possess the fundamental rights, and it is also important to note that the provisions of Citizenship Act are also not applicable in the case of company.

In Chiranjit Lal Chowdhuri *v.* The Union of India where the learned judge observed obiter: 'The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated, company, therefore, can come this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well'.

Is company servant of the state?

The question whether a corporation is an agent or a servant of the State must be decided on the facts of each case. In the absence of any statutory provision, a commercial corporation acting on its behalf, even if it is controlled wholly or partially by a Government department, will be presumed not to be a servant or an agent of the State. Where, however, the corporation is performing in substance Governmental, and not commercial, functions, an inference will readily be made that it is an agent of the Government.

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7. State Trading Corporation of India Ltd. *v.* C.T.O

TRADITIONAL CHARACTERISTIC OF COMPANY

Perpetual Existence = 'a person that never dies.'

A company is the creature of statute, though it considered to be a jurist person, but it is beyond the human characteristics, and unaffected by death or departure of any member of company, and its status is constituted by the Memorandum of Association of the Company, and seems to be the perpetual succession. The word 'perpetual' means continuous without end. It is considered that life does not depend upon the death, insolvency, or retirement of any or all shareholders or directors. The company may be compared with a flowing river where the water keeps on changing continuously; still the identity of the river remains the same. Does it mean the company is immortal which cannot come to an end? The answer is not affirmative, everything its mortal, means nothing more than that 'the corporation lasts until dissolved, principle is also applicable to Company; law creates it and law alone can dissolve it'.

Why Perpetual Existence?

The core objective of any corporation existence is sustainable growth of society, to create financial stability, which cannot be achieved with short-term thinking. Professors Margaret Blair and Lynn Stout used the term 'capital lock-in' which supports long-term capital investment by shareholders of the company and the idea of financial stability. The statutory command gives separate legal entity to plan a perpetual future which is necessary for corporate management.

In Revlon, Inc. *v*. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), it was enunciated that the concept behind the perpetual existence is the long-term value.

Limited Liability

Limited liability is another important feature of company. The phrase comprises two words: limited + liability; which means the liability is limited, or which is strict with some parameter that is shares or limited amount for debt of a company. It is the liability of company to repay not the liability of its members. Members' liability is only limited up to the shares, because the members of the company are neither the owners of the company's undertakings nor liable for its debt. Unlike a partnership firm wherein the liability of the partners for debts are fully and even the personal assets of partner can be attached to discharge the liability of the firm.

The question arises here,

'Why such characteristics are associated with a company?'

Separate legal entity is the fundamental attribute of company, then the obvious is that it is the outspring of its Limited Liability.

In Re London and Globe Finance Corporation Ltd, Justice Buckley discussed as:

> The statues relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantages as well of the investor as of the public, allowed and encouraged aggregation of all sums into large capitals which have been employed in undertakings of great public utility largely increasing the wealth of the country.

Separate Property

When there is a liability there must be right, the same principle is applicable to a company. A company has the liability for its debts and its creditor, in reflection company has some rights, the one which we can see is the right of separate property.

The law makes the company capable of owning, enjoying, and disposing of and managed property on its own name, distinct from its member. The same thing is being discussed in the Case of R.F Perumal V.H.H. John Deavin, A.I.R, 1960 Mad. 43, in which the Hon'ble Madras High Court held that no member of the company can claim during the existence or at the time of winding up of company for the property of company.

Transferability of Shares

This is another feature of a company—transferability of shares of the company, freely transferable without the permission of the company subject to procedures provided in the articles. The shareholders may transfer their shares to another person and this does not affect the funds of the company. In the case of a private company, this right is not absolute but certain restrictions on transfer of its shares are imposed by the act.

Common Seal

As discussed above a company is the jurist person and has no physical existence but exists, and to execute the above-mentioned rights and liabilities it must act through its agents, who can enter into and act on behalf of company, such agents perform such work under the seal of the company. Companies Act, 2013 made requirement of common seal to be affixed on certain documents, as a signature of the company for example bill of exchange, share certificates, etc. Now, the use of common seal has been made optional.

Under **the Companies (Amendment) Act, 2015,** having a common seal of the Company is optional and instead of affixing the common seal on the documents signed by two directors or one director and a company secretary of the company is sufficient.

Accordingly, sections 9, 12, 22, 46, 223 of **the Companies Act, 2012** have been amended accordingly.

Company May Sue and be Sued in Its Own Name

Incorporation gives the power to the company for acquiring legal rights through the principle of separate legal entity, by which the company may sue and be sued in its own name and not its members.

As in the case of Foss *v*. Harbottle it was discussed that, only the company can sue for redress if a wrong has been done to it, not minority shareholders.

