

## **CHAPTER 1: INTRODUCTION TO COMPANY**

### **Introduction to Company**

Industrial revolution of Britain in 17th and 18th Century has led to the emergence of large scale business organizations. These organization require big investments and the risk involved is very high. Limited resources and unlimited liability of partners are two important limitations of partnership in undertaking big business. Joint Stock Company form of business organization has become extremely popular as it provides a solution to overcome the limitations of partnership business. The Multinational companies like Coca-Cola and General Motors have their investors and customers spread throughout the world. The giant Indian Companies may include the names like Tatas, Reliance, Tata Bajaj Auto, Infosys Technologies, Hindustan Lever Ltd., Ranbaxy Laboratories Ltd., and Larsen and Tubro etc.

In terms of the Companies Act, 2013 (Act No. 18 of 2013) a "company" means a company incorporated under this Act or under any previous company law [Section 2(20)].

In common law, a company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members. However, an association formed not for profit also acquires a corporate character and falls within the meaning of a company by reason of a license issued under Section 8(1) of the Act.

A company is not merely a legal institution. It is rather a legal device for the attainment of social and economic end. It is, therefore, a combined political, social, economic and legal institution. Thus, the term company has been described in many ways. "It is a means of cooperation and organization in the conduct of an enterprise". It is "an intricate, centralized, economic and administrative structure run by professional managers who hire capital from the investor(s)".

### **Meaning and Definition of company**

The word 'company' is derived from the Latin word, 'com' which means 'together' and the word 'ponies' which means 'bread'. A company is thus an association of persons who took their meal together. In simple language the term company means an association of persons formed for some common purpose. When a few person form a company for the purpose of some business of profit it is called a joint-stock company. The persons forming the company are called 'share holders' The liability of the members of the company is usually limited.

According to Section 2(20) of the Companies Act, 2013 defines the term "company" to mean "a company incorporated under the Companies Act 2013 or any previous company law."

Accordingly, a company is an artificial person created by law with a perpetual succession and a common seal". It has a legal entity, separate from the person composing it. It can sue and be sued in its own name

### **Features of Company**

#### **1. Incorporated Association**

Incorporation means registration. A company is created when it is registered under the Companies Act. A Private company comes into existence from the date of incorporation and Public Company from the date of business commencement certificate. Registration is mandatory for companies whereas it is optional in case of Sole trading concern or partnership firms. For forming a public company at least seven persons and for a private company at least two persons are required. These persons will subscribe their names to the Memorandum of association and also comply with other legal requirements of the Act.

#### **2. Voluntary Association**

It is a voluntary association of persons (it includes both natural and artificial person). No persons are compelled or forced to become a member or exit from the membership.

#### **3. Artificial Legal Person**

A company is an artificial person. As it has separate legal existence apart from its members, it can purchase the property or transfer the title of property or be sued in a court of law in its own name. The property of the Company is to be used for the benefit of the Company and not for its members or Share holders. It exists in the eyes of the law and cannot act on its own. It has to act through board of directors elected by shareholders. It was rightly pointed out in Bates V Standard Land Co. that: "The board of directors are the brains of the company, which is the body and the company can and does act only through them". However, it is not a citizen as it cannot enjoy the rights under the Constitution of India or Citizenship Act. In State Trading Corporation of India v CTO (1963 SCJ 705), it was held that neither the provisions of the Constitution nor the Citizenship Act apply to it. It should be noted that though a company does not possess fundamental rights, yet it is a person in the eyes of law.

It can either into contracts with its Directors, its members, and outsiders, justice Hidayatullah once remarked that if all the members of the company are citizens of India, the company does not become a citizen of India.

#### **4. Separate Legal Entity**

A company has a legal distinct entity and is independent of its members. The creditors of the company can recover their money only from the company and the property of the company. They cannot sue individual members. Similarly, the company is not in any way liable for the individual debts of its members. The property of the company is to be used for the benefit of the company and nor for the personal benefit of the shareholders. On the same grounds, a member cannot claim any ownership rights in the assets of the company either individually or jointly during the existence of the company or in its winding up. At the same time the members of the company can enter into contracts with the company in the same manner as any other individual can. Separate legal entity of the company is also recognized by the Income Tax Act.

#### **5. Perpetual Existence**

An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person is unaffected by death, insolvency or departure (retirement) of any member and it remains the same entity, despite total change in the membership. A company's life is determined by the terms of its Memorandum of Association. It may be perpetual, or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association. Perpetual succession, therefore, means that the membership of a company may keep changing from time to time, but that shall not affect its continuity

- Its life does not depend upon the death, insolvency or retirement of any or all shareholder (s) or director (s). Law creates it and law alone can dissolve it. Members may come and go but the company can go on for ever
- "During the war all the member of one private company, while in a general meeting. were killed by a bomb. But the company survived; not even a hydrogen bomb could have destroyed it. 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. Thus, a company has a perpetual existence, irrespective of changes in its membership.

#### **6. Common Seal**

Upon incorporation, a company becomes a legal entity with perpetual succession and a common seal. Since the company has no physical existence, it must act through its agents and all

contracts entered into by its agents must be under the seal of the company. The Common Seal acts as the official signature of a company. The name of the company must be engraved on its common seal. A rubber stamp does not serve the purpose. A document not bearing common seal of the company, when the resolution as passed by the Board for its execution is not authentic and shall have no legal force behind it.

- A company may have its own regulations in its Articles of Association for the manner of affixing the common seal to a document.
- If the Articles are silent, the provisions of Table-A (the model set of articles appended to the Companies Act) will apply. As per regulation 84 of Table-A the seal of the company shall not be affixed to any instrument except by the authority of a resolution of the Board or a Committee of the Board authorized by it, on behalf, and except in the presence of at least two directors and of the secretary or such other person as the Board may appoint for the purpose, and those two directors and the secretary or other person aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

### 7. Limited Liability

A company may be company limited by shares or a company limited by guarantee.

- A. Limited by Shares: In company limited by shares, the liability of members is limited to the unpaid value of the shares. For example, if the face value of a share in a company is 10 and a member has already paid 8 per share, he can be called upon to pay not more than 2 per share during the lifetime of the company. If the shares are fully paid up no liability will arise.
- B. Limited by Guarantee: In a company limited by guarantee the liability of members is limited to such amount as the member may undertake to contribute to the assets of the company in the event of its being wound up. Example: Incorporated firm without share capital, and in which the liability of its members is limited to the amount each one of them undertakes to contribute (Le, guarantee) at the time the firm is wound up

### 8. Transferable Shares

In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the articles. However, the articles shall prescribe the manner in which such transfer of shares will be made and it may also contain bona fide and reasonable restrictions on the right of members to transfer their shares. But absolute restrictions on the rights of members to transfer their shares shall be ultra vires.

\* This provides liquidity to the investor and stability to the company. Shares or interest of the member in a Company is freely transferable except to the extent of restrictions prescribed in the Articles of a Private Company.

\* However, in the case of a private company, the articles shall restrict the right of member to transfer their shares in companies with its statutory definition. In order to make the right to transfer shares more effective, the shareholder can apply to the Central Government in case of refusal by the company to register the transfer of shares.

\* If the articles does not provide anything for the transfer of shares and the Regulations contained in Table "F" in Schedule I to the Companies Act, 2013, are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property.

### **9. Separate Property**

A company is a legal person distinct from its members, it is capable of owning, enjoying and disposing of property in its own name. Although its capital and assets are contributed by its shareholders, they are not the private and joint owners of its property. The company is the real person in which all its property is vested and by which it is controlled, managed and disposed of. A shareholder does not have even an insurable interest (A Person is said to have insurable interest in some property or other related matter when he gains from the existence and loses from its destruction, as per the insurance patience) in the property of the Company. The property of the Company is not the property of its shareholders.

B. Limited by Guarantee: In a company limited by guarantee the liability of members is limited to such amount as the member may undertake to contribute to the assets of the company in the event of its being wound up. Example: Incorporated firm without share capital, and in which the liability of its members is limited to the amount each one of them undertakes to contribute (Le, guarantee) at the time the firm is wound up

### **8. Transferable Shares**

In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the articles. However, the articles shall prescribe the manner in which such transfer of shares will be made and it may also contain bona fide and reasonable restrictions on the right of members to transfer their shares. But absolute restrictions on the rights of members to transfer their shares shall be ultra vires.

\* This provides liquidity to the investor and stability to the company. Shares or interest of the member in a Company is freely transferable except to the extent of restrictions prescribed in the Articles of a Private Company.

\* However, in the case of a private company, the articles shall restrict the right of member to transfer their shares in companies with its statutory definition. In order to make the right to transfer shares more effective, the shareholder can apply to the Central Government in case of refusal by the company to register the transfer of shares.

\* If the articles does not provide anything for the transfer of shares and the Regulations contained in Table "F" in Schedule I to the Companies Act, 2013, are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property.

### **9. Separate Property**

A company is a legal person distinct from its members, it is capable of owning, enjoying and disposing of property in its own name. Although its capital and assets are contributed by its shareholders, they are not the private and joint owners of its property. The company is the real person in which all its property is vested and by which it is controlled, managed and disposed of. A shareholder does not have even an insurable interest (A Person is said to have insurable interest in some property or other related matter when he gains from the existence and loses from its destruction, as per the insurance patience) in the property of the Company. The property of the Company is not the property of its shareholders.

### **10. Delegated Management**

A joint stock company is an autonomous, self governing and self-controlling organization. Since it has a large number of members, all of them cannot take part in the management of the affairs of the company. Actual control and management is, therefore, delegated by the shareholders to their elected representatives, known as directors. They look after the day-to-day working of the company. Moreover, since shareholders, by majority of votes, decide the general policy of the company, the management of the company is carried on democratic lines. Majority decision and centralized management compulsorily bring about unity of action. In short, its management is conducted by the Board of Directors. But the shareholders who are the actual owners of the company are not allowed to participate directly in the management. So there is separation of ownership from control.

**11. Capacity to sue and be sued**

A Company being a body corporate can sue and be sued in its own name.

**12. Limitation of action**

The creditors can make their claims only against Company and cannot proceed against shareholders. Their action stops with the Company. It is only the Company which can call for any unpaid capital from its shareholders.

**13. Maintenance of Reserves**

The basis of formation of the joint stock company is to earn profit. Whole profit is not distributed among the shareholders but some portion of profit is transferred to Reserve Fund. So that it may be used at the time of emergency.

**14. High Capital Contribution**

As there is no limit to the maximum number of shareholders in case of Public Company, capital may be increased and large business may be commenced. But it is not possible in other form of organization due to lack of capital.

**15. Various sources of Finance**

There are many sources by which business funds and capital may be raised in the Public Company. It increases its capital by selling its debentures, shares, other securities and thereby incorporate saving. But these sources are not available in sole trading concern, partnership or any other form of business.

**16. Loans in its own name**

Company can receive loan in its own name which are payable by the company itself. But in the partnership, the loans are obtained by partners in their own personal liability.

**17. Bound by numerous rules**

Its activities are controlled by many central or provincial departments. There are numerous rules which must have to be carried into effect by the company. It has to audit its accounts and to submit the various reports to Registrar office. It thus cannot operate freely without any interference.

**Highlights of Companies Act 2013**

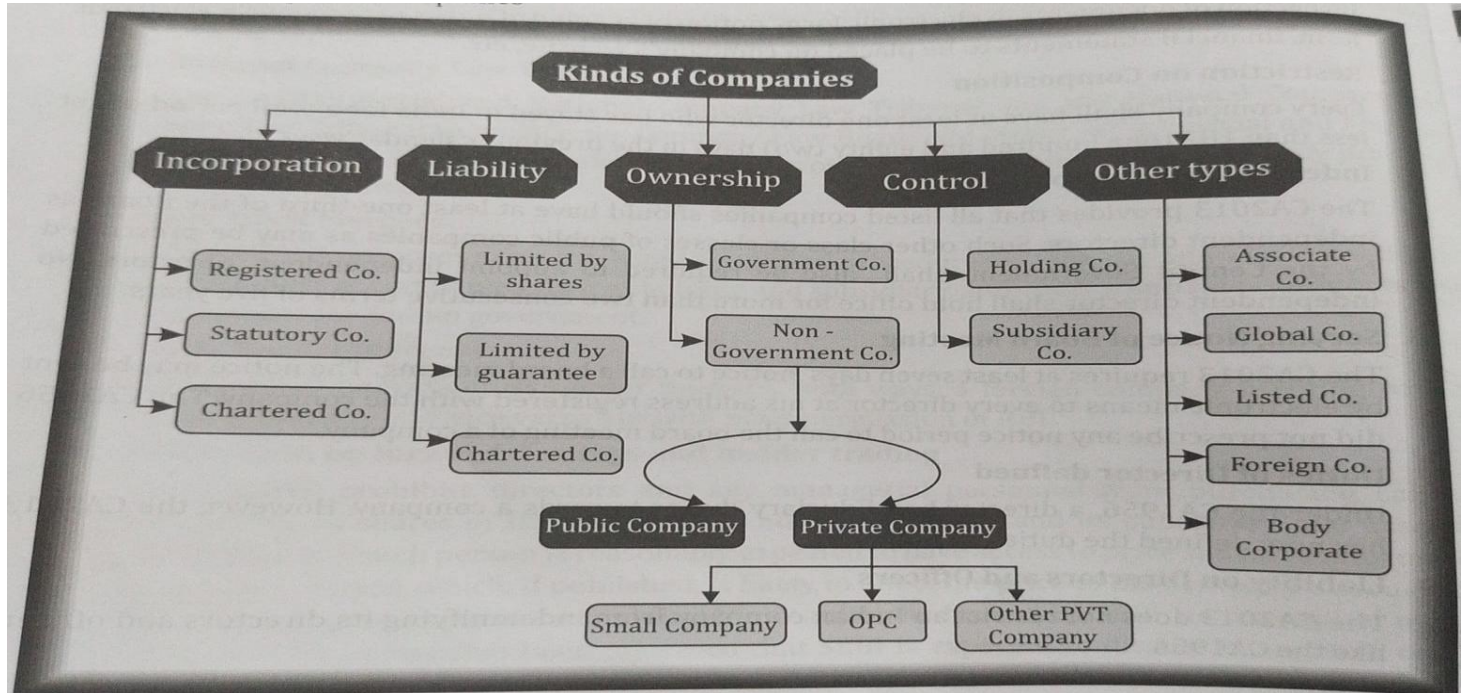
**The new Companies Act, 2013 is applicable to:**

1. Companies registered under Companies Act, 2013 or any earlier Companies Act,

2. Insurance Companies (except in so far as the said provisions are not inconsistent with IRDA Capital, Act, 1999).
3. Banking Companies (except in so far as the said provisions are not inconsistent with Banking Regulation Act, 1949).
4. Electricity Companies (except in so far as the said provisions are not inconsistent with the Electricity Act, 2003).
5. Companies governed by Special Act (except in so far as the said provisions are not inconsistent with such Special Act)

- The promulgation of the new law is a step towards globalization and is a successful attempt to meet the changing environment and is progressive and futuristic duly envisaging the technological and legal developments.
- Increase in number of Companies from approximately 30,000 in the year 1956 to 11,00,000 in the year 2013.
- The Act comprises of 29 chapters, 470 Clauses with 7 Schedules as against 658 sections and 14 Schedules in the Companies Act, 1956.
- Some of the definitions introduced in this Act are already in usage. Now, by defining more clarity is given. The new definitions interrail covers, Auditing Standards, Associate Company,
- Authorized Capital, Books of Accounts, Called up Capital, Chartered Accountant, Chief Executive Officer, Chief Financial Officer, Company Liquidator, Control, Cost Accountant, Deposit, Expert, Financial Institution, Financial Statement, Global Depository Receipt, Independent Director Indian Depository Receipt, Interested Director, Issued Capital, Key Managerial Personnel, Notification, One Person Company, Ordinary or Special Resolution, Paid up share capital, Postal Ballot, Previous Company Law, Promoter, Public Financial Institution, Register of Companies, Related Party, Remuneration, Serious Fraud Investigation Office, Small Company, Subscribed Capital, Tribunal, Turnover, Unlimited Company, Voting Right, Whole Time Director.

