Unit-1

Introduction

The concept of ‘Company’ or ‘Corporation’ in business is not new but was dealt with, in 4th century BC itself during ‘Arthashastra’ days. Its’ shape got revamped over a period of time according to the needs of business dynamics. Company form of business has certain distinct advantages over other forms of businesses like Sole Proprietorship/Partnership etc. It includes features such as Limited Liability, Perpetual Succession etc.

After reading this lesson, you would be able to understand the historical development in the evolution of corporate law in India and England, emerging regulatory aspects including Companies Act, 2013, besides dealing with basic characteristics of the company and how it differs from other forms of businesses.

I. Meaning of a Company

The word ‘company’ is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together. In the leisurely past, merchants took advantage of festive gatherings, to discuss business matters.

Nowadays, business matters have become more complicated and cannot be discussed at festive gatherings. Therefore, the company form of organization has assumed greater importance. It denotes a joint-stock enterprise in which the capital is contributed by several people. Thus, in popular parlance, a company denotes an association of likeminded persons formed for the purpose of carrying on some business or undertaking.

A company is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word ‘corporation’ is derived from the Latin term ‘corpus’ which means ‘body’. Accordingly, ‘corporation’ is a legal person created by a process other than natural birth. It is, for this reason, sometimes called an artificial legal person. As a legal person, a corporation is capable of enjoying many of the rights and incurring many of the liabilities of a natural person.

An incorporated company owes its existence either to a special Act of Parliament or to company law. Public corporations like Life Insurance Corporation of India, SBI etc., have been brought into existence by special Acts of Parliament, whereas companies like Tata Steel Ltd., Reliance Industries Limited have been formed under the Company law i.e. Companies Act, 1956 which is being replaced by the Companies Act, 2013.

II. Definition of Company

In the legal sense, a company is an association of both natural and artificial persons (and is incorporated under the existing law of a country). 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 the 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)".

***Lord Justice Lindley** has defined a company as " an association of many persons who contribute money or money's worth to common stock and employ it in some trade or business and who share the profit and loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company.*

The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his "share". The shares are always transferable although the right to transfer them may be restricted."

From the foregoing discussion, it is clear that a company has its own corporate and legal personality distinct which is separate from its members. A brief description of the various attributes is given here to explain the nature and characteristics of the company as a corporate body.

III. Nature and Characteristics of a Company

Since a corporate body (i.e. a company) is the creation of law, it is not a human being, it is an artificial juridical person (i.e. created by law); it is clothed with many rights, obligations, powers, and duties prescribed by law; it is called a 'person'.

Being the creation of law, it possesses only the powers conferred upon it by its Memorandum of Association which is the charter of the company. Within the limits of powers conferred by the charter, it can do all acts as a natural person may do.

The most striking characteristics of a company are:

(i) Corporate personality

A company incorporated under the Act is vested with a corporate personality so it redundant bears its own name, acts under a name, has a seal of its own and its assets are separate and distinct from those of its members. It is a different 'person' from the members who compose it. Therefore it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.

Its members are its owners however they can be its creditors simultaneously. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital.

A Company is an artificial person created by law. It is not a human being but it acts through human beings. It is considered as a legal person which can enter into contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law. It is capable of enjoying rights and being subject to duties.

(ii) Limited Liability

The privilege of limited liability for business debts is one of the principal advantages of doing business under the corporate form of organization. The company, being a separate person, is the owner of its assets and bound by its liabilities.

The liability of a member as a shareholder extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. Members, even as a whole, are neither the owners of the company's undertakings nor liable for its debts. There are various e***xceptions to the principle of limited liability.***

In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited.

(iii) Perpetual Succession

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 or departure of any member and it remains the same entity, despite the 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.

The membership of an incorporated company may change either because one shareholder has sold/transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act.

Thus, perpetual succession denotes the ability of a company to maintain its existence by the succession of new individuals who step into the shoes of those who cease to be members of the company. Professor L.C.B. Gower rightly mentions,

"Members may come and go, but the company can go on forever. During the war, all the members of one private company, while in general meeting, were killed by a bomb, but the company survived — not even a hydrogen bomb could have destroyed it".

(iv) Separate Property

A company is a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed of.

Their Lordships of the Madras High Court in ***R.F. Perumal v. H. John Deavin, A.I.R. 1960 Mad. 43*** *held that "no member can claim himself to be the owner of the company's property during its existence or in its winding-up". A member does not even have an insurable interest in the property of the company.*

(v) Transferability of Shares

The capital of a company is divided into parts, called shares. The shares are said to be a movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint-stock

companies were established, the object was that their shares should be capable of being easily transferred, **[In *Re. Balia and San Francisco Rly.,* (1968) L.R. 3 Q.B. 588]**.
Section 44 of the Companies Act, 2013 enunciates the principle by providing that the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles.

If the articles do 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 the transfer of movable property.

A member may sell his shares in the open market and realize the money invested by him. This provides liquidity to a member (as he can freely sell his shares) and ensures stability to the company (as the member is not withdrawing his money from the company). The Stock Exchanges provide adequate facilities for the sale and purchase of shares.
Further, as of now, in most of the listed companies, the shares are also transferable through Electronic mode i.e. through Depository Participants in dematerialized form instead of physical transfers. However, there are restrictions with respect to transferability of shares of a Private Limited Company which are dealt in chapter 2.

(vi) 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 a common seal of the company, when the resolution passed by the Board, for its execution requires the common seal to be affixed is not authentic and shall have no legal force behind it.
However, a person duly authorized to execute documents pursuant to a power of attorney granted in his favour under the common seal of the company may execute such documents and it is not necessary for the common seal to be affixed to such documents.

The person, authorized to use the seal, should ensure that it is kept under his personal custody and is used very carefully because any deed, instrument or a document to which seal is improperly or fraudulently affixed will involve the company in legal action and litigation.

(VII) Capacity to sue or be sued
A company is a body corporate, can sue and be sued in its own name. To sue means to institute legal proceedings against (a person) or to bring a suit in a court of law. All legal proceedings against the company are to be instituted in its name. Similarly, the company may bring an action against anyone in its own name.

A company's right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. Hence, the company is entitled to sue for damages in libel or slander as the case may be [**Floating Services Ltd. v. MV San Fransceco Dipaloa** (2004) 52 SCL 762 (Guj)].

A company, as a person distinct from its members, may even sue one of its own members. A company has a right to seek damages where a defamatory material published about it, affects its business.

Where video cassettes were prepared by the workmen of a company showing, their struggle against the company's management, it was held to be not actionable unless shown that the contents of the cassette would be defamatory. The court did not restrain the exhibition of the cassette. [***TVS Employees Federation v. TVS and Sons Ltd., (1996) 87 Com Cases 37***].

*The company is not liable for contempt committed by its officer. [**Lalit Surajmal Kanodia v. Office Tiger Database Systems India (P) Ltd., (2006) 129 Com Cases 192 Mad**].*

(viii) Contractual Rights

A company, being a legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A shareholder cannot enforce a contract made by his company; he is neither a party to the contract nor be entitled to the benefit derived from of it, as a company is not a trustee for its shareholders.

Likewise, a shareholder cannot be sued on contracts made by his company. The distinction between a company and its members is not confined to the rules of privity but permeates the whole law of contract. Thus, if a director fails to disclose a breach of his duties towards his company, and in consequence, a shareholder is induced to enter into a contract with the director on behalf of the company which he would not have entered into had there been disclosure, the shareholder cannot rescind the contract.