LIFTING OF THE CORPORATE VEIL OR DOCTRINE OF PIERCE

Lifting Corporate Veil = Destruction of Separate Legal
Entity or Disregarding Corporate
Entity concept = Holding member liable, not the the Company.
= Denial of protection to shareholder
= Exception to separate legal entity, and limited liability
= Judicial process for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders
= Judicial process for looking behind the legal personality to the real controllers

The features of company make it a distinct separate legal personality, who is capable to exercise its rights and liability, i.e., enjoying property , entering into contract, can sue and can be sued in its own name, etc. through its agent.

A company is the creature of law and has no physical existence except the mark of its presence as common seal.

In practice the member of the company controls the affairs of the company. However, there are certain circumstances in which courts will have to look through the corporation, i.e., lift the veil of incorporation, and hold the shareholders of the company directly and personally liable for the obligations of the corporation.

Allahabad High Court in the case of Incan Mutual Fund Benefit Ltd. *v*. Incan Employees Welfare 2006 129 CompCas 977 All, 2004 51 SCL 438 All, held that :

> It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The concept of lifting the corporate veil is a changing concept and is of expanding horizons.

In the case of Subhra Mukherjee *v*. Bharat Coking Coal Ltd. AIR 2000 SC 1203, the Supreme Court rejected the argument that undue emphasis was given to the fact that the directors of the Company were brothers and the appellants are their wives and that the company is a separate legal entity which is independent of its directors and shareholders. On the strength of the decision of Solomon *v*. Solomon the Supreme Court held that 'lifting of veil of incorporation under statutes and decisions of the Courts is equally settled position of law'. The Apex Court further observed. '…To look at the realities of the situation and to know the real state of affairs behind the facade of the principle of the corporate personality, the courts have pierced the veil of incorporation.

Where a transaction of sale of its immovable property by a Company in favour of the wives of the directors is alleged to be sham and collusive, as in the instant case, the Court will be justified in piercing the veil of incorporation to ascertain the true nature of the transaction as to who were the real parties to the sale and whether it was genuine and bona fide or whether it was between the husbands and the wives behind the facade of separate entity of the Company.[8]

For finding out whether or not the buyer and the seller were related persons within the meaning of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, the Supreme Court permitted lifting of the corporate veil in the case of Collector of Customs *v.* East African Traders [2000] 9 SCC 483.

Why Lifting the Corporate Veil?

The protection of public interests is of paramount importance, when the corporate character is being deliberately used as a cloak for fraud or improper conduct or where the company has been formed to evade obligations imposed by the law, it is necessary to stab the cover of corporate personality, and save the interest of shareholders of or the investors of the company.

The concept of corporate veil comes from the concept of separate legal entity, and limited liability, i.e., shareholders of the are company are liable to till their investment/ share in the company. The separate personality concept is the statutory privilege for legitimate commercial purpose only. The company is the tool to achieve and maintain society's commercial objective, which can be enjoyed only by those who want to make an honest use of the 'Company', contrary; it shall destroy the commercial and ultimately the social structure of the society. Thus, any contrary, fraudulent, dishonest, or illegal use of separate personality immunity cannot be allowed to be used as a shelter. In such circumstances the court comes into the picture and breaks the corporate shell by applying 'lifting the corporate veil.'

A company can only act through its member or agent who actually for their own mala fide intention acts contrary the company, law, state.

When any dishonest, illegal, and fraudulent use of the facility of incorporation takes place, the law lifts the corporate veil and identifies the real person, i.e., members behind the curtain and holds them responsible for the same. This is known as lifting the corporate veil.

The very reason behind this principle is to put a control mechanism or create a legal consequence who tries to use company as a medium to sustain the fraud, or perform contrary objectives.

In the case of Calcutta Chromotype Ltd. *v.* CCE [1998] 3 SCC 681, the Supreme Court held that lifting of veil would depend on facts and circumstances of the case and that even if they are two separate companies under the Companies Act, authorities/court can lift their corporate veil to see whether the persons behind them are the same and if the buyer is found to be associated with the manufacturer, a presumption under

8. supra Incan Mutual Fund Benefit

section 114 of Evidence Act can arise regarding their having interest, directly or indirectly, in the business of each other.[9]

ABSENCE OF CONCEPT LIFTING OF VEIL
The absence of corporate veil piercing would result in a crucial incidence of breached contracts, non-performing debt which ultimately hits the innocent user of the company, and ultimately hit the social structure of society, and creates disbelief in the financial process of the society, and misuse of the corporate entity will increase.

Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc.[10]

Theories for Lifting of Corporate Veil

There are two popular theories for of the corporate veil:

1. "Alter-ego" or other self-theory
2. "Instrumentality" theory

Alter-ego or other self-theory

The literal meaning of alter ego is another side of oneself; a second self.

A doctrine used by the courts to disregard the separate entity of a corporate so that they may be held personally liable for their illegal or fraudulent activities and action.

The constituent elements of this theory are:

(i) There is unity of interest and ownership between the company and the interest of shareholder, and the concept of separate legal existence has ceased.

(ii) That separation reveals the fraud and illegal act of shareholder of company.

Instrumentality theory

This theory tries to find out whether the company is being used by its shareholders as an instrument for their personal benefit against the objective of the company, or any fraud is being carried out.

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9. Incan Mutual Fund Benefit.

10. Krishi Foundry Employees Union vs Krishi Engines Limited And Ors. 2003 (2) ALD 392, 2003 117 CompCas 340 AP, (2003) IILLJ 798 AP.

Constituent element of this theory

1. The company was only a instrument of shareholder.
2. The shareholder has full control over the company in a way so as to defraud or act contrary to the company objective.

The basic idea behind the concept of corporate veil exhibits that the company is being used by its promoters in a way which gives personal benefits to the promoters of the company contrary to the objective of company.

In nutshell lifting the corporate veil principle is that it is the direct opposite of the limited liability concept, and in the event the veil is lifted, the owners' personal liability arises and their assets are exposed to the litigation, as a sole proprietorship or general partnership as they are conducting the business in their personal capacity.

In Hackbridge-Hewittic and Easun Ltd. *v*. G.E.C. Distribution Transformers Ltd., (1992) 74 Comp. Cases 543 (Mad), a Division Bench of Madras High Court considered the question of lifting the veil and it was observed:

> Indeed, what has come to stay as an organic theory, under which the doctrine has departed from the orthodox approach extending the rule of piercing the veil to know the true character of a person, has in essence made it almost obligatory to make a closer examination as to whether the principal and subsidiary like principal and agent exist for each other or as one mind, thus as organs of each other. It is often said that a corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. The orthodox approach that a company is a legal entity in itself and thus whether it is a subsidiary of another or not, is of no meaning or consequence for fixing the responsibility of the activities of one upon another.... Thus, on the principle aforementioned, the fact that the subsidiary company has a distinct legal personality does not suffice to dispose of the possibility that its behaviour might be imputed to the parent company. Such may be the case in particular when the subsidiary, although being a distinct legal personality, does not determine its behaviour on the market in autonomous manner but essentially carries out the instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, it is possible to say that it has no personality of its own and that it has one and the same as the parent company.

Nature of Lifting of Corporate Veil Principle

In State of U.P. And Ors v. Renusagar Power Co. And Others 1988 AIR 1737, 1988 SCR Supl. (1) 627 the Apex Court observed as follows:

> It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The concept of lifting the corporate veil is a changing concept and is of expanding horizons.

Circumstances under which court lifts the corporate veil

What are the circumstances under which protection under separate legal entity can be suspended by the court, the Supreme Court in the case of Life Insurance Corporation of ... *v.* Escorts Ltd. & Ors 1986 AIR 1370, 1985 SCR Supl. (3) 909, laid down that:

> Generally and broadly speaking, the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the corporate veil is permissible, since that must necessarily depend on the relevant statutory or other provisions the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, and the effect on the parties who may be affected etc.

The state laws and facts decide the circumstances which can result in a piercing of the corporate veil. However, generally, the following factors are considered by the court that the creation or use of the company to evade fraud and lift the veil:

To Determine the True Character of the Company

As discussed above incorporation of a company is the economic socio-objective for the country, and it is non-default obligation of the company to address the country's economic objective. Sometimes it has been seen that the company may assume a character of an enemy company when persons in de facto control of its affairs are residents of an enemy country.

In famous Case Daimler Co Ltd. *v.* Continental Tyre and Rubber Co. the same thing is being discussed. But as discussed in the case of People's Pleasure Park Co. Vs. Rohleder (1908) 109 Va 439: 61 SE 794, it was discussed that if there is no danger to public interest, the court may refused to pierce the corporate veil.