## Kinds of Companies



### On the Basis of Incorporation

1. **Registered Companies:** These are the companies as defined u/s 2 of the Act. They are registered under the Companies Act, 2013 or any other earlier Companies Act.
2. **Statutory Companies:** They are companies created by a Special statute of the legislature/parliament, E.g. Reserve Bank of India is incorporated as per RBI Act, LIC is incorporated as per LIC. The provisions of the Act, apply to them if they are not inconsistent with the provisions of the Special Act under which they were formed.
3. **Chartered Companies:** These are companies are incorporated with the permission of King. Queen or Prince. In India, we don't have any Chartered companies at present. Earlier, East India Company was a charter company which was incorporated with the permission granted by Queen Elizabeth of Britain.

### On the Basis of Liability

As per section 3(2), a company formed under this Act may be either

- (a) A Limited Company; or
- (b) An Unlimited company.

### **(a) Limited Company**

The term 'Limited Company' means a company limited by shares or by guarantee.

The liability of the members, in the case of a limited company, may be limited with reference to the nominal value of the shares, respectively held by them or to the amount which they have respectively guaranteed to contribute in the event of winding up of the company.

Accordingly, a limited company can further classified into: **Company limited by shares, and Company limited by guarantee.**

#### **1. Companies Limited by Shares [Section 2 (22)]**

"Company limited by shares" means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.

Accordingly, no member of a company limited by shares, can be called upon to pay more than the nominal value of the shares held by him. If his shares are fully paid-up, he has nothing more to pay. But in the case of partly-paid shares, the unpaid portion is payable at any time during the existence of the company on a call being made, whether the company is a going concern or is being wound up.

#### **2. Companies Limited by Guarantee [Section 2(21)]**

"Company limited by guarantee" means a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up. Clubs, trade associations and societies for promoting different objects are examples of such a company.

A guarantee company may or may not have share capital. As regards the funds, a guarantee company without share capital obtains working capital from other sources, e.g. fees or grants. But a guarantee company having a share capital raises its initial capital from its members, while the normal working funds would be provided from other sources, such as fees, charges, subscriptions, etc.

The Memorandum of Association of every guarantee company must state that every member of the company undertakes to contribute to assets of the company in the event of its being wound up while he is a member for the payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the charges, costs and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as

may be required, not exceeding a specified amount. The Memorandum of a company limited by guarantee must state the amount of guarantee. It may be of different denominations.

### **(b) Unlimited Company**

It is a Company where the liability of every member is unlimited. It is a Company where every member is liable for the debts of the Company as in any ordinary partnership, but only in proportion to their interest in the Company. In India, we don't have Unlimited Companies.

### **On the Basis of Ownership**

On the basis of Ownership, the Companies can be classified as Government Companies and Non-Government Companies.

#### **1. Government Companies - [Section 2(45)]:**

A Government Company is a Company in which not less than 51% of the paid Capital is held by

- The Central Government or
- The State Government(s) 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.

**2. Non Government Companies:** They are Companies other than Government Companies. They are further classified as:

#### **A. Private Company**

- i. One Person Company
- ii. Small Company
- iii. Other Private Company

#### **B. Public Company**

- i. Listed Company
- ii. Unlisted Company

### **Private Company [Section 2(68)]**

A "Private Company" means a company having a minimum paid-up share capital of one lakh rupees (1,00,000) or such higher paid-up share capital as may be prescribed, and which by its articles,

1. Restricts the right to transfer its shares;
- ii. Except in case of One Person Company, limits the number of its members to 200 (excluding the past and present employees)

iii. Prohibits any invitation to the public to subscribe for any securities of the company; The words 'Private Limited' must be added at the end of its name by a private limited company. The Private Company Can be further classified as One Person Company and Small Company

**(1) One Person Company - [Section 2(62)]:**

"One Person Company" means a company which has only one person as its member.

The Act provides that the words "One Person Company" or "OPC" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

**The Logic and Advantage of New Concept - OPC**

The introduction of OPC in the legal system is a move that would encourage corporation of micro businesses and entrepreneurship with a simpler legal regime so that the small entrepreneur is not compelled to devote considerable time, energy and resources on complex legal compliances. This will not only enable individual capabilities to contribute towards economic growth, but also and e copy form business has been provided with concessional /relaxed requirements under the Companies Act. 2013. With the implementation of the Companies Act, 2013, a single national person can constitute a Company, under the One Person Company (OPC) concept. This Concept was recommended by Committee and this concept is widely accepted in countries like China, Pakistan, Singapore, Us etc..

**Provisions applicable to the formation of One Person Company [Rule 3]**

1. Only a natural person who is an Indian citizen and resident of India-

- Shall be eligible to incorporate a One Person Company:
- Shall be a nominee for the sole member of a One Person Company.
- Resident in India means a person who has stayed in India for a period of 182 days or more during the immediately preceding one calendar year.

2. No person shall be eligible to incorporate more than a 'One Person Company' or become nominee in more than one such company. (One person cannot incorporate more than one OPC or become nominee in more than one OPC)

3. If a member of OPC becomes a member in another OPC by virtue of his being nominee in that OPC then within 180 days he shall have to meet the eligibility criteria of being Member in one OPC.

+ Nominee name should be mentioned in the Memorandum.

+ Written Consent of nominee is necessary.

+ Nominee's name along with his consent is to be filed with the ROC.

+ Minor shall not be made as nominee of such company or can hold share with beneficial interest.

+ Nominee may withdraw his consent by giving notice to the Sole Member of the Company. In such a case, the sole member shall give another nomination in the same way and shall file the withdrawal and fresh inclusion to the ROC within 30 days.

+ When the sole member of the OPC dies or becomes incapacitated from contracting and the nominee becomes the sole member, he has to nominate another natural person as his nominee.

4. Such Company cannot be incorporated or converted into a company under section 8 of the Act.

5. Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates.

6. No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of One Person Company.

7. One Person Company shall get itself compulsorily converted into a private company or Public co., in the following circumstances within 6 months (exception for two years period)

- Where the paid up capital exceeds to 50 Lakhs or
- Where the average annual turnover for the past three financial years exceeds Two crores.
- Where the Balance Sheet total exceeds 1 Crore within 30 days, the OPC shall give notice of its conversion to the ROC.

### **Privileges available to OPC**

1. The most significant reason for shareholders to incorporate the 'single-person company is certainly the desire for the limited liability,

2. Businesses currently run under the proprietorship model could get converted into OPCS without any difficulty.

3. Mandatory rotation of auditor after expiry of maximum term is not applicable.

4. One Person Company needs to have minimum of one director. It can have directors up to a maximum of 15 which can also be increased by passing a special resolution as in case of any other company.

5. The provisions of Section 98 and Sections 100 to 111 (both inclusive), relating to holding of general meetings, shall not apply to a One Person Company.

6. Minimum authorized share capital required for One Person Company having share capital is 1,00,000/-.

7. Minimum and maximum number of members for One Person Company is one only.

8. OPC is not required to hold annual general meeting.

### **Benefits of One Person Company**

The concept of One person company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, access to market, limited liability, and legal protection available to companies.

Prior to the new Companies Act, 2013 coming into effect, at least two shareholders were required to start a company. But now the concept of One Person Company (OPC) would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery. Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now the OPC would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure, Further, the amount of compliance by a one person company is much lesser in terms of filing returns, Balance Sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

### **(2) Small Company [Section 2(85)]:**

A "Small Company" means a company other than a public company

1. Whose paid up capital does not exceed 50 lakhs
- ii. Whose turnover as per the latest accounts does not exceed 2 Crores.
- iii. This will not include
  - Holding or subsidiary company
  - Section & Company (Le, Charitable Company)
  - Company or body corporate government by Special Acts.

### **Salient Features**

- Only a private company can be classified as a small company.
- Holding company, subsidiary company, charitable company and company governed by any Special Act cannot be classified as a small company.
- For a small company, either the paid up capital should not exceed Rupees fifty lakhs or the turnover as per last statement of profit & loss should not exceed rupees two crores.
- The status of a company as "Small Company" may change from year to year. Thus the benefits which are available during a particular year may stand withdrawn in the next year and become available again in the subsequent year.

### **Privileges/exemptions of a Small Company**

- The financial statement, with respect to Small Company may not include the cash flow Statement
- Financial assistance can be given for purchase of or subscribing to its own shares or shares in its holding company

- The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words it need not be signed by the company secretary in practice.
- Need not prepare a report on Annual General Meeting.
- Small company need not have more than two directors in its Board.
- A proportion of directors need not retire every year. Additional grounds for disqualification for appointment as a director may be specified in the articles.

### C. Public Company:

A Public Company means a company which is

1. Not a private company and has a minimum paid up capital of Rs. 5 Lakhs or such higher paid up capital, as may be prescribed; or
2. A Private company which is a subsidiary of a company which is not a private.

### **Chart of Difference Between Public Company and Private Company**

<b>Basis of Difference</b>	<b>Public Company</b>	<b>Private Company</b>
<b>Meaning</b>	A Public company is the one that is registered in the share market of the country to issue shares for the public to subscribe to them.	A private company is the one that has the minimum paid-up share capital as prescribed in the Articles of Association.
<b>Number of Owner/ Members</b>	It has a <b>minimum of 7</b> and <b>no maximum limit</b> on the number of owners/ members.	It has a <b>minimum of 2</b> and a <b>maximum of 200</b> owners/ members.
<b>Share Capital</b>	Rights of share capital and profits are distributed among all owners/members as per article of association and the <b>number of shares owned</b> by one person.	Rights of share capital and profits are distributed among all owners/members as <b>per article of association</b> .
<b>Transfer of Share</b>	Owners/Members are <b>free to transfer</b> their share to the other person in the market.	As per the terms and conditions <b>decided in the article of association</b> , many types of restrictions are imposed by the AOA.
<b>Share Prospectus</b>	The prospectus <b>must be</b> issued to invite the public to subscribe to shares of the company.	Prospectus <b>not need</b> to be issued.
<b>Number of Directors</b>	It must have <b>at least 3 Directors</b> and it can have a maximum of 15 Numbers of Directors.	It must have <b>at least 2 Directors</b> and it can have a maximum of 15 Numbers of Directors.
<b>Name of Company</b>	The word ' <b>Limited</b> ' is used as part of the name of the company.	The word ' <b>Private Limited</b> ' is used as part of the name of the company.
<b>Funds Raising</b>	Public companies, <b>it is very easy to raise funds</b> by issuing shares to the <b>public</b> in the share market.	Possible to raise funds by issuing shares of the company with the <b>mutual consent of all members</b> of the company.
<b>Who can Subscribe the Share Capital</b>	The public <b>can</b> easily subscribe to the share of the company.	The public <b>can't</b> subscribe to the share of the company.

### **On the Basis of Control**

1. **Holding Companies** - [Section 2(46)]: Holding Company means a Company of which such other company (or Companies) is its subsidiary.
2. **Subsidiary Company [Section 2(87)]**: A company shall be deemed to be subsidiary of another company, if and only if.

#### **(a) That other company controls the compositions of its Board of Directors.**

The control of the composition of the Board of directors of a company means that the holding company has power, at its discretion, to appoint or remove all or majority of the directors of the subsidiary company without the consent of the other persons.

**(b) That other Company, exercises or controls more than half of the total share capital either on its own or together with one or more subsidiaries; or Total Share Capital'** means the aggregate of the Paid up equity share capital and convertible preference share capital.

**(c) The first-mentioned company is a subsidiary of any company which is that other's subsidiary.**

#### **Meaning: Control [Section 2 (27)]**

Control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in consent, directly or Indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

### **Other Types of Companies**

1. **Foreign Company**: [Section 2(42)]: Foreign company means 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

#### **Sections 379 to 393 of the Act deal with such companies:**

Section 380 of the Act lays down that every foreign company which establishes a place of business in India must, within 30 days of the establishment of such place of business, file with the Registrar of Companies for registration:

- (a) A certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;
- b) The full address of the registered or principal office of the company:
- (c) A list of the directors and secretary of the company containing such particulars as may be prescribed;
- (d) The name and address or the names and addresses of one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company:
- (e) The full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) Particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- (g) Declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) Any other information as may be prescribed.
- Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified place or document as required under Section 382.
  - Section 381 requires a Foreign Company to maintain books of Account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.
  - Section 376 of the Companies Act, 2013 provides further that when a foreign company, which has been carrying on business in India, ceases to carry on such business in India, it may be wound up as an unregistered company under Sections 375 to 378 of the Act, even though the company has been dissolved or ceased to exist under the laws of the country in which it was incorporated.

3. **Association Not for Profit/ Non Profit Companies/ Charitable Association [Section 8]:**

When a person or an Association of Persons proposes to be registered as a Limited Company and it

(a) Has in its objects the promotion of Commerce, Arts, Science, Sports, Education, Research, Social Welfare Religion, Charity, Protection of environment or such other object.

(b) Intends to apply its profit or other income in promoting its objects

(c) Intends to prohibit the payment of any dividend to its members.

The Central government may permit such registration as a limited company under this section. (Section 8) without addition of two word(s) "Limited" or "Private Limited".

✓ A firm could be a member of such company.

✓ The Memorandum and Articles of this company cannot be altered without Central Government's prior approval

Central government can also revoke the license so granted after giving an opportunity of being heard, to the company.

The Central government may also pass orders for amalgamation of the company with any other company.

**3. Global Company:** Global corporations operate in two or more countries and face many challenges in their quest to capture value in the global market.