*Similarly, a member of a company cannot sue in respect of torts committed against the company, nor can he be sued for torts committed by the company. [**British Thomson-Houston Company v. Sterling Accessories Ltd**., (1924) 2 Ch. 33]. Therefore, the company as a legal person can take action to enforce its legal rights or be sued for breach of its legal duties. Its rights and duties are distinct from those of its constituent members.*

(ix) Limitation of Action

A company cannot go beyond the power stated in its Memorandum of Association. The Memorandum of Association of the company regulates the powers and fixes the objects of the company and provides the edifice upon which the entire structure of the company rests.

The actions and objects of the company are limited within the scope of its Memorandum of Association.

In order to enable it to carry out its actions without such restrictions and limitations in most cases, sufficient powers are granted in the Memorandum of Association. But once the powers have been laid down, it cannot go beyond such powers unless the Memorandum of Association, itself altered prior to doing so.

(x) Separate Management

As already noted, the members may derive profits without being burdened with the management of the company. They do not have effective and intimate control over its working and they elect their representatives as Directors on the Board of Directors of the company to conduct corporate functions through managerial personnel employed by them.

In other words, the company is administered and managed by its managerial personnel.

(xi) Voluntary Association for Profit

A company is a voluntary association for profit. It is formed for the accomplishment of some stated goals and whatsoever profit is gained is divided among its shareholders or saved for the future expansion of the company. Only a Section 8 company can be formed with no profit motive.

(xii) Termination of Existence

A company, being an artificial juridical person, does not die a natural death. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up. However, to avoid winding up, sometimes companies adopt strategies like reorganization, reconstruction, and amalgamation.

IV. Distinction between Company and Partnership

The principal points of distinction between a company and a partnership firm are as follows:

1. A company is a distinct legal person. A partnership firm is not distinct from the several persons who form the partnership.
2. In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals who are its members.
3. Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.
4. Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business. A member of a company has no such power.
5. A partner cannot contract with his firm, whereas a member of a company can.
6. A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's share can ordinarily be transferred.
7. Restrictions on a partner's authority contained in the partnership contract do not bind outsiders whereas such restrictions incorporated in the Articles are effective because the public is bound to acquaint themselves with them.
8. A partner's liability is always unlimited whereas that of a shareholder may be limited either by shares or a guarantee.
9. A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company, whereas the death or insolvency of a partner dissolves the firm, unless otherwise provided.
10. A company may have any number of members except in the case of a private company which cannot have more than 200 members (excluding past and present employee members). In a public company, there must not be less than seven persons in a private company not less than two. Further, a new concept of one person company has been introduced which may be incorporated with only one person.
11. A company is required to have its accounts audited annually by a chartered accountant, whereas the accounts of a firm are audited at the discretion of the partners.

12. A company, being a creation of law, can only be dissolved as laid down by law. A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement among the partners.

V. Distinction between Company and Hindu Undivided Family Business

1. A company consists of heterogeneous (varied or diverse) members, whereas a Hindu Undivided Family Business consists of homogenous (unvarying) members since it consists of members of the joint family itself.
2. In a Hindu Undivided Family business, the *Karta* (manager) has the sole authority to contract debts for the purpose of the business, other coparceners cannot do so. There is no such system in a company.
3. A person becomes a member of a Hindu Undivided Family business by virtue of birth. There is no provision to that effect in the company.
4. No registration is compulsory for carrying on a business for gain by a Hindu Undivided Family even if the number of members exceeds twenty [***Shyamlal Roy* v. *Madhusudan Roy***, AIR 1959 Cal. 380 (385)]. Registration of a company is compulsory.

COMPANY SECRETARY – APPOINTMENT, DUTIES, RIGHTS, LIABILITIES, RESTRICTIONS

Meaning of Company Secretary

According to the Companies Act, a company secretary means a company secretary as defined in sec 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 (sec 2(24)).

According to sec 2(1)(c) of the companies secretaries Act 1980 “company secretary means a person who is a member of the Institute of company secretaries of India”

Thus, company secretary means an individual who is a member of the institute of company secretaries of India/ICSI and is appointed to perform the function of a company secretary under the companies Act.

A company secretary is an important organ of a company who performs various ministerial and administrative duties. It is mandatory for every company having a paid up share capital of 5 crore or more to appoint full-time company secretary who is member of Institute of company secretaries of India.

Appointment of Company Secretary

Section 2(24), 203, 204 of the companies act state the provisions regarding appointment of company secretary, which are as follows:

- Only a individual who is a member of Institute of company secretaries of India can be appointed as a company secretary.
- Every listed company under the companies act must have a full-time company secretary.
- Every Unlisted Company having a paid-up capital of 5 crore or more must also have a full-time secretary.
- Every Private company having a paid-up capital of 5 crore or more must also have a full-time secretary.
- A company Secretary is appointed by the resolution of the board.
- A company secretary is entitled to become the director of the company with the prior permission of the board.
- A company secretary is not allowed to hold office in more than one company.
- The position of Company Secretary must not be vacant for more than 6 months.
- In case of Default in complying with the above provisions the company shall be fined ranging from Rs. 1 – 5 Lakh

Duties of Company Secretary

The Company Secretary is an employee of a company and he must perform his duties with reasonable care. He may be dismissed on the grounds of disobeying, misconduct or permanent disability.

Statutory Duties of Company Secretary

According to company Act –

- To sign documents and proceedings requiring authentication by the company.
- To deliver registration and return of allotment to the Registrar

- To give notice to registrar for increase in the share capital
- To deliver share certificate of allotment on within 2 months after transfer
- To make entry for register of members of the share warrant
- To send annual return
- To make a statutory declaration for receiving certificate of commencement of business
- To send notice of general meeting to every member of the company
- To make statutory books
- To sign every balance sheet and P/L account in case of a non-banking financial company
- To prepare minutes of every General Meeting and Board Meeting within 30 days
- To file a resolution with the registrar

According to I T Act –

- To ensure proper income tax is deducted at source from the salary of employees
- To see that the certificate of TDS is issued
- To ensure that the tax deducted is deposited to government treasury
- To submit and verify various forms and returns

Under Indian Stamp Act –

To see that the documents like letter of allotment and share certificate etc. are properly stamped.

Under other Acts –

To Comply with other acts such as: FEMA, minimum Wages Act, Industrial dispute, Employee State Insurance Act etc.

General Duties of Company Secretary

- To comply with internal regulations and legislation
- Duty to disclose all information for inclusion in register of directors and secretary
- Duty to exercise due care and diligence
- To draft directors report
- Maintaining the statutory registers of the company
- Ensuring Board decisions are properly communicated
- Registration of share transfers and issuance of related share certificates
- Communicating with company shareholders
- Safe custody of company seal
- Certifying documents such as Certificate of Incorporation, Memorandum and Articles of Association
- Giving legal advice to Directors
- To act as an Information link

Liability of Company Secretary

It means that the Company Secretary will be liable as the officer in default for the non-compliance with the provisions of the company Act.