In the case of Juggilal Kamlapat, Kanpur *v*. Commissioner Of Income-Tax 1970 AIR 529, 1970 SCR (1) 720 it was held that:

> In the present case the transaction since the inception appears to be impressed with the character of a commercial transaction entered with a view to earn profit. Large block of shares was purchased at the ruling rates with borrowed money, and soon thereafter the shares were disposed of at a profit in small lots. Some of the shares were sold through brokers to strangers. The story of the firm that some or all the shares were merely 'distributed' to its associates is not proved. The interest which the firm had to pay for the amount borrowed for purchasing the shares was acted in the revenue account and was claimed as a revenue allowance. It was not the case of the firm that Aluminium and J.K. Trust shares were purchased for .acquiring the managing agency. It was claimed that the shares were taken over because the public did not accept those shares. It was one of the objects of the firm to finance its allied concerns and in taking over shares which the public did not subscribe the firm was 'acting' in the course of its business. The firm commenced selling the shares soon after they were purchased. Aluminium shares were purchased between January 26, 1945 and April 5, 1946 (except a few which were retained) and sold at profit. Whereas the first lot was purchased on January 26, 1945, the first sale was made on February 1, 1945. It could not be said that this was an investment in shares independent of the trading activity of the firm. The story that the shares had to be sold on account of financial difficulties is plainly belied by the circumstance that the firm went on purchasing and selling the Aluminium shares. J.K. Trust shares were purchased on February 14, 1945 and were sold on August 22, 1945. Aluminium shares as well as J.K. Trust shares were sold at a profit and through brokers. These transactions were also stamped with the character of commercial transactions entered into with a profit motive and were not transactions in the nature of capital investments.

Same in the case of Sir Dinshaw Manakjee Petit AIR 1927 Bomaby 371, to evade tax Dinshaw became the majority shareholder in all the companies. The companies made investments and whenever interest and dividends were received by the companies, he applied to the companies for loans, and without any objection the loans were granted, which he never repaid. In the decision of court the corporate veil of all the companies was lifted and the income of the companies treated as if they were of Dinshaw.

It was held that:

> The assessee was receiving under the guise of loans or advances the profits which were made by the company which he controlled and in which he held all the shares except three which were held by his subordinates. The company was created by him merely, so that he could make entries in the company's books suggesting that it received the interest and dividends and paid them as loans whilst in reality the receipt of dividends and interest, if it could be called the

business of the company, was its only business and was in fact the business of the assessee himself.

The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But **the legal effect of a transaction cannot be displaced by probing into the substance of the transaction.**[12]

When there is no specific provision for lifting the veil in the Act?

In Meenakshi Mills Commissioner of Income Tax, ... *v*. M/S. Madurai Mills Co. Limited 1973 AIR 1357, 1973 SCR (3) 662, case, while dealing with a situation arising under the Income Tax Act, which does not contain any specific provision regarding lifting of corporate mask, their Lordships of the Supreme Court observed that:

it is well established that in a matter of this description the income tax authorities are entitled to pierce the veil of corporate entity and to look at the reality of the transaction. It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But, in certain exceptional cases, the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade.[13]

Company Acting as an Agent or Trustee of the Shareholder

The identity of company should be its real identity, it should not act as an agent or trustee of the shareholder, or use the corporate facade to cover up that agency or trust.

In the case of R.G. Films Ltd., (1953) 1 Al E.R. 615, 90% of the shares were held by the President of an American Company which financed the production of the film, while the American company produced a film in India technically in the name of a British.

The Board of Trade refused to register the film as a Britsh film on the ground that English company acted merely as the nominee of the American corporation.

The concept of separate legal entity denies the situation. The company exists to become an agent for its shareholders and does not hesitate to lift the veil. Prevention of Fraud or Improper Conduct.

Preventation of Fraud or Improper Conduct

The basic foundation of concept of lifting the veil is based on prevention of fraud, or improper conduct, or legal obligations like defrauding creditors or fraudulent purposes,

12. Commissioner of Income-Tax, *v*. M/S. B.M. Kharwar 1969 AIR 812, 1969 SCR (1) 651.
13. India Waste Energy Development ... *v*. Govt. of NCT of Delhi And Anr 2003 (66) DRJ 224.

the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.

Public Interest

In company law, separate legal entity of incorporated body, has to be maintained for reasons more than one. Nonetheless, the lifting of corporate veil or piercing the corporate veil is permissible if public interest requires. This is also subject to considerations of permissibility as per the statute. If the company uses any other concern; a firm, society, or association, only to facilitate evasion of legal obligation like payment of direct or indirect taxes or denial of statutory benefits to workmen, the Court has to disregard the separate legal entity of the company. In such an event the question before the Court is one of company law, and the corporate personality of the company is of secondary importance. The important test is whether the method adopted for evasion of legal obligations would subvert public interest.[15]

FORMATION OF COMPANY

Formation of company is not a spontaneous process, it require composite steps for a certificate of incorporation, which gives the company a legal status, or birth to a legal entity. Promoters are persons who visualize the idea of forming a company and execute all the requirements thereto.