**4. Associate Company [Section 2(6)]:** Associate Company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

- A company is considered to be an associate company of the other, if the other company has significant influence over such company (not being a subsidiary) or is a joint venture company. Significant influence means control of at least 20 percent of total share capital of a company or of business decisions under an agreement.
- To add more governance and transparency in the working of the company, the concept of associate company has been introduced. It will provide a more rational and objective framework of associate relationship between the companies.
- Further, as per section 2 (76), Related party includes Associate Company. Hence, contract with Associate Company will require disclosure/approval/entry in statutory register as is applicable to contract with a related party.

**5. Listed Company/ Quoted Company:** Company whose shares are traded on an official stock exchange. It must adhere to the listing requirements of that exchange, which may include how many shares are listed and a minimum earnings level.

- Company whose shares are listed (quoted) on a stock exchange for public trading are also called quoted company.
- Listing means admission of securities to dealings on a recognized stock exchange. The securities may be of any public limited company, Central or State Government, quasi governmental and other financial institutions/corporations, municipalities, etc.

**The objectives of listing are mainly to:**

- Provide liquidity to securities;
- Mobilize savings for economic development;
- Protect interest of investors by ensuring full disclosures.

**Listing of Securities:** A company, desirous of listing its securities on the Exchange, shall be required to file an application, in the prescribed form, with the Exchange before issue of Prospectus by the company, where the securities are issued by way of a prospectus or before issue of 'Offer for Sale', where the securities are issued by way of an offer for sale. The company shall be responsible to follow all the requirements specified in the Companies Act, the listing norms issued by SEBI from time to time and such other conditions, requirements and norms that may be in force from time to time and included hereafter in these Bye-laws and Regulations to make the security eligible to be listed and for continuous listing on the Exchange.

6. **Body Corporate or Corporation or Corporation Aggregate:** Body corporate broadly means a corporate entity which has a legal existence.

**According to Section 2(11): Body Corporate includes the following**

1. A private company
2. A public company
3. One person company
4. Small company
5. Limited liability partnership
6. Foreign company or a company incorporated outside India.

**However, body corporate does not include:**

1. A co-operative society registered under any law relating to co-operative societies, and
- ii. Any other body corporate (not being a company as defined in the Companies Act 2013). which the Central Government may, by notification, specify in this behalf

The above definition is different from the provisions existed in the erstwhile companies Act 1956, which had excluded a "corporation sole also from the definition of body corporate which was, however, not defined in the Act of 1956.

**7. Dormant Company:** Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction for the last 2 years. Such a company or an inactive company can make an application to ROC for obtaining the Status of a dormant company.

**Significant accounting transaction mentioned above means transaction other than the following:**

1. Payment of fees by the company to ROC.
2. Payment made by it to fulfill the requirements of this Act or any other law.
3. Allotment of shares
4. Payment for maintenance of its office and records.

**Other Points:**

1. The ROC may allow the status of a Dormant Company to the application.
2. ROC shall maintain a register of Dormant Companies
3. The ROC on its own, shall issue a notice to such company when the Annual Return has not been filed for 2 years and enter the company's name in the Register maintained for the Purpose
4. The Dormant Company shall have such minimum directors, file such documents and pay such fees as may be required to retain its Dormant character.
5. It can be become active on making an application and on payment of the requested fees to the ROC.
6. The ROC may strike of the name of the Dormant Company if it fails to comply with the specified requirements.

## Chapter 2: Formation of Companies

### Introduction

A Company comes into existence when a group of people come together with a view of forming an association to exploit the business opportunities by bringing together, men, material, money and management. Thus, there are different stages of formation of company

### Stages of Formation of a Company:

1. Promotion Stage.
2. Incorporation (Registration Stage).
3. Raising the Share Capital Stage (Capital Subscription).
4. Commencement of business.

### Promotion Stage

#### Meaning: Promotion Stage

The promotion of a company refers to all those steps which are taken from the time of having an idea of starting a company to the time of actual starting of the company business.

According to Heney, Promotion is defined as "the process of organizing and planning the finances of a business enterprise under the corporate form is called promotion."

The promotion work may be undertaken for starting a new business or expansion of an existing business unit.

The term "Promotion" refers to the process of by which a company is 'incorporated' or brought into existence

Once the promoters conceive idea of starting a company, they have to decide about

- The name of the company.
- The state in which it is to be registered.
- Type of the company (Public or Private, etc.)
- Objects for which it is being started
- Size of its capital base, etc.,

**As per Section 3(1) of the Companies Act, 2013, a company may be formed for any lawful purpose by-**

- (a) Seven or more persons, where the company to be formed is to be a public company
- (b) Two or more persons, where the company to be formed is to be a private company; or
- (c) One person, where the company to be formed is to be One Person Company

it is done by subscribing their/his name(s) (i.e., Promoter(s) name) to a memorandum and complying with the requirements of this Act in respect of registration:

**Meaning: Promoter**

The person who undertakes the responsibility of bringing a company into existence is called a promoter. The promoter may be a single individual or group of individuals. The promoter conceive the idea of for incorporation company.

**Who is a promoter?**

1. People who think of forming a company and take necessary steps in its formation are known as "Promoters" or "Company Promoters"
2. The person who conceives such an idea is called "Company Promoter"
3. A promoter is one "who undertakes to form a company with reference to a given object and bis set it going and who takes the necessary steps to accomplish that purpose"

**Definition: Promoter**

As per Section 2(69) of the Companies Act, 2013, "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, directaur or otherwise: or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

**As per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, "promoter" includes:**

1. The person or persons who are in control of the issuer
- ii. The person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public:
- iii. The person or persons named in the offer document as promoters

A person who is acting merely in a professional capacity enabling formation of a company is not a promoter. Example: A solicitor, banker, accountant etc., are not regarded as promoters.

A promoter is one who undertake to form a company, with reference to a given project and to see it going and takes the necessary steps to accomplish the task.

It is clear from the foregoing that the word "promoter" is used in common parlance to denote any individual, corporate, syndicate, association or partnership which has taken all the necessary steps to create and mould a company and set it going. The promoter originates the scheme for the formation of a company; gets together the subscribers to the memorandum, gets the Memorandum and Articles prepared, executed and registered, finds the bankers, brokers and legal advisers, finds the first directors, settles the terms of preliminary contracts with vendors and agreement with underwriters. and makes arrangement for preparation, advertisement and circulation of the prospectus and placement of the capital. But a person who merely acts in a professional capacity on behalf of the promoter, such as a solicitor who draws up an agreement or articles, an accountant or valuer who prepares figures or valuation on behalf of a promoter, and who is paid for the same, is not a promoter

**Legal Status (Position) of a Promoter**

A promoter is neither an agent nor a trustee of the company under incorporation. A promoter stands in a fiduciary relationship (relation requiring confidence or trust) with the company which he promotes.

**A fiduciary position calls for a Promoter:**

- (a) Not to make any profit (either directly or indirectly) at the expense of the company,
- (b) To give the benefit of negotiations to the company:
- (c) To make full disclosure of his interest or profit:
- (d) Not to make unfair use of his position.

Lord Cairns has correctly stated the position of a promoter in *Erlanger v. New Sombrero Phosphate Co.* "The promoters of a company stand undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how, and when, and in what shape and under what supervision, it shall come into existence and begin to act as a trading corporation."

**Functions of Promoters**

1. To discover an idea for establishing a company.
2. To make detailed investigations about the demand for the product, availability of power, labor, raw material.
3. To investigate the idea and know whether the formation of the company is possible and profitable.
4. To find out suitable persons who are willing to act as first directors of the company.
5. To select the name of company.
6. To select bank, legal advisor, auditor, underwriter for the company.
7. To submit all the documents required for incorporation with the registrar.
8. To meet all the preliminary expenses for floating of a company.
9. To make contracts with vendors, underwriters, and managing directors of the company
10. To arrange for the loan etc. from various financial resources.
11. To make proper arrangement for the office of the company.

**Duties and Obligation of Promoters****The promoter of a company have two important duties:**

1. A promoter cannot make either directly or indirectly any profit at the expense of the company he promotes, without the knowledge and consent of the company and that if he does so, in disregard of this rule, the company can compel him to account for it.
2. A promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed.

Thus, The promoter must see, in connection with the prospectus, if any issued (or statement in lieu of prospectus), that the prospectus -

- Contains the necessary particulars, (I.e., promoters must disclose fully all the material facts regarding the formation of a company)
- Does not contain any untrue or misleading statement (Le, prospectus of the company should contain the true statements) and
- Does not omit any material fact (Le., to disclose the liability and pay the secret profits if promoters have earned or the Liability on statutory mistakes or frauds in the property)

**If the promoter fails to perform his duty:**

1. Allotment of shares may be set aside in the case of fraudulent or innocent misrepresentations,

ii. He may be sued for damages;

iii. He may be sued for compensation for misrepresentation under Section 35 of the Act

iv. He may be sued for damages by the shareholders who have suffered by reason of his non-compliance with the statutory requirements as to the contents of the prospectus; and

v. He may become liable under criminal proceedings.

**Remuneration of Promoters**

A promoter has no right to get compensation from the company for his services in promoting the company unless there is a contract to that effect. If there is no such contract, he is not entitled to get any compensation in respect of any payment made by him in connection with the formation of the company.

In practice, a promoter takes remuneration for his services in one of the following ways:

(a) He may sell his own property at a profit to the company, for cash or fully-paid shares provided he makes a disclosure to this effect.

(b) He may be given an option to buy a certain number of shares in the company at par.

(c) He may take commission on the shares sold.

(d) He may be paid a lumpsum remuneration in cash by the company on its incorporation. Any remuneration paid to the promoters must be disclosed in the prospectus.

**Liabilities of the Promoters**

If a person acquires a property or has had it before he takes any active steps to promote the company and sells it to the company at a profit, he can retain such profit provided he should make full disclosure of the fact that the property is his and he is the real vendor. If he fails to do so, the company can rescind the contract or claim damages for breach of duty of disclosure.

Where he was in a fiduciary position when he acquired and sold the property to the company. The company may-

(a) Rescind the contract and if he has made a profit on some ancillary transaction, that may also be recovered.

(b) Retain the property and pay no more than what the promoter paid.

(c) Where remedies mentioned above would be inappropriate, the company may sue him for misfeasance.

It is important to understand that it is not the profit made by the promoter which the law forbids, but the non-disclosure of it

**Failure to provide disclosure**

promoter can be compelled by the company to hand over any secret profit which he has made without full disclosure to the company. The company can also sue for the rescission of the contract of sale by the promoter where the promoter has not disclosed his interest therein.

**The following liabilities under the various provisions of the Companies Act, 2013:**

**1. Incorporation of company by furnishing false information:** As per 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 company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration shall be liable for fraud under section 447.

**2. Disclosure of the source of Promoter's Contribution [Section 26]:** The promoter(s) may be held liable for the non-compliance of the provisions of this Section. Further, as per section 26(1)(a)(xiv) prescribed disclosures about sources of promoter's contribution has to be made in prospectus.

**3. Civil Liability for misstatements in prospectus:** A promoter is liable 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. By virtue of section 35(1), where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and certain persons as mentioned in the said section, including a promoter of the company shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

**4. Punishment for fraudulently inducing persons to invest money:** As per section 36, any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,

- i. Any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or
- ii. Any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or
- iii. Any agreement for, or with a view to obtaining credit facilities from any bank or financial institution, shall be liable for punishment for fraud under section 447.

**5. Contravention of provisions relating to private placement:** If a company makes an offer or accepts money in contravention of the provisions of private placement as stated in section 42, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all the money to subscribers within a period of thirty days of the order imposing the penalty.

**6. Failure to cooperate with Company Liquidator during winding up:** As per section 284 (2), where any promoter, without reasonable cause, fails to cooperate with the Company Liquidator during winding up, shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

**7. Liable for public examination:-** A promoter may be liable to public examination like any other director or officer of the company if the Tribunal so directs on a Company Liquidator's report alleging fraud in the promotion or formation of a business or conduct of affairs of the company since its formation [Section 300(1)].

**8. A company may proceed against a promoter on action for deceit or breach of duty:-**Where the promoter has misapplied or retained any money or property of the company or is guilty of misfeasance or breach of trust in relation to the company.

**9. Criminal Liability for misstatement in prospectus:-** Besides civil liability, the promoters are criminally liable under Section 34 for the issue of prospectus containing untrue or misleading statements in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead. Section 447 imposes severe punishment for fraud on promoters who make untrue or misleading statements in prospectus with a view to obtain capital. The punishment prescribed is imprisonment for a term which shall not be less than six months but which may extend to ten years and also a fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Further, where the fraud in question involves public interest, the term of imprisonment shall not be less than three years. A promoter can, however, escape the punishment if he proves:

1. That the statement or omission was immaterial; or
- II. That he had reasonable grounds to believe, and did, up to the time of the issue of prospectus, believe that statement was true or the inclusion or omission was necessary.

#### **Preliminary Contracts (Pre-Incorporation Contracts)**

Preliminary contracts are those contracts which are entered into by agents or trustee on behalf of a prospective company before it comes into existence, E.g., Contract with the proprietor of a business to sell it to the prospective company. Such contracts are legally not binding on the company.

- (a) The vendor cannot sue, or be sued by the company, even after its incorporation.
- (b) The person who acts for the intended company remains personally liable to the vendor even if the company purports to ratify the agreement, unless the agreement provides that-
  1. His liability shall cease if the company adopts the agreements and
  - ii. Either party may rescind the agreement, if the company does not adopt it within a specified time.
- (c) After incorporation, the company may adopt the preliminary agreement. But in some cases, the Memorandum directs the Directors to execute such contract. The company can enforce a pre incorporation contract if it is warranted by the terms of incorporation and for the purpose of the company.

**A pre- incorporation contract can be enforced by and against the company if it is:**

- Warranted by the terms of incorporation and
- It is adopted by the company (sections 15 and 16 of the Specific Relief Act, 1963)

- In such a case, the Directors have no discretion in the matter.

(d) Principle of Notation (Section 62 of the Indian Contract Act) may be recalled here - substitution of new parties in the place of old ones by mutual consent.

### **Stages of Promotion**

**1. Discovery of an idea:** The idea of starting the business enterprise is conceived by the promoter. The idea conceived should be applicable and feasible. At this stage, the promoter makes a rough estimate of probable incomes and expenditures of the business unit to be started. At the time of discovering the idea of starting the business, he makes an assessment about business risks, financial risks, investment risks, technical risks and commercial risks of the venture. This stage of promotion is primarily meant for thinking of an idea to start a company.

**2. Preliminary Investigation:** Preliminary investigation constitute the second important stage of company promotion. At this stage the soundness of the business is studied by the promoter. The soundness of the venture is studied by ascertaining the hidden weakness of the plan and also finding whether the venture is suitable for the consumer or not. The promoter makes a rough estimate about the cost of the project, estimated sales and estimated income resulting from the venture. The viability and profitability of the project is accounted for while making preliminary investigation at promotion stage.