Liabilities of a company secretary can be classified into two categories-

1) Liabilities under the companies Act (Statutory Liabilities)

2) Contractual liabilities

Statutory liabilities of a Company Secretary

- Default in Complying with name requirements – Fine of Rs. 1000 every day during which the default continues that cannot exceed Rs. 1 Lakh.
- Default is filing the return on allotment – Fine Rs. 1000 every day during which the default continues or Rs. 1 lakh whichever is less
- Default in delivering Share Certificates/Debenture Certificates on time – Fine up to Rs. 5 lakh
- Default in filing annual return – Fine ranging from Rs. 50,000 to Rs. 5 lakh
- Default in holding Annual General Meeting – Fine up to Rs. 5000/- during which the default continues extending to Rs. 1 lakh

- Failure to record minutes of the meeting – Fine upto Rs. 500/-
- Default in providing the P/L and B/S at AGM – Fine of Rs. 25,00 extending up to Rs. 1 lakh or imprisonment up to 6 months or both
- Failure to provide notice about Board meeting – Fine upto Rs. 1000
- Failure to maintain the register of members – Fine Ranging from Rs. 50,000 to Rs. 3 Lakh

Contractual Liabilities of Company Secretary

- He is liable for any negligence on part of his duty. He may be dismissed.
- He must not do anything beyond his authority, if he does he will be personally liable for the loss
- He is under the obligation to not disclose any secret information about the company to outsiders
- He is liable for any secret profits made by him on account of his position
- If the Company Secretary commits any fraud, he must indemnify to the company for any loss occurred

Rights and Powers of Company Secretary

- He has the right to supervise and control the secretarial department of the company
- He has the right to issue share certificate of the company
- Being the principal officer he also has the right to sign official documents of the company
- He is empowered to perform all activities under various acts
- He has the right to be indemnified for any loss suffered by him in discharging his duties

Restrictions of Company Secretary

- He cannot enter into a contract on behalf of the company unless specifically authorised by the directors of the company
- He cannot borrow money in the name of the company
- He cannot call meetings which are related to 3rd parties
- He cannot acknowledge a debt against a suit against company
- He cannot register, transfer shares without the authority of Board of Directors

DOCTRINE OF CONSTRUCTIVE NOTICE & INDOOR MANAGEMENT

Doctrine of Constructive Notice –

After a company is registered, its memorandum and articles of association become "public documents". The memorandum and articles of association of a company are public documents and are open to inspection by anyone by payment of a nominal fee. Hence it is presumed that every person dealing with the company has read these documents and understood them before entering a contract with the company. This is known as **Doctrine of constructive notice.**

The effect of this doctrine is that a person dealing with a company cannot hold the company liable for any dealings inconsistent with the memorandum due to default on his part or due to his negligence.

Exception to Doctrine of Constructive Notice

- Forgery cases
- In case the outsiders had prior knowledge of the irregularities of the company.
- In case the outsiders are negligent.

Doctrine of Indoor Management

The doctrine of constructive notice provides that, people while dealing with a company are presumed to have read "public documents" and understood its contents and therefore cannot hold the company liable for any irregularities in dealing due to their negligence. The doctrine of Indoor management is an exception to this. This rule provides that people while dealing with a company are entitled to assume that the internal requirements and regulations prescribed by the public documents have been met by the officials of the company and they are not bound to enquire about regularities of internal proceedings of the company.

However people dealing with the company must see that the proposed dealings are consistent with the memorandum and articles. The effect is that the company can be held liable for any dealings conducted by it in an unfair or irregular manner i.e. if the internal formalities have not been completed.

Exceptions to Doctrine of Indoor Management

- This rule does not protect a person if he/she has prior knowledge of the irregularity
- The rule cannot protect any person who did not study the company's memorandum and articles before entering into a contract i.e. on part of his negligence
- This rule does not apply in case of forgery i.e. in case the outsider relies on forged documents to claim protection under the rule.
- This rule also does not apply to transactions which are illegal and void.
- A person must make proper enquiries about the person who is dealing on behalf of the company. If he fails to make enquiry he cannot rely on the rule.

DOCTRINE OF ULTRA VIRES – COMAPANY LAW

Meaning of Doctrine of Ultra Vires

The doctrine of ultra vires applies to the memorandum of association of a company. The memorandum of association contains the permitted range of activities in its objects clause and a company cannot practice any other activity which is not defined under the scope of objectives mentioned in the memorandum. Any activity done out of the purview of the memorandum is considered as an ultra vires activity. Such activities are null or void and all ultra vires transactions can never be subsequently ratified or validated, not even by the consent of the shareholders.

This rule is meant to protect the interests of the shareholders and creditors of the company.

Effects of Doctrine of Ultra Vires

The effects or the consequences of the Doctrine of Ultra vires are –

PERSONAL LIABILITY OF THE DIRECTORS – The funds of the company can only be used for authorised objectives. In case if any director makes an unauthorised payment, he will be compelled to refund the money to the company.

The director will be personally liable for any loss suffered by the company due to him.

ULTRA VIRES ACQUIRED PROPERTY- If the money has been spent on purchasing ultra vires property, the company will have the secured right over the property. If the property is legally and formally transferred, it will become the asset of the corporation, even though the company was not entitled to acquire such property.

ULTRA VIRES CONTRACT- Any contract by the company officials outside its scope is completely void and it has no legal effect.

ULTRA VIRES LENDING – When the company makes any ultra vires lending or when a person borrows money from the company under an ultra vires contract, he can be sued by the company to recover the amount. The promise to get back the money on the borrowed amount is not illegal.

ULTRA VIRES TORT- A company cannot be liable for any tort committed by its officers in connection with the business outside its scope of objectives. If officers have performed a tort which is intra-vires, the company will be held liable.

Exceptions of Doctrine of Ultra Vires

Following are the exceptions to the doctrine of ultra vires –

- If the company has made any ultra vires lending, it has the right to recover the amount from the borrower.

- If the company has acquired any property under ultra vires contract, the amount can be recovered from company by the order of the court.
- If the director makes payment which is ultra vires the company, the director can be compelled to refund the amount and he also has the right to be indemnified.
- An act which ultra vires the articles but intra vires the memorandum of the company, it may be altered and included in the acts of the company.
- An act which is intra vires the company but ultra vires the director, the director is liable and but if it is out of the authority of the directors the company can ratify it in proper form.
- If the act is ultra vires the company but it is done in an irregular manner, it can be validated by the consent of the shareholders.

Unit-2

FORMATION AND INCORPORATION OF A COMPANY – COMPANY LAW

The procedure for the incorporation of a company can be understood through the following steps

Step 1	Selection of the type of a company
Step 2	Preliminary Requirements
Step 3	Reservation of Name
Step 4	Preparation of the Memorandum of Association and Articles of Association
Step 5	Filing of the documents with the Registrar of companies
Step 6	Certificate of Incorporation and allotment of Corporate Identity Number
Step 7	Effect of Registration
Step 8	Commencement of business

Selection of the type of a company-

The first step for incorporation of a company is to select the type of company the promoters or owners wish to form i.e. one person company, private company, public company, non-profit company etc.

Preliminary Requirements –

In order to file the application for incorporation of a company all the directors of the proposed company must have a director identification number (DIN). Out of all the directors, at least one director must have a digital signature to sign the incorporation and other official documents digitally.

Reservation of Name-

The next step for incorporation of a company is the reservation of company name. The promoters must apply to the registrar of companies (ROC) for the reservation of the name of the proposed company. While applying for the reservation of the company name, the following points must be kept in mind –

1. The Application in e-Form No. INC.1 along with the fees of Rs. 1.000/- must be filed as prescribed in the companies act, 2014.
2. Maximum six proposed names must be given in order of preference.