Section 2(69) of the Companies Act, 2013 defines the term 'promoter' as under:

'Promoter' means a person

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly, whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions, or instructions the Board of Directors of the company are obliged to act.

Provided that sub-clause (c) shall not apply to a person who is acting merely in a professional capacity.

The above definition clarifies that promoters are the persons who have control over the management of company, directly or indirectly, and board of directors of the company are obliged to act on thier advice. The section excludes the person as director who is acting merely in a professional capacity.

In simple words promoters are like the fathers of the company, who give birth to the company (by conceptualizing and executing the idea), and try to nourish the company thereto.

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15. Krishi Foundry Employees Union (supra).

In the case of Lagunas Nitrate Co. *v*. Lagunas syndicate (1899)2 Ch. 392, it was discussed that it is not essential that promoter should be associated with the initial formation of the company. Any person who afterwards helps to arrange floating of its capital will be considered a promoter.

Role of Promoter

Certainly promoters play an important role in the company, but they are not considered as agents or a trustee for the company because it is not in existence, but their role is that of a fiduciary in relation to the company and therefore requires making full disclosure of all the relevant facts, including any profit made by them.

In the case of Lidney Wigpool Iron Ore Co. *v*. Bird [1866] 33 Ch. D. 85 it was held that

> Although not an agent for the company, nor a trustee for it before its formation, the old familiar principles of law of agency and of trusteeship have been extended and very properly extended to meet such cases. It is perfectly well settled that a promoter of a company is accountable to it for all monies secretly obtained by him from it just as the relationship of principal and agent or the trustee and cestui que trust had really existed between him and the company when the money was obtained.

Liability of Promoters under the Companies Act, 2013

False information for incorporation of company

Section 7(6): Where, at any time after the incorporation of a company, it is proved that the company has been incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such a company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making the declaration shall be liable for fraud under section 447.

Non-compliance

Section 26; The promoters may be held liable for the non-compliance of the provisions of this section:

Section 102(4): Whereas a result of non-disclosure or insufficient disclosure in any explanatory statement annexed to the notice of a general meeting, by a promoter, director, manager, if any, or other key managerial personnel, any benefit accrues to them or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

The intention of legislature to insert this section is aimed to prohibit the secret profits or any other expense generated by the promoter, as the company cannot be used as a tool for personal profit.

Section 35 has fixed the civil liability of promoter along with other person mentioned in the section, for any misleading statement in the prospectus to a person who has subscribed for any securities of the company on the faith of the prospectus.

Section 36: Punishment for fraudulently inducing persons to invest money: The word 'any person', includes promoter in the preview of this section.

Section 447 Punishment for Fraud: The section establishes the criminal liability in case of any fraud sustained by any person in the company.

Pre-incorporation Contract

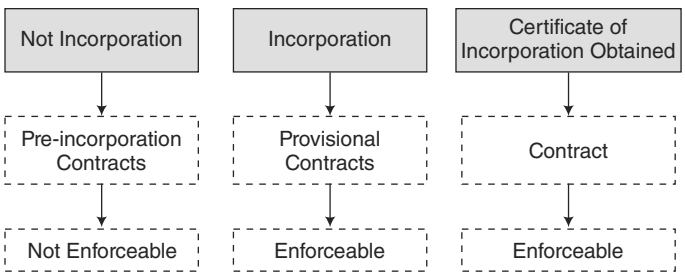
When a promoter enters into a contract on behalf of company, being duly prior to it incorporated, to acquire any property or right of the company, is known as 'pre-incorporation' contract or 'preliminary' contract.

The basic rule says a contract made before the company's incorporation cannot bind the company, but it is the personal liability of the promoters who execute the said contract. The exception to this rule is governed by sections 15(h) and 19(e) of The Specific Performance Act, 1963.

The nature of such a contract seems to be a tripartite contract, indeed it is bilateral, and the promoter is not the agent of the company nor he is doing any approved work but he is entering into a contract with a third party on behalf of a non-existing principle. It is important to note here that the company being a legal separate entity, can perform its work only through its agent or members, but before incorporation it is not in existence as in Kelner *v*. Baxter, (1866) LR 2 CP 174, it was held that 'two consenting parties are necessary to a contract, whereas the company, before incorporation, is a non-entity'.

Pre-incorporation Type of Contracts

Pre-incorporation contracts can be classified in two categories—public and private company. A private company can commence its business immediately after obtaining a certificate of incorporation, the concept of provisional contracts is not applicable on a private company.



Pre-incorporation contracts

Contracts entered into on behalf of the company by the promoters prior to its incorporation, are known as pre-incorporation contracts.

Provisional Contracts

Contracts entered into after the incorporation of company but prior to obtaining the certificate of incorporation are called provisional contracts.