**3. Detailed Investigation:** The first and second stage of promotion has given a wide range of encouragement to the promoter who has got inspired at this stage. After preliminary investigation, the promoter goes for detailed investigation of his ideas with the help of different experts like engineer, chemist, financial experts and market analysis experts. Detailed investigation gives a good picture regarding the soundness of the project because at this stage the promoter is in a better position to know the capital requirement, place of location, size of the unit, demand for the product in the market and the probable prices of the product. The knowledge about the various branches are obtained from the experts.

**4. Assembling:** When all the parameters of starting a company are found favorable in the detailed investigation stage, the promoter goes for giving a concrete shape to the business. In the detailed investigation stage, the promoter is satisfied regarding the practicability and profitability of the proposed venture. After being satisfied he proceeds to the next stage called assembling which means getting the support and consent of some other persons to act as directors or founders arranging suitable site for the company and arrangement for patents. At this stage all the steps for setting up a company is accounted for. The promoter also enter into contract with the government and other agencies for necessary clearance and license of the business.

**5. Financing the Venture:** Finance is the life blood of each and every business unit, in financing stage the promoter approaches bankers, financing institutions, underwriters, prospective Investors and creditors to help in financing the preposition. The promoter also prepares prospectus which is written invitation to the public to subscribe for the paid-up capital. Promoter also takes necessary steps for incorporating a company and getting certificate of commencement. For incorporating a company and getting certificate of commencement a int of legal formalities are maintained and he has to comply for these legal formalities.

### **Incorporation Stage**

The promoter of the company should select the type of company as they wish to form themselves (ie. one person company, private company, public company, non-profit company, etc.,). The promoter has to gather the required number for subscribing to the Memorandum of Association. For eg, in case of public company, the minimum number of members is seven, while it is two in the case of a private company and one in case of one person company

All the directors of the proposed company must ensure that they are having Directors' Identification Number (DIN). Out of all the directors of the proposed company, at least one director should have digital signature to digitally sign the incorporation and other related documents.

### **Steps for the Incorporation of a Company:**

**1. Application for Availability of Name:** A company cannot be registered in the name of an existing company. It also cannot be registered in a name, which is undesirable in the opinion of the Central Government. Therefore, it is necessary for the promoters to find out the availability of the name of the company from the Registrar of Companies.

The first step in the formation of a company is the approval of the name by the Registrar of Companies (ROC) in the State/Union Territory in which the company is to be registered. This approval is provided subject to certain conditions. For instance, there should not be an existing company by the same name. Further, the last words in the name are required to be "Private Ltd." in the case of a private company and "Limited" in the case of a Public Company

**Finalization of Name:** The application for approval of name should mention at least four suitable names of the proposed company, in order of preference. The ROC, generally, informs the applicant within seven days from the date of submission of the application, whether or not any of the names applied for is available. Once a name is approved, it is valid for a period of six months, within which time Memorandum of Association and Articles of Association together with miscellaneous documents should be filed.

If one is unable to do so, an application may be made for renewal of name, by paying additional fees. After obtaining the name approval, it normally takes approximately two to three weeks to incorporate a company, depending on where the company is registered.

**2. Preparation of the Memorandum of Association (MOA) and Articles of Association (AOA):** Once the name of the company is finalized, immediately the next step is drafting of the MOM and AOA. It should contain main objects of the company. These documents basically contains the character and internal rules and regulations of the company.

**3. Declaration from the Professional:** Section 7(1)((b) requires filing of a declaration in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with,

Rule 14 of The Companies (Incorporation) Rules 2014 states that for the purposes of Section 7(1)(b), the declaration by an advocate, a Chartered Accountant, Cost accountant or Company Secretary in practice shall be in Form No. INC.8.

**4. Filing of Documents:** The following three documents are required to be filed with the Registrar of Companies of the State in which the registered office of the company is to be situated:

1. Memorandum of Association duly signed by all subscriber

II. Articles of Association duly signed by all subscriber

iii. Declaration by an advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice and by a person named in the Articles as a Director, Manager or Secretary (giving a declaration that all the requirements regarding Incorporation have been complied with)

iv. An affidavit from each subscriber and the persons named as First Directors to the effect that they are not convicted of any offence in connection with promotion, formation or management of any company or that he has not been found guilty of any fraud or misfeasance or breach of duty to any company under the Act for the past 5 years and that documents filed contain information that is correct and complete and true to the best of his knowledge and belief.

v. Address for correspondence till Registered office is established

vi. Names and residential address of every subscriber to Memorandum along with proof Identity.

vii. Details of First Directors in the Articles and particulars of their interest and their consent.

viii. An undertaking by the directors to take up and pay for the qualification shares.

**5. Payment of Stamp Duty and Filing Fee:** The company has to pay the necessary stamp duty and filing fee, according to the authorized share capital of the company.

**6. Certificate of Incorporation or Registration:** If the Registrar is satisfied that the requirements under the Act for the purpose of registration of a company have been complied with, he shall register the company and issue a certification of incorporation.

The date of Registration of a Company is the date mention on the Certificate of Incorporation (COI) and not the date on which the signature of Registrar is written.

**7. Allotment of Corporate Identity Number (CIN):** [Section 7(3)]: 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.

**8. Effect of Registration [Section 9]:** From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, and company shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible. to contract and to sue and be sued, by the said name.

**9. Documents of incorporation to be preserved [Section 7(4)]:** The company shall maintain and preserve at its registered office copies of all documents and information as originally filed till its dissolution under this Act.

**Memorandum of Association**

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact memorandum is one of the most essential pre-requisites for incorporating any form of company under the Act. Section 3 of the Act, Provides that to form a company there should be subscribers who have to subscribe their names to a memorandum and complying with the requirements of this Act in respect of its registration. To subscribe means to append one's signature or mark a document as an approval or attestation of its contents.

**Meaning: Memorandum**

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world.

**Definition: Section 2(56)**

Memorandum means the memorandum of association of a company as originally framed and altered from time to time in pursuance of any previous company law or this Act. Section 4 of the Act specifies in clear terms the contents of this important document which is the charter of the company

**Purpose of Memorandum**

There are two purpose of Memorandum of Association

1. The intending shareholder who contemplates investing in a company should know the field in or the purpose for which it is going to be used and the risk he is taking in making the investment.
2. The person dealing with the company should know, without and doubt, whether the contractual relationship he contemplates with the company is one relating to a matter which is within its corporate objects.

**Form of Memorandum of Association [Section 4(6) of the Companies Act, 2013]:**

Memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

- i. The Form in Table A is applicable in the case of companies limited by shares;
- ii. The Form in Table B is applicable to companies limited by guarantee not having share capital,
- iii. The Form in Table C is applicable to the companies limited by guarantee having share capital:
- iv. The Form in Table D is applicable to unlimited companies not having a share capital:
- v. The Form in Table E is applicable to unlimited companies having a share capital.

A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.

**Contents of Memorandum - Section 4**

The Memorandum of a Company shall state the following

- i. Name Clause - Name of the Company
- ii. Situation Clause - State in which the Registered office is situated.

III. Objects Clause Objects for which the Company is incorporated and any other matter considered necessary for furtherance of its objects.

IV. Liability Clause - Liability of the Members

V. Capital Clause - The Share Capital, Number of Shares

VI. Subscription Clause - Details of Subscribers of Memorandum and their Share Capital.

VII. Succession Clause - The name of the "Nominee" in case of OPC.

**1. Name Clause-Name of the Company:** A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known. The company may adopt any suitable name provided it is not undesirable.

**According to section 4(2), the name stated in the memorandum shall not-**

(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law, or

(b) be such that its use by the company-

- Will constitute an offence under any law for the time being in force; or
- Is undesirable in the opinion of the Central Government.

Section 4(3) provides that without prejudice to the provisions of section 4(2), a company shall not be registered with a name which contains-

(i) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(ii) Such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

As per section 4(4) a person may make an application, in such form (Form INCI) and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as-

- The name of the proposed company; or
- The name to which the company proposes to change its name.

**Reservation of Name:** A person can apply to the ROC seeking reservation of a particular name for a company. Such reservation can be incorporated up to a period of 60 days.

However, if the name of the company has been applied with wrong or incorrect information,

(a) When the company is yet to commence, the reserved name will be cancelled and a penalty upto 1 lakh may be levied.

(b) When the company has already commenced,

i. The company may be directed by the ROC to get the name changed within a period of months or

ii. The ROC may strike off the name of the company from the Register of Companies or

iii. Make a petition for the winding up of the company.

**2. Situation Clause:** The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be

stated therein. Within 15 days of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent. The company must also furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

**Section 12(3) states that every company shall-**

- (a) Paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed therefor are not those of the language or of one of the languages in general use in that locality, also in the characters of that language or of one of those languages;
- (b) Have its name engraved in legible characters on its seal;
- (c) Get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, bill heads, letter papers and in all its notices and other official publications; and
- (d) Have its name printed on hundis, promissory notes, bills of exchange and such other documents as may be prescribed:

Provided that where a company has changed its name or names during the last two years, it shall paint or affix or print, as the case may be, along with its name, the former name or names so changed during the last two years as required under clauses (a) and (c):

**3. Objects Clause:** The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1)(c) of the Companies Act, 2013, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

- The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities.
- It states affirmatively the ambit and extent of powers of the company and stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified.
- The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts.

The subscribers to the memorandum of association enjoy unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.

**4. Liability Clause:** Section 4(1)(d) of the Companies Act, states that the liability of members of the company, whether limited by shares or limited by guarantee or unlimited, and also state,-

- (a) 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; and

(b) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute

- i. 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, and
- ii. To the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

(c) In an unlimited company, the clause shall specify that the liability of members is unlimited and can extend to personal assets of the members. Each and every member have to contribute in proportion to the ratio of investment made in the company only at the time of dissolution.

**5. Capital Clause:** This is the fifth compulsory clause which must state

- The amount of the capital with which the company is registered.
- The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share.
- The capital is variously described as "nominal", "authorized" or "registered"
- If there are both equity and preference shares, then the division of the capital is to be shown under these two heads
  - This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013.
  - A company is not authorized to issue capital beyond its authorized/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorized capital, the amount received on excess number of shares should be returned.
  - Out of the issued capital, the total amount actually subscribed or agreed to be subscribed is known as subscribed capital, and this subscribed capital again may be wholly paid or partly paid, in which latter case the balance would be payable on future calls when made. The amount actually paid by the shareholders is called the paid-up capital.
  - According to Section 60 of the Act, if the amount of the authorized capital (nominal capital), of the company is stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall also contain a statement in an equally prominent position and in equally conspicuous terms the amount of capital which has been subscribed and the amount paid-up.

**6. Association Clause and Subscription:** In this clause, the person (includes a body corporate) subscribing to the memorandum declare their desire to form a Company and agree to take the shares indicated opposite their respective names.

Following are the statutory requirements regarding subscription of memorandum

- The memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signature.
- Each subscriber must take at least one share;
- Each subscriber must write opposite his name the number of shares which he agrees to take. [Section 4(1)(e)]

**Declaration for Subscription:** The subscribers to the memorandum declare: "We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set against our respective names".

Then follow the names, addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness.

- 7. Succession Clause (applicable only for OPC):** This clause shall state the name of the person who in the event of the death or incapacity to contract of the subscriber, shall become the member of the company. [This clause shall be the part of Association and subscription clause) The above clauses are compulsory and are designated by the Companies Act as "Conditions" on 32 the basis of which alone a company is incorporated.

### Articles of Association

#### Definition: Articles of Association [Section 2(5)]

Articles means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

In terms of section 5(1), the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business.

#### Meaning: Articles of Association

The Articles are the rules, regulation and bye-laws for the internal management of the affairs of the company. They are framed with the object of carrying out the objects as set out in the Memorandum of Association. The Articles should not contain anything which is inconsistent with either the provisions of the Memorandum of Association or of the Companies Act.

It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company interest. They are subordinate to and are controlled by the memorandum of association.

The articles play a part that is subsidiary to the memorandum of association. They accept the memorandum of association as the charter of Incorporation of the company, and so accepting it the articles proceed to define the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carries on, and the mode and form in which changes

in the internal regulations of the company may for time to time be made... The memorandum, is as it were... the area beyond which the action of the company cannot go inside that area shareholders may make such regulations for the governance of the company as they think fit".

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies

### **Forms of Articles**

Section 5 of the Companies Act provides that the articles of association of a company should be in respective Forms specified in Tables F, G, H, I and I of Schedule I to the Act, as may be applicable to such company.

A company may adopt all or any of the regulations of the aforesaid Model Articles. If duly registered articles of a company do not expressly exclude or modify the regulations contained in applicable model articles, such regulations shall apply as if they were contained in the duly registered articles of a company.

### **Contents of Articles**

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Number and value of shares.
3. Allotment of shares.
4. Lien on shares.
5. Nomination.
6. Alteration of capital.
7. Share certificates.
8. Conversion of shares into stock.
9. Meetings and rule regarding committees.
10. Adoption of preliminary contracts.
11. Issue of preference shares.
12. Calls on shares.
13. Transfer and transmission of shares
14. Forfeiture of shares.
15. Buy back.
16. Dematerialization.
17. Voting rights and proxies.
18. Directors, their appointment and delegations of powers.
19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.

22. Managing director, Whole-time director, Manager, Secretary.
23. Additional directors.
24. Seal
25. Remuneration of directors.
26. General meetings.
27. Directors meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalization of reserves.

#### Difference Between MOA & AOA

<b>Objective</b>	<b>MOA</b>	<b>AOA</b>
<b>Objective</b>	It states the objective of foundation of the company.	It states the rules of internal management of the company.
<b>Situation</b>	It is a fundamental document.	It is a complementary document.
<b>Relationship</b>	MOA defines the relationship between the company and outsiders.	AOA defines the relationship between the company and its members.
<b>Necessity compulsion</b>	The preparation and filing of MOA is compulsory.	It is not necessary for public companies to have their own AOA.
<b>Changes</b>	It is difficult to make changes in MOA.	It is comparatively easier to make changes in AOA.
<b>Nature</b>	MOA is the charter of a company.	It sets out the rights and duties of the governing body.
<b>Supremacy</b>	It is not governed by AOA.	It is governed by MOA.
<b>Specification</b>	There is no specification.	There is a specification.
<b>Provision</b>	It is formed under companies Act.	It is formed under MOA and AOA.

## **Certificate of Incorporation**

### **Meaning: Certificate of Incorporation**

A certificate issued by the Registrar of Companies of a State indicating that a company's memorandum association and articles of association have been accepted for filing and that the company is incorporated called as Certificate of Incorporation is obtained. It is Registered firm's 'birth certificate' showing its legal name and date of incorporation. It is also called certificate of registration.