The registrar of companies, upon the receipt of the application form INC.1 for the reservation of name verifies all the criteria and guidelines under sec 4 and related rules. After the verification, the registrar of companies, approves any one name which is valid for a period of sixty days from the date of intimation by the registrar/MCA. After 60 days, if the documents of incorporation of the company are not filed with the registrar, the reservation of the name for the proposed company shall lapse automatically.

Preparation of the Memorandum of Association and Articles of Association-

Memorandum of Association and Articles of Association are prepared or drafted after the reservation of name. Memorandum of Association and Articles of Association shall be in the forms as specified in schedule-1. It should be noted that main objects of Memorandum of Association and Articles of Association must be matched with the objects shown in e-form INC.1. These two documents are the charter of the company and contain all the internal rules and regulations of the company, therefore it should be drafted with utmost care and should be prepared with the advice of experts.

Number of copies of memorandum and articles of association should be printed and made available with the company. One copy of the Memorandum and Articles must be duly stamped by the collector of stamps and submitted to the registrar of companies.

Filing of the documents with the Registrar of companies –

It involves the task of submitting the following documents to the registrar of companies along with the fees as provided in the companies act (registration offices and fees rules, 2014) within 60 days from the date of intimation regarding the reservation of name:

1. A duly stamped, signed and witnessed copy of Memorandum of Association and Articles of Association signed by all the suscribers.
2. A statutory declaration in the prescribed format signed by a Charted Accountant or Company Secretary
3. An affidavit containing details and particulars of all the directors, managers, secretaries
4. A written consent of the person named as the first director to act in that capacity along with an undertaking that he has taken up the qualification shares
5. Proof of the address and location of the registered office of the company.
6. A statutory declaration signed by Advocate of High Court or Supreme Court etc. stating all above requirement have been complied with.
7. A public company with share capital must follow the guidelines laid out by SEBI, to obtain the required capital for the company.

Certificate of Incorporation and allotment of Corporate Identity Number –

The registrar of companies issues the certificate of incorporation within 7 days of the receipt of documents, if he is satisfied that everything has been complied according to the companies act.

The validity of registration cannot be challenged after the certificate of incorporation has been issued but that does not mean that the certificate of incorporation legalizes the illegal objects mentioned in the memorandum.

Registrars allot a corporate identity number on or from the date mentioned in the certificate of incorporation which acts as a unique identity number for the company.

Effect of Registration –

After receiving the certificate of Incorporation the company becomes be a body corporate with a name, perpetual succession, common seal, capable of exercising all the functions of a company, with the power to hold and dispose property, to contract, to sue and be sued. The subscribers of the articles become the members of the company.

A private company can begin its business operations on receiving the Certificate of Incorporation, while a public company can begin its business activities on after receiving the Certificate of Commencement of Business.

Commencement of business –

A Statutory declaration must be signed by director or company secretary and submitted to the registrar. If the registrar is satisfied, a trading certificate will be issued which provides authority to the company to begin its business operations.

MEMORANDUM OF ASSOCIATION – COMPANY LAW

Memorandum of Association is simply the constitution or charter of a company.

According to the companies Act, 2013, “memorandum” means “memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.”The memorandum of association contains the fundamental provisions of the company’s constitution and all those essential conditions upon which the company can be incorporated. It determines the powers and limitations of the company and determines the scope beyond which company`s operations cannot go.

It consists of the following:

- Name of the company
- Address of Registered Head Office
- Capital structure of the company
- Objects of the company
- Scope of its Operations
- Liability of its members

Purpose/Importance of Memorandum of Association –

- The memorandum enables all those who deal with the company be it shareholder or creditors to know the purpose of company and its range of activities.
- The document of memorandum limits the company`s capacity to contract, thereby restricting it to the activities mentioned in the memorandum of association at the time of its formation.

Form of Memorandum –

Memorandum of a company should is prepared according to the respective forms specified in Tables A,B,C,D and E of the Schedule 1, Section 4 of the Companies Act.

- Form in Table A is applicable to companies limited by shares
- Form in Table B is applicable to companies limited by guarantee and not having a share capital
- Form in Table C is applicable to the companies limited by guarantee and having a share capital
- Form in Table D is applicable to unlimited companies, not having a share capital
- Form in Table E is applicable to unlimited companies

Printing and Signing of Memorandum of Association

The memorandum of association must be printed and signed by each member (7 members in case of Public Company and 2 in case of Private Company and 1 in case of One Person Company). The memorandum should be signed in the presence of at least one witness who will attest the signatures of the subscribers of memorandum.

In case of one person company (OPC), the name of the nominee must be mentioned in the Memorandum of Association. In case of death or incapability the nominee shall become the member of the company.

The address, occupation and the No. of shares held by each subscriber must also be mentioned in the Memorandum of Association.

Contents of Memorandum of Association –

Section 4 of the Companies Act states that the memorandum of association of every company must contain the following clauses –

1. Name Clause – According to the first clause the memorandum must state the name of the company by which it wants to be known subjected to the following restrictions:

- The name of the company must not be identical with an existing company.
- No company will have the name which is undesirable in the opinion of the government.
- The name must not mislead the public. For example, a company will not be allowed to use a name, which is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.
- The company must not use any names which suggest any connection with the government or state Patronage without the prior approval of the government.
- The name of a private company limited by shares, must end with 'Private Limited'

2. Situation or Registered Office Clause – This clause requires the memorandum to mention the name of the state in which the registered office of the company is to be situated. A company must have its registered office ready within 15 days from its incorporation and within 30 days of its incorporation, the verification of its registered office should be done. This is done in order to fix the domicile of the company. It must be noted that the domicile is the place of registration of the company and may or may not be the residence of the company. Residence of the company will be the place from where the management and control of the business is carried out.

3. Objects Clause – The object clause determines the purpose for which the company has been set up and it determines the capacity of the company. A company is not legally entitled to conduct any business activity that is not specifically mentioned in its object clause. The objects are classified into three categories: main object, ancillary object, and other objects that will be pursued to accomplish the main object. However the following points must be noted while preparing Objects clause:

- The objects of the company must be stated specifically and must not be ambiguous statements.
- The objects of the company must not be illegal
- They must not be against the provisions of the companies act
- They must not be against the public policy of the country

4. Liability Clause – The fourth clause of memorandum of every company states the liability of its members, i.e. whether the liability of its members is limited by shares, or limited by guarantee or is unlimited.

- In case of company limited by shares, members cannot be called upon to pay more than what remains unpaid. If his shares are fully paid, the liability of shareholders is nil.
- In case of company limited by guarantee, the liability clause must state the amount each member has to pay at the time of the liquidation of the company.
- In case of unlimited company, the liability of members is unlimited and personal assets of the members can be used.

5. Capital Clause (only in case of a company having share capital)- This clause requires all companies limited by liability to mention the amount of capital with which the company is formed. The capital of the company must be divided into smaller fixed value units which are known as shares. There is no legal limit on the amount of share capital. A company cannot issue share capital exceeding the amount mentioned in the capital clause.

6. Association and Subscription Clause – According to this clause the memorandum must mention the amount of authorised share capital and the amount of shares taken by each subscriber/member. The following are the statutory requirements regarding subscription-

- The memorandum must be signed by each subscriber in the presence of at least one witness who attest the signatures.

- Each subscriber must take at least one share; and
- Each subscriber must write the number of shares held by him

7. Succession Clause (only in the case of OPC) – According to this clause the memorandum must state the name of the person who shall become the member of the company in the event of death of the subscriber.