Before the application of section 11 (commencement of business)* on the company the contract made by the company having a share capital, whether public or private, though made after incorporation but before the company becomes entitled to commence the business, is not binding on the company.

The section specifies certain conditions before commencing the business of company, i.e., a declaration has to be filed by a director in form and verified in such manner as may be prescribed, with the Registrar.

In the case of a company having a share capital, whether public or private, contracts made after incorporation but before the company becomes entitled to commence business in terms of section 11 are provisional and are not binding on the company until the company becomes so entitled after filing of the prescribed declaration by its director and verification of its registered office with the Registrar under that section. But after the company becomes entitled to commence business, such contracts automatically become binding, i.e., without any ratification.

Enforceability of Pre-incorporation Contract

English Law = Promoters are liable not the company

Kelner *v*. Baxter (1866) 2LR 2CP 174[1] was the first English case which enunciated pre-incorporation contracts, and held promoter for it as:

> There was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent', but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which

*Section 11 of Companies Act, 2011, has been omitted in the Companies (Amendamnd) Act, 2015

Invention of an idea

Every project starts with the invention of an idea, when we conceptualize the potential opportunity in any business. Thereafter the idea is explored with its positive and native side with the help of others.

Planning and analysis

The second state starts when we analyse and do the detailed investigation of idea and constitute the planning for each and every resource to set out the profitability and revenue.

Financing the proposition

The final and important stage is financing—to decide the capital structure of the company, i.e., the shares, the debentures, and other sources of capital generation, such as loans, etc.

Incorporation or registration

Chapter II of the Act enunciates the formation of the company as "Incorporation of Company and Matters Incidental Thereto".

Purpose of the Company Incorporated

Lawful purpose

The intention of the legislature is very clear about the object of the company, by using the word in the section 'A company may be formed for any lawful purpose'. A company can only be incorporated for a lawful purpose only. Although meaning of lawful purpose is not being defined in the act, to understand the meaning of lawful purpose we have to do a clinical analysis.

The objective of any enactment is the projection of the will of the society and it reflects the social behaviour in that particular time. The company is the vehicle to discharge the economic and social behaviour of the society. The object of the section is to formulate a way under which a company can be constructed by the person to uphold not only the requirement of legal provisions but also compete with social structure.

Demarcation of economic freedom

Section 3 of the Act demarcates the adverse object of the company so as to avoid any anomalous situations. The company is the vehicle to discharge the economic objective of the society, which is the final destiny of the company is as reflected in the Memorandum of the Company. In the filtration process, the said word has great importance from the point of view of economic justice, avoidance of hardship to the person associated with company, and it may have affect from any illegal objective of the company.

Otherwise also the law prohibits any association of people for any illegal objective. The section uses the word 'lawful object in the section'. Contrary to such word a company

(f) the particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the director identification number, residential address, nationality, and such other particulars including proof of identity as may be prescribed; and

(g) the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

(2) The Registrar on the basis of documents and information filed under sub-section (1) shall register all the documents and information referred to in that sub-section in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) On and from the date mentioned in the certificate of incorporation issued under sub-section (2), the Registrar shall allot to the company a corporate identity number which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) The company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

(5) If any person furnishes any false or incorrect particulars of any information or suppresses any material information of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under section 447.

(6) Without prejudice to the provisions of sub-section (5) where, at any time after the incorporation of a company, it is proved that the company has been, incorporated by furnishing any false or incorrect information or representation, or by suppressing any material fact or information in any of the documents, or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under clause (b) of sub-section (1) shall each be liable for action under section 447.

(7) Without prejudice to the provisions of sub-section (6), where a company has been incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,

(a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or

(b) direct that liability of the members shall be unlimited; or
(c) direct removal of the name of the company from the register of companies; or
(d) pass an order for the winding up of the company; or
(e) pass such other orders as it may deem fit:

Provided that before making any order under this sub-section,—

(i) the company shall be given a reasonable opportunity of being heard in the matter; and
(ii) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

Capital Subscription

After the grant of Certificate of Incorporation, it is important for the company to make necessary arrangements for raising the capital of the company, to run its business.

Capital Subscription is the process by which the company collects the funds to run its business.

A private company has the flexibility to start its business immediately after the grant of Certificate of Incorporation, because it is funded by the promoters, however, in the case of Public Limited Company the "Capital Subscription Stage" is important, under which the company can raise the required funds from the public by way of "issue of shares and debentures", which is called "issue a prospectus", which is a sort of invitation to the general public to subscribe to the capital of the company, that is why it is called a "Public Company" and the former one is "Private Company".