### **Subscription Stage**

A Public Company has to start accumulating the necessary capital to start its business activity. For this purpose the promoters issue the prospectus to the public inviting their subscriptions towards capital. After receiving the applications for shares towards the share capital, a public company has to allot shares to the public.

The company cannot make allotment of shares unless the following conditions are fulfilled.

1. Minimum subscription as stated in the prospectus is to be received.
2. The application money not less than 5% of the nominal value of shares has to be received.
3. The application money is to be deposited in a Scheduled Bank.
4. If prospectus is not issued, statement in lieu of prospectus is made and delivered to Registrar at least 3 days before the first allotment.
5. If minimum subscription is not received within 120 days of the date of issue of prospectus the application money is to be refunded within next ten days.
6. Listing the shares in a stock exchange if stated in prospectus and Articles of Association

### **Minimum Subscription**

It is the minimum amount of money to be collected by the company from the public by way subscription towards the share capital. The amount of minimum subscription is normally specified in the Articles or Prospectus of the company

The minimum subscription is to be received so that the company can meet the following important expenses.

- Towards purchase/lease of property for company's use.
- Towards preliminary expenses including payment of the underwriters commission if any
- Towards working capital requirements.
- Towards repayment of loans already taken for the above purpose.
- Towards any other expenses giving details of such expenses.

The directors or promoters have to then submit a declaration that the minimum subscription has been received and that the other requirements have been met, to the Registrar of Companies.

A Private company or a public company which does not have share capital can commence its business just after getting incorporated. Hence "capital subscription stage" and "commencement of business stage" applies only on public companies with share capital.

Under Capital subscription stage, a promoter has to perform following activities to collect the required capital:

- Company issues prospectus to General Public and one copy of this is sent to Registrar
- Banker receives the applications for shares.
- If company receives minimum subscription then directors pass the proposal of allotment and allotment letters is sent to applicants. Return of allotment is sent to registrar.
- If company is not able to receive the minimum subscription money within 12 days of issuing prospectus then it cannot allot the shares and it has to refund the money, it has received on application.
- When a public company invites general public to purchase the shares of company, it cannot allot the shares till the time, it receives the minimum subscription.

### **Prospectus**

A public company may issue securities

- (a) To public through prospectus L.e., public offer
- (b) Through private placement
- (c) Through rights or bonus issue.

Public officer includes initial public officer (IPO) or subsequent public offer of securities by a company or an offer for sale of securities to the public by an existing shareholder through issue of prospectus

A private company can adopt the route of private placement or through rights or bonus issue.

In public offer of securities, a document containing such offer of securities is deemed to be prospectus. When ever a company proposes to reach out to the public soliciting their subscription or purchase of its securities, prospectus needs to be issued to them

### **Definition: Prospectus [Section 2(70)]**

Prospectus is defined as "any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate"

### **Features of Prospectus**

On the basis of aforesaid definition, it may be said that a document should have following ingredients to constitute a prospectus:

- (a) It is a document in writing. An oral invitation is not a prospectus.
- (b) There must be an invitation to the public; An offer is not to be treated as invitation to public if it is
  - Directed to specific person or a group of persons.
  - Not calculated to result in the shares or debentures becoming available to others.
- (c) The invitation must be made "by or on behalf of the company or in relation to an intended company":
- (d) The invitation must be "to subscribe or purchase";
- (e) The invitation must relate to any securities of the company.

Prospectus is an invitation issued to the public to offer for purchase/subscribe any securities of the company.

**Contents of Prospectus**

Every prospectus shall state following information:-

1. The prospectus should be dated and signed.
2. The prospectus should contain following information.
  - (a) Name of the company.
  - (b) Address of the Registered Office of the company.
  - (c) Name of the Company Secretary, Chief Financial Officer, Auditors, Legal Advisers, Banker Trustees, if any, underwriters and such other persons as may be prescribed.
3. Dates of the opening and closing of the issue.
4. Declaration about the issue of allotment letters and refunds within the prescribed time.
5. Statement by the Board of Directors about the separate bank account where all money received out of the issue are to be transferred and disclosure of details of all money including utilizes and unutilized money out of the previous issue in the prescribed manner.
6. Details about underwriting of the issue.
7. Consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed.
8. The authority for the issue and the details of the resolution passed there for:
9. Procedure and time schedule for allotment and issue of securities.
10. Capital structure of the company in the prescribed manner.
11. Main objects of public offer, terms of the present issue and such other particulars as may be prescribed.
12. Main objects and present business of the company and its location, schedule of implementation of the project.
13. Particulars relating to management perception of risk factors specific to the project gestation period of the project, extent of progress made in the project, deadlines for completion of the project, and any litigation or legal action pending or taken by a Government Department of a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company.
14. Details of Minimum subscription.
15. Amount payable by way of premium.
16. Issue of shares other than cash.
17. Details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and
18. Disclosures in such manner as may be prescribed about sources of promoter's contribution. It shall also make a declaration about the compliance of the provisions of the Act (and SEBI, if applicable)

**Registration of Prospectus**

A signed copy of the prospectus is to be filed with ROC before publication. It should be accompanied by the following documents:

- (a) The consent of the expert mentioned in the prospectus, if his report is included in the prospectus;
- (b) A copy of every contract relating to the appointment and remuneration of a Managing Director or Manager.
- (c) A copy of every material contract, not being a contract entered into in the ordinary course of business of the Company, within two years of issue of the prospectus.
- (d) A written statement relating to the adjustments if any, in respect of figures of any profit or losses and assets and liabilities;

- (e) The consent in writing of the person, if any, named in the prospectus as the Auditor, Legal Adviser, Attorney, solicitor, Issue House, Banker, Managers to the issue or Broker of the Company to act in that capacity;
- (f) The consent of the Director in respect of new Directors, if any named therein and of the underwriting agreement, if any
- (g) A copy of the underwriting agreement

#### **When Registrar must refuse registration of Prospectus:**

Section 26 provides that the Registrar shall not register a prospectus, if

- (a) It is not dated;
- (b) It does not have the prescribed contents, reports and declarations,
- (c) It contains statements or reports of experts engaged or interested in the formation or promotion or management of the company,
- (d) It includes a statement purported to be made by an expert without a statement that he has given/ has not withdrawn his consent to the manner of its inclusion therein.
- (e) It does not contain consent in writing of directors,
- (i) It is not accompanied by the consent in writing of the auditor, legal advisor, attorney, etc. to the issue or broker, if named in the prospectus to act in that capacity.

#### **Declaration**

The prospectus must contain a statement that a copy has been delivered for registration, and an indicate the requisite documents (giving names) delivered with it

#### **Issue**

The prospectus must be issued within 90 days of registration with the ROC. Otherwise it will be invalid.

#### **Approval of Prospectus by Various Agencies**

The draft prospectus has to be approved by various agencies before it is filed with the ROC of the concerned State. The prospectus has to be approved by the following agencies.

- (a) All the Lead Managers to the Issue.
- (b) The Lead Financial Institution underwriting the issue, if applicable.
- (c) Each of the Stock Exchanges where the share of the Company are listed or where the shares/debentures are proposed to be listed.
- (d) In case of listed companies, the draft prospectus is vetted by SEBI to ensure adequacy of disclosures.

#### **Statement in lieu of Prospectus**

Statement in lieu of prospectus is similar to actual prospectus but without the invitation to the public for subscribing to the shares of the company. This statement is prepared when a company issues shares by private placement. The statement in lieu of prospectus is prepared for the purpose of record, and it is filed with the Registrar of Companies before allotment of share.

1. The prospectus contains a summary of the past, present and prospects of the company.
2. The prospectus expressly invites the public to buy shares issued by the company.
3. It is the basis of share issue. The contents of prospectus are considered legal evidence in the event of dispute between share holder and the company.
4. A misleading clause in the prospectus will be taken seriously by the court.

**Meaning: Book Building**

It is a process of generating, capturing, and recording investor demand for shares during an initial public offering (IPO), or other securities during their issuance process, in order to support efficient price discover

**Definition: Book Building**

Book Building is the process of determining the price at which an Initial Public Offering will be offered. SEB guidelines, 1995 defined book-building as "a process undertaken by which a demand for the securities proposed to be issued by a body of corporate is elicited and built up and the price for such securities is assessed for the determination of the quantum of such securities to be issued by means of a notice, circular, advertisement, document or information memoranda or offer document

In general, the word "Book building" is a method of marketing the shares of a company whereby the quantum and the price of the securities to be issued will be decided on the basis of the "bids" received from the prospective shareholders by the lead merchant bankers. According to this method, share prices are determined on the basis of real demand for the shares at various price levels in the market.

**Private Placement - [Section 43]**

Private placement means an offer of securities or invitation to subscribe for securities to a select group of persons through issue of a private placement offer letter.

**Important Provision of Private Placement:**

- (a) A company shall not make any private placement unless the same has been approved by special resolution.
- (b) The said offer cannot be made to more than 200 persons in aggregate in a financial year, excluding Qualified Institutional Buyers (QIBs) and employees offered securities through ESOP.
- (c) The minimum investment size shall not be less than Rs. 20,000/- of face value of the securities per person and payment for subscription shall be made through the bank account of the subscriber only.
- (d) Neither public advertisements will be released nor any media, marketing or distribution channels or agents will be used to inform the public at large about such an offer.
- (e) No fresh allotment to be made unless earlier allotment is completed.
- (f) The company shall maintain complete record of Private placement offer in Form PAS-35.

**Underwriting**

When securities are offered to public, it has to be subscribed by general public. If the shares are under-subscribed then the company cannot come into exists and it has to refund the amount collect on share application.

In order to avoid such a situation, company makes an agreement with the financial institutions, bank etc., who in consideration of a commission, agree to subscribe for the securities to the extent to which securities are not taken by the public. The commission so referred to is known as underwriting commission. Thus, underwriting is an insurance against under-subscription.

- (a) the payment of the commission must be authorized by the directors of the company
- (b) the rate of the commission must not exceed 5% of the price at which the securities issued or any lesser amount prescribed by articles in the case of debentures, the rate of the commission must not exceed 2.5% or any lesser amount prescribed by articles,
- (c) Underwriting commission shall not be paid on those securities which are not offered to the public for subscription
- (d) Commission may be paid out of the proceeds of issue or profits of the company or both
- (e) The name of the underwriter and rate of commission must be disclosed in the Prospectus  
(The prospectus should also indicate the number of securities or debentures which have been underwritten, and
- (f) A copy of underwriting agreement should be delivered to the Registrar along with the prospectus.

**Deemed Prospectus/Prospectus by Implication/Offer for sale - [Section 25]:**

The document "Offer for Sale, is an invitation to the general public to purchase the shares of a company through an Intermediary, such as an issuing house or a merchant bank.

**In order to constitute 'Offer for sale' either of the two conditions must be satisfied:**

- (a) 'Offer for sale to the public was made within six months after the allotment or agreement to allot: or
- (b) At the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

Where a company allots the shares or debentures to Issue House, which in turn makes an Offer for sale' to the public, the document by which an 'Offer for sale is made by Issue House, although not being issued by the company, shall be deemed to be a prospectus issued by the company. That is why the document is known as deemed prospectus or prospectus by Implication.

All enactments and rules of law as regards the contents of prospectus and liability for misstatements or omission in prospectus shall apply to a Deemed prospectus to the extent applicable

**Shelf Prospectus (Section (11))**

Shelf prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in a company or a class of companies as specified by SEBI in one or more issues over a certain period without the issue of a further prospectus.)

A company filing a shelf prospectus with the ROC shall not be required to file prospectus afresh at every stage of offer of securities by it within the period of validity. The concept of "Shelf Prospectus will save company's expenditure and time in issuing a new prospectus, every time they wish to issue securities to the public within a period specified.

**Red Herring Prospectus (section 32)**

A company proposing to make an offer of securities may issue a Red Herring Prospectus prior to the issue of prospectus. A Company shall file this Red herring Prospectus with ROC at least 3 days prior to the opening of Subscription list. It is a document similar to the prospectus. Upon the closing the thing in the total capital raised and closing price as also other details. given earlier shall be filed both with the ROC and SEBI

Red Herring Prospectus concept has been introduced to facilitate Book Building method for public issue of securities. It is similar to a prospectus but does not contain complete particulars of the quantum or the price of securities

### **Commencement Stage [Section 11]**

The Registrar upon scrutinizing the declaration, if satisfied that all the formalities have been following then Has a certificate known as the Certificate of Commencement of business to the Company.

A Public Company is entitled to commence its business activities only after the Commencement Certificate has been obtained from the Registrar of Companies. No public company can start its business without obtaining the Certificate of Commencement of business. This is the last stage in the formation of a public company.

All newly incorporated Company (whether Public or Private) having Share capital shall not commence any business or exercise any borrowing powers, unless the following documents are filed with the ROC

- i. A declaration by a director in the prescribed form that every subscriber to the memorandum has paid the value of shares taken by him, and
- ii. The verification of its registered office.

When no declaration has been filed with the Registrar within a period of 180 days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on business or operations, may remove the name of the company from the register of Companies

### **Procedure for Obtaining Certificate of Commencement of Business:**

In order to obtain Certificate of Commencement of Business (COB), a public company shall file the Following documents with the Registrar of Companies as desired by section 149:

1. A prospectus/ Statement in lieu of Prospectus should be filed along with the following documents:-

- (a) List of the members of the company with their shareholdings:
- (b) Confirmation for paid up share capital to the extent of Rs. 5,00,000 and proof thereof. viz, copy of bank statement etc..
- (c) List of Directors, Manager, Secretary, Auditors and changes among them, if any,
- (d) Consent of the Auditors to include their name in the prospectus /Statement in lieu of prospectus,
- (e) Copy of the agreements for appointment of Managing Director, Underwriters, contracts entered into by the any: printed and certified copy of the Memorandum and Articles of Association of the Company,
- (f) Details of the preliminary expenses incurred by the company.
- (g) Power of attorney to make correction in the prospectus/ Statement in lieu of prospectus and to obtain certificate for commencement of business from the Registrar of Companies:
- (h) Certified copy of the resolution passed by the Board for approval of prospectus /Statement

2. A duly verified declaration on stamp paper that provisions of section 145 of the Act have been complied with, by one of the directors or secretary or, where there is no secretary, by a secretary in whole time practice, in e-Form 19/20 as the case may be.

### **E-Filing**

Electronic Filing or E-File: The process of submitting tax returns over the Internet, using tax preparation software that has been pre-approved by the relevant tax authority.

The concept of physical filling has become a thing of past in the wake of electronic governance. Filing forms or returns with ROC is not an exception to this.. This is being done electronically with the help of internet through MCA portal called MCA21. MCA21 is an e-Governance initiative of Ministry of Corporate Affairs (MCA), Government of India that enables an easy and secure access of the MCA services to the corporate entities, professionals and citizens of India.

### **Meaning: E-Filing**

Filing and registration of documents is a Statutory requirement under the Companies Act, 1956 as well as under Companies Act, 2013.