The above clauses are compulsory and are designated by companies Act as 'conditions", on the basis of which alone a company can be incorporated.

DIFFERENCE BETWEEN PUBLIC COMPANY AND PRIVATE COMPANY

In order to understand the key difference between Public Company and Private Company, one must know the main features both.

A private company means a company, which has a minimum paid up share capital of Rs. 1 lakh or such higher capital as may be prescribed and which by its articles provides the following-

- restricts the transfer of shares by its members
- limits the maximum number of members to 200

A public company refers to a company which has a minimum paid up share capital of Rs. 5 lakh or higher as prescribed by its memorandum and articles and which is not a private company.

Difference between Public Company and Private Company

The key difference between a public company and a private company can be understood with help of the following chart:

PRIVATE COMPANY	PUBLIC COMPANY
It can be started with a Minimum Paid up Capital of Rs. 1 lakhs	Its Minimum Paid up Capital requirement is Rs. 5 lakhs
Minimum number of Members – 2 members	Minimum number of Members – 7 members
Max. number of members – 200 members excluding employed members	Max. number of members – No limit
Min. number of directors – At least 2	At least 3
Transferablity of Shares – The right to transfer is restricted by Articles of Association, it requires prior permission of the Board Of Directors of the company.	Shares can be transferred freely
Public subscription is restricted	They can invite public for subscription
Acceptance of public deposits – The articles prohibit a private company from accepting deposits.	A public company can accept deposits from public
Commencement of business – It can Commence its business immediately after getting the certificate of incorporation	It can only commence business after getting certificate of commencement of business
Issue of prospectus – Not compulsory	Compulsory
Statutory meeting – Not required	It must hold a statutory meeting after one month or before 6 months from the date of obtained certificate of commencement
Managerial remuneration not fixed	Fixed at 11% of annual net profits

Index of members is not required	It is required
Provisions regarding directors – It is free to appoint directors	It requires the prior approval of Central Govt. to appoint directors

PROMOTER – MEANING, ROLE, LEGAL POSITION, DUTIES

The term ‘promoter’ has been defined under section 2(69) of the Companies Act, 2013. As per this section it refers to a person-

a) Who has been named as such in the prospectus or is identified by the company in the annual return;

b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or any other position in the company

c) Who advices, directs or instructs the the board of directors of a company (but does not include a person who is acting merely in a professional capacity).

Meaning of a promoter

A promoter may be an individual, a firm or a company who performs all the preliminary duties necessary to bring company into existence. He conceives the idea, develops it and finds and induces others to join the company.

The promoters prepare the scheme for the formation of the company, find and bring together the subscribers to the memorandum, prepare the memorandum and articles and get it executed and registered, finds the bankers, brokers and legal advisers, finds the first directors and makes arrangement for the advertisement and circulation of the prospectus and arranges the capital.

The question whether a person is a promoter or not depends upon the role that he has performed during the formation of the company. Any person who acts on his behalf whether as a solicitor or an accountant and or paid worker is not considered as a promoter. The most important criteria for being a promoter is that the individual must have a personal business interest in the company.

Legal position of promoter

A promoter is neither a trustee nor an agent of the company but he has a fiduciary relationship with the company. Fiduciary relation means a relation of trust and confidence. Therefore he is liable to disclose all the relevant facts and any secret profit made by him in relation with the formation of the company.

Duties of a promoter

Following are the important duties of a promoter of a company-

1) He being in a fiduciary position cannot make either directly or indirectly any secret profit at the expense of the company and even if he makes any secret profit then a company can rescind the contract made with him.

2) He cannot sell his own property to the company and derive profit out of it, unless he discloses all the facts relevant to it.

Functions of a Promoter

- Discovering business opportunities
- Conceptualizing the business idea
- Conducting feasibility studies and analysis
- Arranging for funds and managerial expertise
- Preparation of documents

- Implementation of Idea
- Other preliminary activities

Remedies available to the company against a promoter

If a promoter makes any secret profit and does not disclose it, in that case a company has the following remedies available against him.

1) Rescind the contract and recover the secret profit made by him

2) Retain the property, paying no more for it than what the promoter has paid depriving him of his profit.

3) Where the above remedies would be inappropriate, the company may sue him.

Remuneration of promoters

When a promoter makes proper disclosure and does not makes any secret profit , he is often rewarded for his efforts. Therefore, when the company is registered , it pays some remuneration to him for his services.

In practice, following are the ways by which a promoter can be remunerated-

a) He may sell his own property to the company after making full disclosure to the board of directors or to the intended shareholders.

b) He may sell his property to the company and buy fully-paid shares after making full disclosure.

c) He may be given opportunity to buy further shares at par in the company.

d) He may be given a commission.

e) He may be paid a lump sum amount by a company according to the contract made by them.

Unit-3

*The **Companies Act, 2013** ('the Act') defines the term 'share' in Section 2(84) as a share in the share capital of a company which includes stock unless such differentiation between the two is made out. The definition does not help us understand its nature and hence, the courts and jurists have given us many important definitions for the same.*
This article explores the meaning, differences and scope of shares, share capital and debentures.

I. Share

The Halsbury's Law of England: It defines a 'share' as a right to a specified amount of the share capital of a company, carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The Court in **Borland's Trustee v. Steel Bros[1]**, stated that a share in the interest of a shareholder in the company measured by a sum of money, for the purposes of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se.
In **Bacha Guzdar v. CIT [2]** it said that a share is a right of participation in a company's profits when it is a going concern, and its assets when it is being wound up.
Hence, it becomes clear that to raise capital for its own purposes, a company issues shares to the public or private individuals, and in proportion to the shares acquired by them, they acquire rights and liabilities of participation as well, such as Voting Rights and liability to pay the amount due on share when called on.

In Indian law, a share is also included in the definition of goods under Sale of Goods Act, 1930 which labels both shares and stock as 'moveable property' covered under its ambit. Section 44 of the Act categorises shares a movable property as well.

II. Share Capital

The solitary word 'capital' when used in Company law often refers to the share capital itself. It is not necessary that all companies shall have share capital although all companies limited by share must have a share capital specified in their memorandum. Companies limited by guarantee may or may not opt to have a share capital. In a company operating with a share capital, it means a statement included in the memorandum stating the maximum amount of capital the company is authorized to raise and breaks down the amount into a given number of shares of a given value each. It looks like this – “The Share Capital is Rs. 100000 divided into 10000 shares of Rs. 10 each.”

- Important Terms (Types of Capital)

i. **Authorised/Registered Capital**: As given in section 2 (8), “authorised capital” or “nominal capital” means the capital which is authorised by the memorandum of a company to be the maximum amount of share capital of the company. It is the 1 lakh amount in the above example. The company cannot raise more money than this amount.

ii. **Issued Capital:** As given in section 2 (50), “issued capital” means the capital which the company issues from time to time for the subscription. It is that part of the registered or authorized capital which the company issues for public subscription and allotment for the time being. This is to be computed at the nominal value.

iii. **Subscribed Capital:** As given in Section 2 (86), “subscribed capital” means the part of the capital which is for the time being subscribed by the members of a company. It is that portion of the issued capital at face value which has been subscribed for or taken up by the subscribers of shares in the company. It is clear that the entire issued capital may or may not be subscribed. The part which does get subscribed becomes this.

iv. **Called up Capital:** As given in section 2 (15), “called-up capital” means the part of the capital, which has been called for payment. Shares are issued and the people subscribing them are not required to pay at the time. Payment is called from time to time asking people to deposit the amount as per the shares subscribed. Called up capital is that portion of the subscribed capital which has been called up or demanded on the shares by the company. The amount that actually gets paid will become the paid-up capital.

v. **Paid-up Share Capital**: As given in section 2 (64), “paid-up share capital” or “share capital paid-up” means the aggregate amount of money credited as is equivalent to the amount received in respect of shares issued. It includes any amount credited as paid-up in respect of shares of the company but does not include any other amount received in respect of such shares, by whatever name it may be called.