The following steps are required for raising funds from the public:

(a) Securities and Exchange Board of India (SEBI) approval
(b) Filling of prospectus
(c) Appointment of bankers/brokers/underwriters
(d) Minimum sub-subscription
(e) Application to stock exchange
(f) Allotment of shares

Securities and Exchange Board of India (SEBI) Approval

Protection of investors are the heights priority in Public Company, SEBI (Securities and Exchange Board of India), is the regulatory authority which monitors and protects the investors, by way of issuing guidelines for the disclosure of information and investor protection.

It is mandatory for the company, before making a public offer for sale of shares and debentures must comply with SEBI guidelines. The fundamentals of SEBI guidelines are:

Application to stock exchange

Another important step is to make an application at least one stock exchange for permission to deal in its shares or debentures. It is important because if such permission is not granted before the expiry of ten weeks from the date of closure of subscription list, the allotment shall be considered void and all money received from the investor must be returned to them.

Allotment of Shares

If everything goes well as mentioned above, then the last step is to obtain certificate of commencement.

*Certificate of commencement**

In the erstwhile Companies Act, 1956, the date of incorporation of company was not the date of commencement of business, because there was a requirement of obtaining the Certificate of Incorporation from the Registrar of the Company. With the recommendation of J.J. Irani Committee** the requirement of obtaining a certificate of commencement of business has been done away.

CLASSIFICATION OF COMPANIES

Sub-section (1) of section 3 of the Companies Act, 2013 describes three types of companies which can be incorporated as:

I. Public Company
II. Private Company
III. One Person Company
   - When there are seven or more persons it is called a Public Company;
   - when there are two or more persons it is called a Private Company;
   - when there is only one member it is called one person company. It is a new feature which has been added in the Companies Act, 2013 to increase the entrepreneurship.

Further sub-section (2) of section 3 describes that:

(2) A company formed under sub-section (1) may be either

(a) a company limited by shares; or

(b) a company limited by guarantee; or

(c) an unlimited company.

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*It appears that issue of a certificate of commencement of business would not be necessary since the present Companies Act prescribes the amount of capital to be paid up immediately after the registration. This should be adequate to establish the borrowing power of the company. In view of this, the requirement of obtaining a separate Certificate of Commencement of business imposes avoidable delay and could be dispensed with.

**Jamshed J. Irani Committee (Expert Committee on Company Law)

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member;

Provided further that

(i) persons who are in the employment of the company; and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company.

The above definition reflects the following points:

Number of person, and paid up capital: A private company can be classified on the basis of number of members and paid up capital. As per the section a minimum of two persons are required to form a private company, which can be capped to 200 people.

Restriction to right of transfer its Shares: The Act imposes the restriction to right of transfer of shares. If we compare a public and a private limited company, it is the key attribute between the two. The article of a association of a private limited company, must exhibit that right to transfer its shares is restricted.

Prohibits any invitation to the public to subscribe for any securities of the company: Another restriction imposed by the act on a private company is prohibition to issue a prospectus to the public.

It is an advantage of the private company that it is exempted from any compliance of the act related to the prospectus.

Public Company Under the Companies Act, 2013

Section 2(71)*: 'Public company' means a company which

(a) is not a private company;

(b) has a minimum paid-up share capital requirement of INR 500,000 under the Companies Act, 2013 has been done away with. Therefore, the definitions of private and public companies amended and henceforth, no minimum paid-up capital requirements will now apply for incorporating the company.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be a public company for the purposes of this Act even where such a subsidiary company continues to be a private company in its articles.

The Section specifies the following points:

1. A public company is distinct from a private company.

*Clause 2(71) in sub-clause (b), the words "of five lakh rupees or such higher paid-up capital," shall be omitted. as per the Companies (Amendment) Act, 2015

4 (7) have been repealed, which creates some confusion over the position of an Indian subsidiary's treatment under the Act. Because when we examine section 2(71) in relation with Explanation (c) of section 2(87), simply using the phrase 'not being a private company' is not clear. As a subsidiary company is considered to be a deemed public company if the holding company is not a private company it is pertinent to note here that the holding company could be anything else as well, such as it could be a body corporate.

Further, Explanation (c) establishes that corporate incorporated outside India certainly be considered as a deemed public company by using the expression 'Company' which includes body corporate, though the phrase "for the purposes of this clause' is being used in the section but it may be considered nothing but the definition of a subsidiary.

Other Features of Public and Private Company in The Companies Act, 2013

Section 11

To commence its business or exercise any borrowing power, it is mandatory to pay the value of the shares agreed in the Memorandum by the director, and file a declaration before the Registrar.