An E-form is only a re-engineered form and represents a document in an electronic format, for filling returns with the MCA authorities through the internet. This may be a form filed either for the purpose of compliance or providing information or it may be an application seeking approval from the MCA

### **Scope of Service provided through MCA21**

This project serves the internet of all the key stake holders and public at large. It aims at providing a smooth and trouble-free service to the following interest groups:

1. Budding corporate entities to enable easy filing and obtaining approvals.
2. Public to get easy access to relevant information and effective and speedy redressal of their grievances.
3. Professionals to offer efficient services to their corporate clients
4. Financial institutions to easily find details relating to charges
5. Employees in ensuring proactive and effective compliance of relevant laws and corporate governance.

More importantly these services become accessible anytime from anywhere, which removes the procedural delays prevalent earlier.

### **The Scope of Service offered by MCA21 portal Includes**

1. E-filing: Ministry of corporate Affairs

MCA21 facilities e-filing in the following areas

- (a) Incorporation of Requirements
- (b) Compliance Related filing
- (a) Incorporation Requirements
- (c) Change services
- (d) Charge Management
- (e) Investor service
- (f) Returns relating to Managerial Personnel.

- (g) Approval services and
- (h) Information service

2. Viewing public documents
3. Requesting for certified copies
4. Registering investor complaints
5. Tracking transaction status

### **Benefits of MCA21 Project**

1. Online Incorporation of Companies
2. Simplified mode of filing Forms>Returns.
3. Registration and Verification of charges anytime and from anywhere
4. Inspection of public documents anytime and from anywhere
5. Corporate centric approach
6. Building up a centralized database
7. Enhanced customer service.
8. Total Transparency
9. Timely redressal of grievances
10. Availability of more time for MCA employees for qualitative analysis of corporate information

### **Obtaining Mandatory Numbers for e-filing**

MCA21 identifies companies based on Corporate Identity Number (CIN) or Global Location Number (GLN) given at the time of registration of the company. "Search" services within MCA21 can be made with help of CIN/GLN as the case may be.

### **Director Identification Number (DIN)**

All existing and prospective directors are required to obtain a Director Identification Number (DIN). This is also mandatory for directors of Indian Companies who are not citizens of India. But it is not required for directors of foreign companies. DIN is a unique identification number and once obtained is valid for a lifetime.

### **Digital Signature Certificate**

The e-forms are required to be authenticated by the authorized signatories using digital signatures as defined under "The Information Technology Act, 2000. A digital signature is the electronic signature duly issued by a Certifying Authority that shows the authority of the person signing the same. It is an electronic analogue of a written signature

Every user required to sign an e-form for submission with MCA is required to obtain a Digital Signature Certificate.

**Certified Filing Center (CFC)**

CFC is an extended arm of the Ministry which is manned by professionals from three core arms (Le., Company Secretaries, Chartered Accountants and Cost Accountants). It is one of the channels available for stake holders to enable e-filing with ROCs across the country

**Service Request Number (SRN)**

Every transaction under e-filing is uniquely identified by a Service Request Number (SRN). On filing an e-form, the system generates an SRN with which the user can check the status of the documentation/transaction.

**Mode of Payment**

MCA21 offers both office and online payment through Debit or Credit cards or through internet banking.

**Online Inspection of Documents:**

The documents filed online, once taken on record by ROC offices shall be available for public viewing on payment of requisite fees. These documents shall be in the domain of public documents.

**Registrar of Companies**

The Registrar of Companies is the official agency that deals with administration of Companies Act, 2013. It falls under Ministry of Corporate Affairs. It has offices in all major states of India. The Registrar of Companies is the primary regulator for company related matters in India.

**Definition: Registrar of Companies**

Sub-section 75 of Section 2 of the Companies Act 2013 defines "Registrar" as:

"Registrar" means a Registrar, or an Additional, a Joint, a Deputy or an Assistant Registrar, having the duty of registering companies under this Act (Le. the companies act 2013)

**Registrar of Companies - its appointment, Role and functions:**

- With the power vested under section 396 of the companies act 2013 (earlier section 609 of the companies act 1956), the Central Govt. appoints Registrars, and Additional, Joint, Deputy and Assistant Registrars for various States and Union Territories in India.
- Apart from the primary duty of registering companies incorporated in the respective states and the Union Territories, ROC's are also responsible for ensuring that the Companies comply with statutory requirements under the said Act.

### **States having Two ROCS**

\* Generally most of the State are having only one ROC except the State of Maharashtra and the State of Tamilnadu. These two States have two ROCs each.

\* In Maharashtra, one ROC is at Mumbai and another at Pune. In Tamil Nadu. one ROC is at Chennai and another ROC at Coimbatore.

## **Chapter 3 : Company Administration**

### **Meaning of Director**

An appointed or elected member of the board of director of a company. He has responsibility for determining and implementing the company's policy.

### **Appointment of Directors (Section 152)**

#### **Appointment of First Directors [Section 152(1)]**

1. Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed and
2. In case of a One Person Company an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section.

#### **Appointment of Subsequent Directors [Section 152(6)]**

1. Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors (excluding independent directors) of a public company shall-
  - i. Be liable to retire by rotation (i.e., only one-third can be non-retiring directors); and
  - ii. Be appointed by the company in general meeting, except otherwise expressly provided in this Act,
2. The remaining directors (Le, non rotational/ non retiring/ permanent directors) in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.
3. At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed in accordance with the provisions and at every subsequent AGM, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.
4. The directors to retire by rotation at every AGM shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day. those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.
5. At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

### **Other Provisions relating to Appointment of Directors**

1. Every director shall be appointed by the company in general meeting, except as provided in this Act.
2. Director Identification Number (DIN) is compulsory for appointment of director.
3. Every person proposed to be appointed as a director shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under this Act.
4. A person appointed as a director shall give his consent to hold the office as director on or before the date of appointment.
5. Such consent has been filed with the Registrar within thirty days of his appointment in such manner as may be prescribed in Form DIR-12 along with the fees as provided:

### **Types of Directors and Number of Directors**

There are two types of Directors. They are

1. Whole time directors-Executive Directors
2. Part Time Directors - Non Executive Directors

Number of Directors [Section 149(1)]:

Every company shall have a Board of Directors consisting of individuals as directors and shall have

- (a) A minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and
- (b) A maximum of 15 directors (earlier it was 12 directors):

### **Key points:**

- ✓ A company may appoint more than fifteen directors after passing a special resolution (earlier approval of Central Government was required to increase no: of directors beyond the limit, now it is dispensed):
- ✓ At least 1 woman director for prescribed class or classes of companies
- ✓ At least 1 director shall be a person who has stayed in India for at least 182 days in the previous calendar year. Such directors are called Resident Director.
- ✓ Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

### **Managing Director**

Managing Director means a director who, by virtue of this Articles of a Company or an agreement with the company or a resolution passed in its general meeting, or by its board of directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of management director by whatever name called.

### **Powers of Managing Director**

- **Strategic Decision-Making:** Formulating and implementing long-term business strategies.
- **Operational Oversight:** Managing day-to-day operations and ensuring departmental coordination.
- **Financial Management:** Overseeing budgeting, financial forecasting, and reporting.
- **Human Resources:** Hiring senior executives and fostering organizational culture.
- **Stakeholder Relations:** Representing the company in external communications and negotiations.

### **Duties and Responsibility of Managing Directors**

1. He has to act in good faith in order to promote the objects of the company for the benefit of its members as a whole.
2. Director to act in accordance with AOA.
3. He has to act in the best interest of the company, its employees, shareholders, community and for the protection of environment.
4. He has to carry on his duties with due and reasonable care, skill and diligence and exercise Independent judgment.
5. He shall not involve in a situation in which he may have a direct or indirect interest that conflicts or likely to conflict with the interest of the company.

### **Company Secretary**

The word 'secretary' has been originated from the Latin word 'Secretariat' which means 'a person entrusted with a secret' or 'keeper of secrets. The dictionary meaning of the word Secretary is 'one employed to write or transact business. Therefore, by the term 'secretary', we mean an officer who is generally entrusted with the responsibilities of writing and exchanging letters, maintain documents and performing confidential activities on behalf of someone or any organization.

**Definition:**

A company secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a Company Secretary under this Act; As per Company Secretary Act, "Company Secretary" means a person who is a member of the Institute of Company Secretary of India (ICSI).

In the opinion of J.P. Bose, "The term secretary means a person who writes secret on behalf of this superior or for a body."

**Types of Secretary****1. Personal or Private Secretary:**

A private secretary is a person who is employed for performing some personal works of his employer. Generally, the high officials of any organization or the important persons of the society, like businessmen, doctors, actors and actresses, political leaders, lawyers etc. employ private secretary for getting help in performing their routine functions. Of a private secretary are conducting correspondences, preserving and filling the important documents, making handling telephone calls etc.

**2. Secretary of a Club or Association:**

Sometimes it is seen that many associations, like cultural and sporting clubs, trade associations or some human organizations appoint secretaries to administer their day to day activities. This type of secretary acts either as the chief executive officer or as the representative or as the chief adviser of the association. The main jobs of such secretaries are to direct and supervise the functions of subordinates, conducting correspondence with the outsiders, maintaining the important documents and books of accounts, arranging and conducting various meetings etc. however, they perform their activities under the supervision of the managing committee of the concerned body or association.

**3. Secretary of Embassy:**

Every embassy or high commission or foreign mission appoints a secretary for performing some of its important functions. The secretary of the embassy or high commission is positioned next to the ambassador or high commissioner. In absence of the ambassador or high commissioner, he runs the embassy or commission office.

**4. Secretary of a Cooperative Society:**

The managing committee of every cooperative society generally appoints a secretary to administer the society on their behalf. Any member of the society or any other outsider person can be appointed as the full time secretary of the society on fixed salary. The secretaries of cooperative societies also discharge their duties under the direct supervision of the managing committee.

**5. Secretary of Local Body:**

When a person is appointed as the executive head of any municipal corporation or district board or of any local body, he is designated as the secretary of that body. Secretary of any local body is appointed as per the rules of that body and the law also specifies the functions, duties and responsibilities of the secretary.

#### **6. Secretary of Government Department:**

Generally, government activities are performed under various ministries and departments. Every ministry or department is controlled by a minister with the help of a secretary. The secretary is the executive head of the ministry, while the minister is the head of the ministry.

#### **7. Secretary of a Trade Union:**

A person who conducts and controls the operational activities of the labor organization is known as the secretary of a trade Union. He arranges meeting, prepares minutes of the meeting and keeps record of the books of account.

#### **8. Secretary of a Political Organization:**

A secretary of a political party may be selected or elected from the party members who hold an important status in the party. He plans and executes policies, organizes the meeting related activities and acts as a spokesman.

#### **9. Company Secretary:**

Company secretary is a high-level officer of the company having requisite qualifications. He is appointed as per the rules prescribed in the companies act. Company secretary is mainly responsible for looking after the secretarial works. He generally maintains liaison with the board of directors, employees, shareholders and other outside parties. Now a day, company secretary is one of the most important persons who perform some specified duties in the company form of business. The functions that are performed by company secretaries are maintenance of books and registers as required by the company's act, issue of share certificates, certification of meetings, arranging and attending meetings, drafting the minutes, sending returns to the register etc.

### **Qualification**

#### **1. Educational Qualifications**

- (a) A company secretary has to deal with many people of name and fame. So he must have higher education for better understanding.
- (b) He represents the company to the outside world and therefore he should have language proficiency to be well conversant.
- (c) He should be updated with wide general knowledge relevant to run the company activities.

#### **2. Professional Qualifications**

- (a) A company secretary requires specialized knowledge on secretarial practice to deal with notice, agenda, resolution, minutes of a meeting. He must know about office correspondence for communication.
- (b) A company secretary must have sufficient knowledge on companies Act, Industrial & Commercial law, and law of income tax, stamp Act, Accounting principles and rules of Securities and Exchange Commission (SEC) to deal with legal and statutory affairs.
- (c) A company secretary should have better understanding about money and capital market, foreign exchange and socio-economic condition to deal with trading and financing.
- (d) He requires proper knowledge to work with computer for documentation preservation and future use of data or information.
- (e) To maintain good relation with all stakeholders a company secretary should have knowledge of human relations.

### **3. Personal Qualities**

A company secretary is a high profile officer and therefore he should be a person to have below qualities:

Honesty & Integrity

Loyalty and courtesy;

Punctuality;

Tactfulness and cautiousness;

Sense of discipline and responsibility

Professional minded

### **Powers and Rights of Company Secretary**

1. **Supervision and control:** As a head of the office, a company secretary has the rights to supervise, direct and control all office activities of subordinate offices.
2. **Singing authority:** Being a principal officer, a company secretary can sign contracts, proceedings of the company meeting, files and documents on behalf of the company.
3. **Exercising power:** He has the right to apply power as authorized by the board of directors.
4. **Issuing testimonial:** A company secretary can issue testimonials to employees on behalf of the company.

5. **Claiming salary and damages:** As per contract, he has the right to claim his salary and other allowances. He can also take legal action against the company if there is any breach of contract.
6. **Preferential creditor:** During winding up of a company, company secretary can claim his legal dues as like as a preferential creditor.
7. **Attending meeting:** He has the right to be present in the meetings of the shareholders and board of directors.
8. To superintend, direct and control office work at the registered office of the company.
9. To do all such acts as authorized by directors.
10. To issue testimonials to employees on behalf of the company.
11. To sign the proceedings of company meetings and other such documents, on behalf of the company, which do not require common seal (Sec. 54).
12. To get his remuneration. In winding up of the company a whole-time secretary has a right to claim four months' salary not exceeding rupees one thousand as a preferential creditor (Sec. 530).

The rights of a company secretary mostly flow out of his service agreement with the company. These may be summarized as follows:

### **Rights**

1. Right to supervise the secretarial department. Being head of the secretarial department, he has the right to control and supervise the activities of the department under his control
2. Right to sign documents. As a principal officer within the meaning of the Companies Act, he has to sign documents requiring authentication of the company
3. Right to claim remuneration. The secretary is a servant (employee) of the company and has a right to claim his salary during its lifetime. Before his services are terminated, he can demand a reasonable notice and claim damages for his wrongful dismissal. In the event of the winding up of the company he can claim his outstanding salary as a preferential creditor.

## **Duties and Responsibility**

### **1. Statutory Duties :**

The statutory duties of a company secretary are those prescribed by the Companies Act or by any other legislation such as the Income Tax Act, Sales tax Act, Stamp Act, Employee state. Insurance Act, Industrial Disputes Acts, Contract Act, Monopolies and Restrictive Trade Practices Act, etc, Comply with the rules of company Act 1994; stamp Act and Income Tax Act.