- Equity and Preference Share Capital

Equity share capital is defined in the explanation to Section 43 of the Act as all share capital which is not preference share capital. So, let us understand preference shares first.

Preference share capital is that part of the issued share capital which bears a preferential right in two respects. One, the payment of the dividend is either done at a fixed amount or a fixed rate, unlike the equity shares. Two, at the time of repayment of the paid-up capital, or in the case of winding up, it is seen whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company. These special qualities make these shares preferred shares, and the capital from then the Preferred share capital.

Table of Differences

Preferred Share Capital	Equity Share Capital
The fixed amount of fixed rate of dividend	The amount depends on the available profits and foreseeable expenditure.
Dividend is paid in preference to equity shares	Dividend is paid after payment of Preferred shares.
Preference is given to preferred shareholder over equity shareholder at the time of winding up.	Lower preference for a preferred shareholder during winding up.
The dividend may be cumulative.	The dividend is not cumulative
Section 47 states that Voting rights of the preferred shareholder are limited than equity holders. These can only vote in case of a variation in their special privileges, or when their dividend has not been paid for 2 years. Further, they are entitled to vote on the resolution on winding up of a company.	Equity shareholders may vote on any and all issues
No Bonus or Rights shares are issued.	Bonus or Rights shares might be issued to existing shareholders.

The voting right of a preferred shareholder is calculated with respect to his share in the total preferred share capital only.	The voting right of an equity shareholder is calculated with respect to his share in the total equity share capital only.

III. Debentures

Another way of raising money by the company is to borrow money in return for interest. A security that the borrowed sum will be repaid is issued in the nature of a debenture. Thus, a debenture is a tool used by the company to raise borrowed capital in exchange for fixed rates of interest. The moneylender in this scenario is called creditor of the company. According to **Section 2(30)** of the Companies Act, 2013 "debenture" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. It covers both secured and unsecured debentures.

In **Ram Ratan Karmarkar v. Amulya Charan Karmarkar** [3], a debenture was differentiated from a loan such that a debenture means a document which creates or acknowledges a debt. A loan creates a right in the creditor to demand repayment, and the substance of debt is a liability upon the debtor to repay the money.

Types of Debentures

- On the Basis on Convertibility

i. **Non-Convertible Debentures (NCD):** These instruments cannot be converted into equity shares. They will retain their debt character only.

ii. **Partly Convertible Debentures (PCD):** A part of these instruments can be converted into Equity shares in future at the notice of the issuer. The issuer decides in which ratio the conversion is done, usually at the time of subscription itself.

iii. **Fully convertible Debentures (FCD):** These debentures are fully convertible into Equity shares at the issuer's notice. The issuer decides the ratio of conversion. Upon conversion, the investors enjoy the same status as any ordinary shareholders of the company.

iv. **Optionally Convertible Debentures (OCD):** The investor has an option to convert these debentures into shares at a price decided by the issuer or agreed upon at the time of issue.

- On the Basis of Security

i. **Secured Debentures:** Secured debentures are those secured by a charge on the fixed assets of the company issuing it. This means that if the issuer fails to pay either the principal or interest amount, his assets can be sold for repayment of the liability to the investors. Section 71(3) of the Companies Act, 2013 provides that secured debentures may be issued by a company subject to such terms and conditions as may be prescribed by the Central Government through rules.

ii. **Unsecured Debentures:** In these instruments, if the issuer defaults on payment of the interest or principal amount, the investor has to be on the same standing as other unsecured creditors of the company waiting for repayment. These are also called Naked Debentures.

- On the Basis of Redeemability

i. **Redeemable Debentures:** These are the debentures which are issued with a condition that they will be redeemed at a fixed date or upon demand, or after notice, or under a system of periodical drawings. Debentures, generally are redeemable and on redemption, they can be reissued or cancelled.

ii. **Perpetual or Irredeemable Debentures:** A Debenture, in which no time is fixed for the company to pay back the money, is an irredeemable debenture. The holder of debenture cannot demand repayment till the company is a going concern and does not make default in payment of interest. After the commencement of the Companies Act, 2013, a company cannot issue perpetual or irredeemable debentures.

- On the Basis of Registration

i. **Registered Debentures:** A company maintains a register of debenture holders. The debenture, when issued to a specific person's name, mentioning such name on the certificate and the register, creates a Registered Debenture. It can only be transferred like shares by a duly stamped instrument of transfer satisfying the requirements of Section 56 of the Act.

ii. **Bearer debentures:** On the contrary, debentures may be made out to bearer, making them freely transferable by delivery and entitling its bearer to the amount at the time of redemption. Bearer debentures are negotiable instruments, and the person holding it is a 'holder in due course' under the **Negotiable Instruments Act**. He is thus entitled to receive the principal and the interest thereon (**Calcutta Safe Deposit Co. Ltd. v. Ranjit Mathuradas Sampat** [4]).

Unit-4

DIRECTORS – APPOINTMENT, DUTIES, RIGHTS, LIABILITIES – COMPANY LAW

A director is the member of the Board of Directors.

"Director means a director appointed to the board of a company" sec 2(34)

According to the companies act states the board of directors in relation to a company refers to a collective body of the directors of the company. Sec 2(10)

Meaning of Director

A director is one of those persons, who are responsible for directing, governing and controlling the policy or management of a company. All directors collectively are called as Board of Directors or Board. They are the top administrative organ and the company can operate only through them. They are the brain of the organization responsible for all policy making and decision making activities.

Appointment of Directors

The following guidelines have been established by the companies act regarding the appointment of directors.

- The articles of a company may list the names of the first directors in its articles of association, if no names are mentioned in the articles, the subscribers of the memorandum become the first directors.
- Directors can be appointed by the initial members of the company at its first general meeting.
- A company may appoint an additional director if it needs.
- An Alternate Director may be appointed by the board during the absence of a director for a period not less than 3 months
- A vacant position of director can be filled by the members of the board on temporary terms.
- Nominee Director – It refers to any person nominated as director by a financial institution or a government body who holds shares in the company. He must be appointed by the company.
- On complaint against oppression or mismanagement in a company, the tribunal may order the company to appoint the required number of directors as directed by the Tribunal.
- A director may be appointed by the central government under certain circumstances.
- A director may be appointed by a single transferable vote system or cumulative transferable vote system

Powers of Directors

Statutory Powers of Directors

Powers must be exercised by Board of Directors in the general meeting of the company by passing a resolution.

- The power to make call on shares in respect of unpaid money.
- The power to authorize lack of shares
- The power to issue debentures, whether in or outside india.
- The power to invest in funds
- The power to borrow money otherwise than on debentures
- The power to make loans or give guarantee in respect of loans. But a banking company does not require any resolution by the board.
- The power to approve the financial statement and board's report.
- The power to diversify the business of the company.
- The power to approve amalgamation, merger or reconstruction.
- The power to take over a company or acquire a company or substantial stake in another company.