Section 203: Appointment of Key Managerial Person

Section says every company, which means private company also requires appointing the following whole time key managerial person

- Managing director , Chief Executive Officer, and in their absence a Whole Time Director
- Company Secretary
- Chief Finance Officer

BASIS OF CLASSIFICATION OF COMPANIES

Incorporation

Statutory companies

When a company is incorporated under the special Act of Parliament or Legislature, it is called a statutory company, public corporation. The special Act defines its powers and functions, rules and regulations governing its employees and its relationship with government departments. The intention to create such companies is to serve a larger public purpose, such as railway, gas, electricity, or any other enterprises of national importance. Life Corporation of India, Reserve Bank of India, Financial Corporation, Unit Trust of India, National Human Rights Commission, Food Corporation of India, Inland Waterways Authority of India, Airports Authority of India, Damodar Valley Corporation, National Highways Authority of India, Central Warehousing Corporation are some such enterprises.

Though it has been created under a special enactment of legislature, but it still comes under the preview of Companies Act, 2013, owned by a government with or without other shareholders, or it might be a body without shareholders.

Key features

Financing and subscription

- Mostly it is funded by the State or Central Government and, it is also authorized to subscribe public subscription.

Autonomous body

It is an important feature of such type of companies that they have the status of an autonomous body and that is why they are free to frame their own policies and procedures subject to their legislature. To provide more flexibility in their work and efficiency, such a status is granted to them, with little government interference.

Registered companies

Companies which are registered under the Companies Act, 2013 (also under the Companies Act, 1956).

Limited

Limited liabilities

Under this category the companies are classified on the basis of their limited liability with reference to their share or guarantee, or during winding up of the company.

Company with limited liability

(a) Limited by Share

When the liability of the members of a company is limited to the amount unpaid on the shares, such a company is known as a company limited by share. Such liability can be enforced during the existence of the company or at time of winding up of the company.

Such liability of company must be mentioned in the Memorandum of the Company as the mandate of section 4 of the Companies Act, 2013, specifies that, in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them.

(b) Limited by Guarantee

The liability of the members of the company in the event of winding up of the company is limited by a fixed sum which is stipulated in the Memorandum of the Company.

> Application of section 4 of the Companies Act, 2013 specifies that in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute to the assets of the company in the event of its being

> wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be.

It is important to note here that the company is not required to have any share capital, but in case it has the share capital, it can reduce its share capital subject to section 66 of the Companies Act, 2013.

Company with unlimited liability

Section 2(92) defines 'unlimited company' as a company not having any limit on the liability of its members;

Being its characteristic such companies are incorporated in less numbers compared to a limited by shares. The disadvantage of such companies is the liability of members of such companies is not limited.

Other than the limited liability, in an unlimited liability company every member is liable for the debts of the company as in an ordinary partnership, in proportion to their interest in the company. Such type of company may or may not have share capital; if it has share capital, it may be a public company or a private company. Like the partnership firm, its members have a joint and non-limited responsibility to meet any insufficiency in the assets of the company to enable liquidation or winding up liability.

Having many disadvantages, it has certain advantages such as that there is no requirement for share capital for an unlimited company, but when it specifies its share capital in the Memorandum of Association, it can reduce or increase it.

Ownership

Companies can be classified on the basis of their ownership as:

(a) Government Company

Clause 2(45) of the Companies Bill, 2012 defines a 'Government Company' as any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government Company'.

Sub-section (6) of section 139, immunes the government company for the application of Section 139 which says:

> every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed.

Prohibitions and restrictions regarding political contributions

Section 182 prohibits government companies to contribute any amount directly or indirectly to any political party.

Chapter XXIII defines how to submit the annual reports. Section 394(1) defines: 'where the Central Government is a member of a Government Company, the Central Government shall cause an annual report on the working and affairs of that company', and section 395(1) specifies where the Central Government is not a member of a Government Company, every State Government which is a member of that company, or where only one State Government is a member of the company, that State Government shall cause an annual report on the working and affairs of the company.

(b) Non-Government Company

When any company other than a Government Company is called non-government company, e.g., a Foreign Company Section 2(42) of the Companies Act, 2013 defines a 'foreign company' as any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.

Any company incorporated outside the territorial limit of India is known as a foreign company, but the place of conducting the business activity is within the territorial jurisdiction of India.

Provisions of Chapter XXII of the Companies Act, 2013 are applicable to foreign company.

ACCESS TO CAPITAL

Listed Company

When any company's shares are listed on a stock exchange for public trading it is called a listed company.

Section (52): 'Listed company' means a company which has any of its securities listed on any recognised stock exchange.

Unlisted Company

Other then the listed company.

CONTROL

Holding Company

Holding company is determined by two attributes—control and ownership, in which one company is holding and another is a subsidiary company.