1. The Income-tax Act requires him to take steps for the deduction of income tax from dividends, interest and salary and its payment to the tax authorities.
2. Under the Stamp Act, he has to see that stamps of the requisite amount are affixed to documents, shares etc.,
3. Under the Sales-tax Act, he has to arrange for timely submission of returns and payment of tax. In addition, he has to comply with the provisions of any other. Act, which is applicable to that particular company. For instance, a manufacturing company has to comply with the provisions of the Factories Act, the Industrial Disputes Act, Minimum Wages Act and other industrial laws. The secretary has to see that these provisions are complied with.
4. A company secretary is not only a servant of the company but also a servant of the law. The most important part of his statutory duties relates to the various provisions of the Companies Act are:
  - Maintenance of books and registers of the company
  - Filing of the necessary returns with the Registrar of Companies
  - Supervising the issue, allotment, transfer and forfeiture of share and debentures.
  - Attending to meetings and recording their proceedings.
  - a Safe Custody and proper use of the common seal of the company.

### **b) Sign the Annual Report:**

- i. Maintenance of statutory books or different registers of the company.
- ii. Preparation, validation and filing of resolutions, agreements, document, notices and various returns with the company Registrar.
- iii. Attending the meetings and record their proceedings.
- iv. Keep the common seal in safe custody.

### **2. General Duties :**

#### **a. Duties in Relation to Directors**

- i. Make sure that all actions of the board of directors are in accordance with the company's memorandum and articles of association.
- ii. Deal with the correspondence as per instruction from the directors.
- iii. Provide necessary advice and information to the board to formulate company policy.

- iv. Arrange board meetings, issuing notice and preparing agenda of such meetings also recording the minutes and resolutions of the meeting.
- v. Draft the director's report and presenting it in the annual general meeting in favor of the directors.

**b. Duties in relation to shareholders:**

Application and allotment of shares.

ii. Calls of shares.

Forfeiture of shares.

Transfer and transmission of shares.

Distribution of divided.

Notice and circulars to .members.

Meetings of shareholders

Inquiries and complaints from shareholders.

**c. Miscellaneous and other duties :**

- i. He should not act without authority
- ii. He should discharge his duties honestly
- iii. He should Exercise reasonable care & diligence
- iv. He should Act in & emergency very cautiously in the interest of the company
- v. He should not leak out the secrets or confidential matters of the company either to the share holders or to the Public.
- vi. He should represent the company on social functions

**d. Duties towards office**

**e. Duties in relation to the General Public**

**Dismissal or Removal of Company Secretary**

**1. Disqualification of company secretary:**

Employee Employer relationship exists between a company secretary and the company. If the board of directors is not satisfied with the performance of the company secretary, they can remove him giving a prior written notice.

**2. Irregularities of company secretary:** A company secretary can be fired at any time without any prior written notice if he has been proved:

As a fraud.

To have moral erosion.

To have permanent inability.

**3. End of contract of company secretary:** A company secretary is appointed for a fixed term. If the board of directors does not renew the contract then his contract ends up automatically.

**4. Winding up of company:** During winding up of a company, company secretary is discharged like other employees. If winding up takes place before the expiry of fixed term, he can claim damages for the breach of contract.

### **Auditor**

Auditor is a person who examines and verifies the accuracy of accounts maintained by a company.

### **Types of Auditor**

#### **1. Internal Auditors**

- **Role:** Employed within an organization to assess and improve internal controls, risk management, and governance processes.
- **Focus:** Operational efficiency, compliance with internal policies, and safeguarding assets.
- **Independence:** Reports to senior management or the board of directors, maintaining objectivity within the organization

#### **2. External Auditors**

- **Role:** Independent professionals or firms hired to evaluate the financial statements of an organization.
- **Focus:** Providing an unbiased opinion on the accuracy and fairness of financial reporting.
- **Regulation:** Must adhere to auditing standards and regulations set by professional bodies and government authorities.

#### **3. Government Auditors**

- **Role:** Employed by government agencies to audit public sector entities and programs.
- **Focus:** Ensuring that public funds are used efficiently and in compliance with laws and regulations.
- **Examples:** Comptroller and Auditor General (CAG) in India, Government Accountability Office (GAO) in the U.S.

#### **4. Forensic Auditors**

- **Role:** Specialize in investigating financial discrepancies and fraud.
- **Focus:** Detecting and analyzing financial crimes such as embezzlement, money laundering, and tax evasion.
- **Application:** Findings are often used in legal proceedings and litigation.

#### **5. Tax Auditors**

- **Role:** Examine tax returns and financial records to ensure compliance with tax laws.
- **Focus:** Verifying income, deductions, and tax liabilities.
- **Employment:** May work for tax authorities or private firms specializing in tax services.

## 6. Compliance Auditors

- **Role:** Assess whether an organization adheres to external regulations and internal policies.
- **Focus:** Evaluating compliance with laws, regulations, and standards specific to an industry.
- **Industries:** Common in sectors like healthcare, banking, and finance.

## 7. Information Systems (IT) Auditors

- **Role:** Evaluate an organization's information systems and technology infrastructure.
- **Focus:** Assessing data security, system integrity, and compliance with IT policies.
- **Importance:** Critical in the digital age to protect against cyber threats and data breaches.

## 8. Environmental Auditors

- **Role:** Examine an organization's environmental impact and compliance with environmental laws.
- **Focus:** Evaluating sustainability practices, waste management, and resource utilization.
- **Relevance:** Increasingly important due to global emphasis on environmental responsibility.

## 9. Special Auditors

- **Role:** Conduct audits for specific purposes or events.
- **Examples:**
  - **Due Diligence Auditors:** Assess financial health during mergers or acquisitions.
  - **Bankruptcy Auditors:** Evaluate financial status during insolvency proceedings.
  - **Divorce Auditors:** Investigate asset division in divorce cases.

### Appointment of Auditor

#### Appointment of Auditors

The Auditors are appointed in an annual general meeting: The Board shall take into consideration the qualifications and experience of the individual or the firm proposed to be appointed or re-for appointment or re-appointment. Where a company is required to constitute the Audit committee, the committee shall recommend the name of an individual or firm as auditor to the Board and shareholder.

#### Appointment of First Auditors [Section 139(6)]

The first auditor of a company, other than a Government company, shall be appointed by the Board of Directors within thirty days from the date of registration of the company and in the case of failure of the Board to appoint such auditor, it shall inform the members of the company, who shall within ninety days (from the date of registration) at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting.

**Subsequent Appointment of Auditors [Section 139(1)]**

Every company, 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:

The auditor appointed shall hold their office for 5 successive years, and at each of the 5 successive years such appointment may be ratified by members at every annual general meeting till the sixth AGM by way of passing of an ordinary resolution. If the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditors after following the procedure laid down in this behalf.

Every company, before such appointment is made, shall obtain the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor.

The company shall inform the auditor concerned of his or its appointment and also file a notice of such appointment with the Registrar in Form ADT1 within 15 days of the meeting in which the auditor is appointed.

**Powers and Duties of Auditors and Auditing Standards [Section 143] Rights or Powers of an Auditor**

1. Every auditor of a company shall have a right to access the books of account and vouchers of the company at any time.
2. Every auditor shall be entitled to obtain such information and explanation from the officers of the company as he may consider necessary for the performance of his duties as auditor
3. He shall inquire into the following matters, namely:-
  - (a) Whether loans and advances made by the company on the basis of security have been properly secured and
  - (b) Whether the terms on which they have been made are prejudicial to the interests of the company or its members,
  - (c) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company:
  - (d) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company,
  - (e) Whether loans and advances made by the company have been shown as deposits:
  - (f) Whether personal expenses have been charged to revenue account,
  - (g) Any any such information as required by him to perform his duties.

Right to attend the general meeting.

5. Right to be heard at the general meeting.

6. Right to visit branch office
7. Right to receive remuneration
8. Right to lien.

**Duties of an Auditor**

**The following are the important duties of Auditors.**

- 1The auditor shall make an audit report.
  2. The auditor shall provide adequate disclosures in the audit report.
  3. The auditor shall provide reasons for qualification.
  4. The auditor shall sign the audit report.
  5. The auditor shall attend the meeting of Audit Committee of Directors.
-

## **Chapter 4 : Corporate Meetings**

### **Annual General Meeting:**

The meeting to be held for seeking approval to ordinary business and special business are called annual general meeting and extra-ordinary general meeting.

### **Provisions relating to AGM [SEC 196]**

1. Every Company other than One person Company must hold a general meeting (AGM) in each 1 year apart from other meetings
2. Every Company has to set up a managing Committee to run its smooth working of managerial works.
3. Every Company, apart from One person Company (OPC) must have to hold in addition to other meetings, by giving a notice about the meeting, not more than 15 months in between the date of AGM to the next (i.e., The gap between two annual general meetings should not exceed 15 months.
4. Annual general meeting should be held once every year.
5. First annual general meeting of the company should be held within 9 months from the closing of the first financial year. Hence it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.
6. Subsequent annual general meeting of the company should be held within 6 months from the closing of the financial year. The ROC shall extend the period for holding the AGMs other than the first AGM by a period not exceeding 3 months.
7. Time for holding AGMs: AGMs are to be held during normal business hours (9 am to 6 pm) on any day that is not a National Holiday. "National Holiday" for this purpose means and includes a day declared as National Holiday by the Central Government.
8. Place for holding AGMs: AGMs shall be held at the registered office of the company or some other

### **Business Transacted at an Annual General Meetings**

#### **Ordinary Business [102(2)]**

- (a) The consideration of the Financial Statement and the reports of the Board of Directors and auditors.

- (b) Declaration of dividend ;
- (c) Appointment of Directors in place of those retiring;
- (d) Appointment of auditors and fixing of their remuneration.

### **Special Business**

- (a) Appointment of a director other than a retiring director in an AGM is a special business.
- (b) An auditor is appointed in an Extra-ordinary general meeting
- (c) Dividend may be declared in an EGM, in which case it is a special Business.

### **Importance of Annual General Meeting**

#### **1. Transparency and Accountability**

AGMs provide a formal platform for company executives and the board of directors to present financial statements, performance reports, and discuss key decisions.

Shareholders or members can ask questions, raise concerns, and get clarification about the company's operations, ensuring that the organization remains accountable to its stakeholders.

#### **2. Election of Directors**

- ▶ One of the key purposes of an AGM is the election or re-election of board members or directors. Shareholders have the opportunity to vote for those who will guide the company's strategy and decision-making.
- ▶ This is an important process for ensuring that the board reflects the interests and priorities of the stakeholders.

#### **3. Approval of Financials**

- ▶ The AGM allows shareholders to review and approve the company's annual financial statements. This includes profit and loss statements, balance sheets, and other key financial documents.
- ▶ Shareholders can question the auditors and management about the financial health of the organization, helping to ensure that everything is in order.

#### **4. Strategic Direction and Future Plans**

- ▶ Management often uses the AGM as an opportunity to present the company's strategic goals and plans for the upcoming year.
- ▶ Shareholders and stakeholders can discuss the company's future, raise concerns, and offer suggestions for direction, contributing to the overall strategic vision of the organization.

### **5. Dividends and Profit Distribution**

- ▶ The approval of dividends (if any) is often decided at the AGM. Shareholders vote on how profits will be distributed among them, with many companies offering cash dividends or reinvestment options.
- ▶ This gives shareholders direct influence over their return on investment.

### **6. Legal Requirement and Compliance**

- ▶ For many companies, AGMs are a legal requirement under corporate governance laws. Failing to hold an AGM can result in penalties, fines, or legal consequences.
- ▶ This ensures that companies maintain good corporate governance practices and stay compliant with regulatory requirements.

### **7. Engagement and Building Relationships**

- ▶ AGMs offer shareholders and members an opportunity to engage directly with management, board members, and other stakeholders.
- ▶ This interaction fosters a sense of involvement and belonging, making shareholders feel more connected to the company.

### **8. Addressing Shareholder Concerns**

- ▶ The AGM serves as a forum where shareholders can voice their concerns, ask questions, and seek clarification about company policies or operations.
- ▶ It also gives management the opportunity to address any negative perceptions or misunderstandings directly.

### **9. Legal Voting on Major Changes**

- ▶ Significant decisions such as mergers, acquisitions, or changes in the company's structure often require shareholder approval at the AGM. This provides a democratic process for major decisions that could impact the organization's future.

### **10. Setting Remuneration and Benefits**

AGMs often involve discussions around executive compensation, bonuses, and other employee benefits. Shareholders can vote on these matters to ensure fair and reasonable compensation practices.

### **11. Strengthening Corporate Governance**

- ▶ Holding regular and transparent AGMs contributes to good corporate governance, which is vital for maintaining the trust of shareholders, investors, and the public.
- ▶ The AGM process helps mitigate risks and ensures that decision-making is done in the best interests of the company and its stakeholders.

### **Extra-ordinary General Meeting**

An Extraordinary General Meeting (EGM) is a special meeting convened by a company's board of directors or shareholders to address urgent or exceptional matters that cannot wait until the next Annual General Meeting (AGM). Unlike AGMs, which are scheduled at regular intervals, EGMs are called on an ad-hoc basis to resolve pressing issues.

### **Purpose of an EGM**

- ▶ EGMs are typically convened to discuss and decide on matters such as:
- ▶ Amendments to the company's articles of association
- ▶ Approval of major transactions, such as mergers or acquisitions
- ▶ Appointment or removal of directors or auditors
- ▶ Changes to the company's capital structure
- ▶ Approval of financial statements

### **Importance of EGM**

- ▶ **Flexibility:** Convened at any time, EGMs allow companies to address unforeseen issues promptly.
- ▶ **Focused Discussions:** Tailored agendas ensure concentrated deliberation on specific matters.
- ▶ **Enhanced Transparency:** Shareholders gain deeper insights into critical decisions affecting the company.

- ▶ **Conflict Resolution:** EGMs can resolve deadlocks or disputes that may arise between AGMs .

### Statutory General Meeting

A **Statutory Meeting** is a mandatory initial meeting that must be held by a **public company** with share capital under the provisions of the Companies Act, 1956. This meeting is convened once in the company's lifetime, typically between **one and six months** after it is authorized to commence business. However, it's important to note that the **Companies Act, 2013** does **not** mandate the holding of a Statutory Meeting. As a result, the requirement for this meeting has been effectively **removed** for companies incorporated under the 2013 Act.

### Importance of SGM

- **Approval of the Statutory Report:** Shareholders reviewed and approved the Statutory Report, which included details about the company's incorporation, share capital, and the number of shares allotted.
- ▶ **Disclosure of Preliminary Expenses:** The meeting provided an opportunity to inform shareholders about any preliminary expenses incurred before the company's incorporation.
- ▶ **Contractual Agreements:** Shareholders were informed about any contracts entered into by the company before its incorporation.
- ▶ **Appointment of Office Bearers:** The meeting facilitated the appointment of key office bearers and directors

### Essentials of Valid Meeting

- ▶ **Proper Authority to Convene the Meeting**

The Board of Directors must pass a resolution to convene the meeting. This ensures that the meeting is called by the appropriate authority within the company .