Other powers –

- Power to fill casual vacancy 9sec 161)
- Power to appoint the first auditor of the company
- Power to make political contribution.
- Power to appoint alternate directors. (sec 161)
- Power to appoint additional directors. (sec 161)
- Power to declare interim dividend. (123(3))
- Power to appoint or remove key managerial personnel (KMP)
- Power to declare solvency , where the company winds up voluntarily.
- Power to recommend the rate of dividend on the shares of the company subjected to approval by shareholder of the company

Powers only with a resolution –

- To sell or lease any asset of the company
- To allow time to the director for the repayment of the loan

- To borrow money in excess of paid up capital and free reserves
- To appoint a sole agent for more than 5 years
- To issue bonus shares and for reorganization of share capital
- To contribute money for charitable purposes exceeding Rs. 50,000 or 5% of the average profits of 3 years whichever is greater

Managerial powers of Directors

The Board acts in the interest of shareholders with the following powers –

- Power to contract with the third party
- Power to recommend dividend
- Power to allot, forfeit or transfer shares of company
- Power to take decision regarding terms and conditions for the issue of debentures
- Power to form policy and to issue instructions for the efficient running of the business
- Power to appoint Managing Director, Manager, Secretary of the company.
- Power of control and supervision of work of subordinates

Duties of Directors

General Duties of Directors.

- To form policy and determine objectives of a company
- To delegate power to any committee if the Articles permit
- To issue instructions to subordinates for the implementation of policy to review company's progress
- To appoint their subordinate officer, managing director, Manager, Secretary, other employees
- To act in accordance with the Articles of the company providing that articles are subject to the provisions of this Act. (sec 166(1))
- To act in Good faith in order to promote the objects of the company. However the promotion of the objects should be for the benefit of the company.

- To perform duties with Due and reasonable care and Diligence.
- Duty to not to achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives.

Specific Duties of Directors

- Must disclose his shareholding in a company.
- Must disclose his interest in contracts of the company
- Must disclose their name, address and occupation
- Duty to take up qualification shares within 2 months after his appointment
- Decide the minimum subscription and issue prospectus. It must not contain any false or misleading statement
- The Board of Directors or requisition must be ready to call on an extraordinary general meeting
- Duty to call statutory and annual general meeting of the company
- To ensure full and correct disclosure in prospectus of all matters as required by law.
- To sign the prospectus before it has been delivered to the Registrar.(sec 26)
- To deliver the prospectus to the Registrar before the prospectus is issued to the public.
- To deposit application money in a scheduled Bank. They shall not utilize money other than purposes mentioned in the Act.
- To file Return of Allotment of securities with the Registrar.
- To declare dividend and arrange for the payment
- To file with registrar the reports and resolutions as required by the act.
- To issue forfeit and transfer shares
- To perform all other duties as assigned by the Act

Liabilities of a Director

Liability against Company

The directors will have to make good for any loss on account of –

- an ultra vires act where the directors have entered into a contract beyond their powers. In such case directors are personally liable for the loss caused to the company.
- breach of trust where the directors make a secret profit out of the business
- for negligence or for not performing his duties honestly and carefully
- For dishonest act to make personal profits
- For the activity of the co-directors

Liability toward 3rd parties

The directors will be personally liable towards the 3rd parties –

- For any mis-statement in the prospectus for acting fraudulently, the directors shall be liable to pay compensation to every person who subscribe for shares on the faith of such prospectus.
- For the failure to repay application money on non- receipt of minimum subscription.
- Failure to repay Application money on refusal to list shares by the stock exchange.
- For acting in their own name without mentioning the name of the company
- For acting beyond the powers of the company
- When the liability has been made unlimited by the Memorandum
- For any liability at the company at the time of winding up

Criminal liability of Directors

Will be liable with a fine and imprisonment or both for fraud of non-compliance of any statutory provision.

- For mis-statement in prospectus
- Failure to file return on allotment with the registrar
- Failure to give the notice to the registrar for conversion of share into stock
- Failure to issue share certificate and debenture certificate
- Failure to maintain register of the members and register of debenture holders
- Default is holding Annual General Meeting
- Failure to provide Annual accounts and Balance Sheet

- For holding the office of director in more than 15 companies

What is Extraordinary General Meeting (EGM)? | Definition, Features, Advantages and Disadvantages

An Extraordinary General Meeting (EGM) is a meeting called for all shareholders of a company, or members of an organization, or employees at an office at a time other than the scheduled Annual General Meeting (AGM).
An Extraordinary General Meeting is always held at an emergency or urgent basis, where the issue at hand is too crucial to not be discussed till the next scheduled Annual General Meeting. This only happens in very rare and extreme situations in which the entire membership is required to be present for a decision to be taken.

Since these are emergency meetings, it is quite possible that most people involved at a moment's notice. Thus the purpose of the meeting is always highlighted and spelt out clearly for members to understand the pressing urgency.

Features of an EGM

1. Usually EGMs are held only in very urgent legal and administrative matters. If for a certain reason the financial interest or safety of members concerned is affected, this meeting may be held.
2. EGMs may be held on holidays as well as weekends because of the urgency. This is a primary difference it has from AGMs.
3. AGMs are usually called by the board of directors. An EGM may be called by shareholders, members of an organization, or even a tribunal.

4. In case of absence of some members, voting on any urgent matters may also take place by proxy. Even though this is not an ideal solution it is necessary for quick resolution of issues.
5. Procedure for the conduction of the meeting may be different than it usually is at AGMs. Since time is usually of the essence, only relevant topics may be raised from the minutes of the previous meetings.

Advantages of Extraordinary General Meetings

1. The provision of an EGM is an absolute necessity to ensure transparency on the part of any organization with respect to its members or shareholders. It is key in protecting the interests of the members concerned and ensures their involvement in important decision making.
2. It is an important way of protecting and helping members of any organization assert their rights. In a company's bylaws often details may be laid out regarding which situations require the intervention of shareholders through an EGM. This ensures the board of directors is not empowered beyond reason.
3. Because there are strict guidelines for the calling of an EGM, it can be said with certainty that members are aware of the gravity of the situation. Further the requirement that they must be informed about the issue ensures transparency.

Disadvantages of Extraordinary General Meetings

1. Since the problem primarily concerns the board of directors directly, it is possible that the resolution is presented to the members concerned in a manner that suits their purpose.
2. An EGM is often held on weekends and national holidays. All important shareholders may not be available in that duration and a resolution may be passed without arriving at a clear majority consensus.
3. Proxy votes may always not reflect the reality of the situation.

Annual general meeting (AGM) definition

What is an AGM?

An annual general meeting (AGM) is a yearly gathering between the shareholders of a company and its board of directors. Generally, this is the only time that the directors and shareholders will meet throughout the year, so it is a chance for the directors to present the company's annual report.

AGMs are not just held by companies. For example, universities, schools, charities and unions could all be required to hold an AGM to discuss the future of the organisation or institution in question.

What happens at an annual general meeting?

During an AGM, a company's performance is analysed and its future strategy is discussed. This is an opportunity for shareholders to question the board, get answers for unsatisfactory performance and challenge them on the direction of the company. Equally, an AGM is the time to praise good returns.

Votes can also be held during an AGM, allowing shareholders to vote on company decisions, and fill any vacant positions on the board of directors.