- ▶ **Notice of the Meeting**

**Minimum Notice Period:** At least 21 clear days before the meeting.

**Content:** The notice must specify the date, time, venue, and agenda of the meeting.

**Mode of Delivery:** Notices can be sent via hand delivery, post, or electronic means (such as email)

- ▶ **Quorum**

The minimum number of members required to be present for the meeting to be valid:

**Private Company:** 2 shareholders.

**Public Company:**

- ▶ 5 shareholders if the number of members does not exceed 1,000.
- ▶ 15 shareholders if the number of members is more than 1,000 but up to 5,000.
- ▶ 30 shareholders if the number of members exceeds 5,000

▶ **Chairperson**

A chairperson must be appointed to preside over the meeting. Typically, this is the person who serves as the chairperson of the board of directors .

▶ **Agenda**

The agenda outlines the matters to be discussed and decided upon during the meeting. It must be included in the notice sent to all members .

▶ **Minutes of the Meeting**

Accurate minutes must be recorded, documenting the proceedings and decisions made. These minutes should be signed by the chairperson and kept at the company's registered office .

▶ **Proxy**

Shareholders may appoint a proxy to attend and vote at the meeting on their behalf. The proxy must be submitted in the prescribed format and within the specified time frame .

▶ **Resolutions**

Decisions at the meeting are made through resolutions:

**Ordinary Resolution:** Passed by a simple majority.

**Special Resolution:** Requires a three-fourths majority.

▶ **Voting**

Voting can be conducted through various methods:

**Show of Hands:** Typically used for smaller meetings.

**Poll:** May be demanded for more significant decisions.

**Electronic Voting (E-Voting):** Mandatory for listed companies and may be allowed for others .

## ► Compliance with Secretarial Standards

Companies must adhere to the Secretarial Standards issued by the Institute of Company Secretaries of India, which provide detailed guidelines on conducting meetings, including notice, quorum, proxies, and voting procedures .

### Resolution

A 'motion' is a definite proposal put before a meeting for its consideration and adoption. A 'resolution' on the other hand is the formal expression of the decision of a meeting. When a motion has been duly voted upon and passed by a majority, with or without amendment, it is called a 'resolution'. A resolution once adopted and recorded in the minutes becomes the official decision of the meeting and cannot be rescinded or revoked except by the consent of two-thirds majority in a meeting specially called for the purpose.

### Types of Resolution

1. Ordinary Resolution: A resolution which is passed by a simple majority of votes cast by members present in person or by proxy is called 'ordinary resolution'. Simple majority means that the votes cast in favor of the resolution must be at least one more than 50 per cent of the votes cast.

#### **An ordinary resolution must satisfy the following conditions:**

- (a) It must be moved at a general meeting of which due notice has been given
- (b) The voting may be on show of hands or by poll
- (c) Voting must be by members who are entitled to vote in person or by proxy, if allowed; and
- (d) The votes cast in favor of the resolution, including the casting vote of the chairman, if any, must exceed the votes, cast against the resolution.

Usually, ordinary resolutions are required to transact 'ordinary business'. In addition, ordinary resolutions are sufficient to transact following types of special business:

- (1) Adoption of statutory report
- (ii) Removal of director from office before the expiry of his term
- (iii) Alteration of share capital
- (iv) Issue of shares at a discount
- (v) Appointment of sole selling agents.

**2. Special Resolution:** A special resolution is one which is required for transacting special business and is required to be passed by a three-fourths majority of members present and vote in the meeting.

A special resolution in order to be valid under the law must satisfy the following conditions:

- (a) The notice of the general meeting must have been duly given as required under the Act;
- (b) The intention to propose the resolution as a special resolution must have been duly specified in the notice calling the general meeting or other intimation of such intention must have been given to members;
- (c) The voting may be on show of hands or on poll;
- (d) Votes are cast by members who are entitled so to do, either in person or by proxy; and
- (e) Votes cast in favor of the resolution are not less than three times the number of votes, if any, cast against the resolution.

**Special resolution is required to transact the following types of business:**

1. To change of name of the company
- ii. To change of the domicile of the company
- iii. To change the object clause
- iv. To alter Articles of Association
- v. To create reserve capital
- vi. To Reduce share capital
- vii. To pay interest out of capita
- viii. To decide winding up of the company

**3. Resolutions Requiring Special Notice**

Section 190 of the Companies Act, 1956 provides as follows:

- (a) Where by any provision contained in this Act or in the Articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less than 14 days before the meeting at which it is to be moved, exclusive of the day on which the notice is served or deemed to be served and the day of the meeting

(b) The company shall, immediately after the notice of the intention to move any such resolution has been received by it, give its members notice of the resolution in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the Articles, not less than seven days before the meeting. The Companies Act has specified certain types of business where such a resolution is required. If a member wants to move such a resolution, he must give special notice to the company of his intention to move such a resolution at least 14 days before the date of the meeting. On receipt of such notice, the company must give notice of the resolution to its members at least 7 days before the meeting, in the same manner as it gives notice of the meeting. If it is not practicable, notice must be given through advertisement in newspapers or any other mode allowed by the Articles. The resolution proposed to be moved may be an ordinary resolution or special resolution.

**According to Companies Act, a resolution requiring special notice is required to transact the following types of business:**

1. Removal of a director before the expiry of his term or to appoint another director in place of a director so removed.
2. Appointment as auditor of a person other than the retiring auditors or deciding that retiring auditor shall not be re-appointed.

### **The secretary role at Meeting**

Consult with the Chairperson on the order of business for the meeting, and the way in which it should be dealt with on the agenda. Decide what business requires discussion and what requires a decision by the Management Committee. Ensure that the notice of the meeting is given, that suitable accommodation is arranged and confirmed, and that copies of the agenda are prepared. Circulate to all members (a) any papers to be discussed at the upcoming meeting and (b) a copy of the agenda, minutes of the previous meeting; and Make sure that any reports or information requested at the last meeting is available or that there is a good reason why not.

Arrive in good time before the meeting with the minutes and with all the relevant correspondence and business matters for that meeting, in good order. Record the names of those who are present, and convey and record apologies received from those who are absent. Read the minutes of the previous meeting, and if they are approved, obtain the Chairperson's signature on them. Report on action or matters arising from the previous minutes. Read any important correspondence that has been received. Unless there is a Minutes Secretary, take notes of the meeting, recording the key points and making sure that all decisions and proposals are recorded, as well as the name of the person or group responsible for carrying them out.

Make sure action points are clear and Make sure that the Chairperson is supplied with all the necessary information for items on the agenda, and remind the Chairperson if an item has been overlooked.

Prepare a draft of the minutes (unless there is a minutes secretary) and consult the Chairperson and most senior staff member (where relevant) for approval. Send a reminder notice of each decision requiring action to the relevant person; this can be done by telephone, or by an 'action list' with the relevant action for each person duly marked and Promptly send all correspondence as decided by the Management Committee.

## Chapter 5 : Winding up of Companies

### **Meaning:**

In words of Professor Gower, "Winding up of a company is the process whereby its life is ended and its property is administered for the benefit of its members and creditors. An Administrator, called a liquidator is appointed and he takes control of the company, collects its assets, pay its debts and finally distributes any surplus among the members in accordance with their rights.

### **Modes of Winding Up**

- a) By National Company Law Tribunal [Compulsory Winding Up]
- b) Voluntary Winding Up

### **Compulsory Winding Up**

It takes place when a company is directed to be wound-up by an order of the Court (i.e., NCLT).

#### **Grounds for Compulsory Winding-up (Sec. 433):**

A company may be wound-up by the Court under the following cases:

- i. **Special Resolution of the Company:** If the company has, by special resolution, resolved that the Company be wound-up by the Court;
- ii. **Default:** If a default is made in delivering the statutory report of the Registrar of Companies or in holding the statutory meeting of the company, the court may make a winding-up order;
- iii. **Not commencing or suspending the Company:** If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- iv. **Reduction of Members:** If the number of members falls below seven in case of public company or below two in case of a private company;
- v. **Inability to pay Debts:** If the company is unable to pay its debts,
- vi. **The just and Equitable Clause:** If the Court is of opinion that it is just and equitable that the company should be wound-up

**Petition:** ie, Who can apply for Winding-up? (Sec. 439) A petition for the winding-up of a company may be presented by any one of the following entities

By the Company [Sec. 439(1) (a)];

By any Creditor [Sec. 439(1) (h)];

By any Contributory [Sec. 439(1) (c)]; By a Registrar [Sec. 439(1)(e)]; and

By any person authorized by the Central Government [Sec. 439(1) (1)].

### **Commencement of Winding-Up:**

The winding-up of a company by the Court is deemed to commence from the time of the presentation of the petition for winding-up (Sec. 441). Where there is a resolution for voluntary winding-up, before the presentation of the petition to Court, the winding-up is deemed to commence from the date of the resolution. But the Court may direct otherwise in cases of fraud and mistake.

#### **Powers of Court on Hearing Petition (Sec. 443):**

The court may, on hearing a petition:

- ▶ Dismiss it with or without costs; or
- ▶ Adjourn the hearing conditionally or unconditionally, or Make any interim order that it thinks fit; or
- ▶ Make an order for winding-up of the company with or without costs or any other order as it thinks fit.

### **Consequences of Winding-up Order:**

If the court makes an order for winding-up, its consequences date back to the commencement of winding-up.

**The other consequences of winding-up by the Court are:**

- ▶ Intimation to official liquidator and Registrar (Sec. 444);
- ▶ Copy of Winding-up order to be filed with the Registrar;
- ▶ Order for winding-up deemed to be notice of discharge [Sec. 445(2)];
- ▶ Suits stayed [Sec. 446(1)];
- ▶ Powers of the Court [Sec. 446(2)];
- ▶ Effect of winding-up order (Sec. 447);
- ▶ Official Liquidator to be liquidator (Sec. 449).

**Voluntary winding up**

According to Sec. 484 of the Companies Act, a company can be wound-up voluntarily under the following circumstances:

**1. By an Ordinary Resolution (passed in a general meeting in the following cases):**

Where the duration of the company was fixed by the articles and the period has expired, and

Where the articles provided for winding-up on the occurrence of any event and the specified event has occurred.

**2. By a Special Resolution (passed by the members in all other cases):**

When a resolution is passed for voluntary winding-up it must be notified to the public by an advertisement in the Official Gazette and in a local newspaper (Sec. 485).

**Types of Voluntary Winding-Up:**

Voluntary winding-up is of Three types:

- (a) Members' Voluntary Winding-up
- (b) Creditors' Voluntary Winding-up
- (c) Voluntary Winding-up under the Supervision of Court

**(a) Members' Voluntary Winding-up:** If the company is, at the time of winding-up, a solvent company, i.e., able to pay its debts and the directors make a declaration to that effect; it is called a Members' Voluntary Winding-up. The declaration must be verified by an affidavit.

**The declaration must be:**

- ▶ Made within the five weeks immediately preceding the date of passing of the resolution of winding-up by the company and delivered to the Registrar for registration before that date; and
- ▶ Accompanied by a copy of the report of the auditors of the company on the Profit and Loss Account of the company from the date of the last Profit and Loss Account to the latest practicable date immediately before the declaration of solvency, the Balance Sheet of the company; and a statement of the company's assets and liabilities as on the last mentioned date.

**The Members' Voluntary Winding up is done by the following successive steps:**

- Declaration of solvency;
- Statutory Declaration to the Registrar;
- A resolution in general meeting of the company within 5 weeks of declaration of solvency,
- Appointment of Liquidator;
- Collecting the company's assets,
- pay the liabilities of the company and pay the balance of the proceeds to the contributories.

**Consequences of Winding Up**

1. **Consequences to Shareholders:** A Shareholder is liable to Pay the full amount up to the face value of the shares held by him. The liability of the Shareholder on this account continuous even after the company goes into

liquidation although he is, in this case, unknown as a contributory. The liability of a present contributory is the amount remaining unpaid on the shares held by him.

2. **Consequences as to Creditors:** A Company often goes into compulsory winding-up when it is unable to pay its debts. But it may be wound up on other grounds as well even though it is solvent. Where a solvent company is wound up, all claims of its creditors, when proved, are fully met. When a company is insolvent and is insolvent and is wound –up, the same rule prevails as in the case of law of insolvency. Creditors are of two types, viz. secured and unsecured.
3. **Consequences as to Proceedings against the company:** If a winding order has been made or the official liquidator, no suit or other legal proceedings against the company can be commenced except by the leave of the court.
4. **Consequences as to cost:** According to Sec.476, if assets are insufficient to satisfy liabilities, the court may order for payment for the cost, charges and expenses of the winding up out of asset.

### Roles and Responsibilities of Liquidator

1. **Proceeding In Winding – up:** Sec.451 [1] states that the liquidator shall conduct the proceedings in winding-up the company and perform such duties as the court may impose.
2. **Report:** After receipt of the statement of Affairs of the company the liquidator must submit a preliminary report to the court not later 6 months from the date of winding – up.
3. **Additional Reports:** Sec .455 [2] also provides that the official liquidator may make, if he thinks fit, further report stating the manner in which the company was promoted or formed. He may also state if any fraud has been committed by any person relating to formation or any other matters which it is desirable to bring to the notice of the court.
4. **Custody of Company's Property:** Sec. 456 [1] states that where a winding – up order has been made or where a provisional liquidator has been appointed, the provisional liquidator, as the case may be, shall take into his custody all the property, affects and actionable claims to which the company is entitled.
5. **Control of Powers:** Sec. 460 [1] provides that the liquidator shall, in the administration of the asset of the company and the distribution therefore among creditors, have regard to any directions which may be given by the committee of inspection.
6. **Meeting of creditors and contributories:** According to sec.460 [3], the liquidator may summon general meeting of the creditors/ contributories as soon as thinks fit in order to ascertain their wishes. He shall summon such meeting at such times as the creditors/contributories. May, by direct resolution or whenever requested in writing, to do so by not less than 1/10<sup>th</sup> in value of creditors / contributories, as the case may be.
7. **Directions from the Court:** Sec. 460 [4] provides that the liquidator may apply to the court for directions in relation to any particular matter arising in a winding.
8. **Proper Books :** Sec.461[1] States that the liquidator shall keep proper books for making entries or recording minutes of the proceeding at meetings and such other matters as may be prescribed.
9. **Audit of Accounts:** Sec.462 [1] also provides that the liquidator shall, at such times as may be prescribed but at least twice each year during his tenure of office, present to the court an account of his receipts and payments as liquidators. The account must be in the prescribed form, shall be made in duplicate and duly verified.
10. **Appointment of committee of inspection:** sec.464 [1][b] provides that the liquidator shall, within two months from the date of winding up by the court, convene a meeting of the company's creditors to determine the members of the committee of inspection.