Shareholders who choose not to attend the meeting can normally vote by proxy, which can be done by post or by giving permission for another shareholder to vote on their behalf.

Examples of AGMs

Most companies, whether they are publicly listed or private, must hold an AGM. This is primarily for transparency, but also for shareholders and other interested parties to have a say on company decisions.

The location and format of a company's AGM is entirely at the company's discretion, and depends on the resources at its disposal. For example, the AGM of Warren Buffet's company, Berkshire Hathaway, is colloquially known as 'Woodstock for Capitalists'. It is held in Omaha, Nebraska – where Berkshire's headquarters are – and has seen over 10,000 attendants descending on the American city annually.

MANDATORY REQUIREMENTS FOR CONDUCTING ANNUAL GENERAL MEETING

1. Every Annual General Meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the Registered Office of the Company or at some other place within the city, town or village in which the Registered Office of the Company is situated. For Unlisted company it may be held at any place in India if consent received by all the members in advance. **[Section 96(2)]**
2. **Notice of the meeting must be given at least 21 days before the Meeting either in writing or through electronic mode.[Section 101(1)]**
3. The Notice should specify the day, date, time and full address of the venue, Route Map of the Meeting and procedure of e-voting and Proxy Form. A Meeting may be convened at any time and place, on any day, excluding a National Holiday. **[Clause 1.2.4 of Secretarial Standard on General Meetings]**
4. Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon. In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice. **[Clause 1.2.5 of Secretarial Standard on General Meetings]**
5. Quorum should be present throughout the Meeting. No business should be transacted when the Quorum is not so present. **[Clause 3.1 of Secretarial Standard on General Meetings]**
6. Presence of Chairperson must be required.
7. Maintain the Minutes Book for Signing the minutes.

FOLLOWING PROCEDURE IS TO BE FOLLOWED FOR CONDUCTING ANNUAL GENERAL MEETING OF THE COMPANY [SECTION 96 AND SECRETARIAL STANDARD ON GENERAL MEETING (SS-2)]

1. **Conduct a Board Meeting [Section 173 and Secretarial Standard on Board Meeting (SS-1)]**
   Conduct a Board Meeting or pass the following Resolutions by Circulation
    a. To fix the day, date, time and agenda for the General Meeting.

b. To approve the draft notice of general meeting along with explanatory statement.

c. To authorize Company Secretary or any other officer to issue notice of General Meeting to every member or to every person entitled to receive this notice.

d. The Companies which provide remote e-voting facility shall pass the below mentioned resolutions also

- To appoint Scrutinizer and an Agency for remote e-voting.
- To decide the Cut-Off date for reckoning the names of members entitled to voting rights.
- To authorize Chairman or any other Director duly authorized by the Board to receive the Scrutinizer's Register, Report on e-voting and other relevant documents.

2. **Appointment of Scrutinizer [Section 108 and Rule 20 of the Companies (Management and Administration) Rules, 2014]**
Every company which has listed its equity shares on a recognized stock exchange and every company having not less than one thousand members shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means and for providing e-voting facility at the meeting, they shall appoint a Scrutinizer who can scrutinize the voting and remote e-voting process in a fair and transparent manner.

3. **Notice of General Meeting [Section 101, Rule 18 of the Companies (Management and Administration) Rules, 2014 and SS-2]**

- A General Meeting of a Company may be called by giving not less than clear 21 days' notice either in writing or through electronic mode.

- Notice shall be sent by hand or by ordinary post or by speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means. But where e-voting facility is being provided, notice cannot be sent through Ordinary Post.
- Notice in writing of every Meeting shall be given to every Member of the company. Such Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified persons.
- A statement setting out the special business to be transacted at a general meeting shall be annexed to the notice.
- Notice shall clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon. In respect of items of Ordinary Business, Resolutions are not required to be stated in the Notice.
- Where this is not practicable, Notice shall be published in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and in an English newspaper in English language, both having a wide circulation in that district, at least seven days before the Meeting, exclusive of the day of publication of the Notice and day of the Meeting. In case of companies having a website, such Notice shall simultaneously be hosted on the website.

- Listed Companies shall submit the copy of the advertisement to the Stock Exchange within 24 hours from the publication and post the same on the website within 2 working days. **[Regulation 30 and 46(3) of SEBI (LODR) Regulations, 2015]**
- Where a record date has been fixed by the listed entity, then it shall give notice in advance of at least 7 working days to Stock Exchange of record date. **[Regulation 42 of SEBI (LODR) Regulations, 2015]**

4. **Remote e-voting [Section 108, Rule 20 of the Companies (Management and Administration) Rules, 2014]**
The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the General Meeting. During the period when facility for remote e-voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting.

5. **Maintaining of Proxy Register [Section 105 and SS-2]**
All Proxies received by the company shall be recorded chronologically in a register kept for that purpose. In case any Proxy entered in the register is rejected, the reasons therefor shall be entered in the remarks column.

6. **Convene a General Meeting**

   . Check the presence of Quorum for convening the meeting. Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business.

   a. The Chairman of the Board shall take the Chair and conduct the Meeting. If the Chairman is not present within fifteen minutes after the time appointed for holding the Meeting, or if he is unwilling to act as Chairman of the Meeting, or if no Director has been so designated, the Directors present at the Meeting shall elect one of themselves to be the Chairman of the Meeting. If no Director is present within fifteen Minutes after the time appointed for holding the Meeting, or if no Director is willing to take the Chair, the Members present shall elect, on a show of hands, one of themselves to be the Chairman of the Meeting, unless otherwise provided in the Articles.

   b. If any Director is unable to attend the Meeting, the Chairman shall explain such absence at the Meeting.

   c. Directors who attend General Meetings of the company and the Company Secretary shall be seated with the Chairman.

   d. e. The Chairman shall then conduct the Meeting in a fair and impartial manner and ensure that only such business as has been set out in the Notice is transacted. The Chairman shall regulate the manner in which voting is conducted at the Meeting keeping in view the provisions of the Act.

   e. The Chairman shall explain the objective and implications of the Resolutions before they are put to vote at the Meeting and provide a fair opportunity to Members who are entitled to vote to seek clarifications and/or offer comments related to any item of business and address the same, as warranted.

   f. Company shall provide the e-voting facility to their Members to exercise their Voting Rights if the company having its equity shares listed on a recognized stock exchange other than companies whose equity shares are listed on SME Exchange or on the Institutional Trading Platform and other companies as prescribed.

   g. h. Check that vote of thanks is given to the Chair at the conclusion of the General Meeting.

7. **Submit Disclosure of the Proceedings of the Meeting [Regulation 30 and 46(3) of SEBI (LODR) Regulation, 2015]**
Listed Company shall submit a disclosure of proceeding of the general meeting to the stock

exchange within 24 hours from the conclusion of the meeting and shall post the same on the website of the Company within 2 working days.

8. **Announcement of Result of e-voting [Section 108, Rule 20 of the Companies (Management and Administration) Rules, 2014 and Clause 8.6 of SS -2]**
The Scrutinizer shall submit a report on total number of votes casted in favour or against the resolution and submit the same to the Chairman of the meeting or any person authorized by him, who shall declare the result. And this result shall be displayed for at least 3 days on the notice board of the Company at its Registered Office, Corporate Office and Head Office and shall be posted on the website of the Company.
9. **Preparation and Signing of Minutes [Section 118 and SS-2]**
Refer the Procedure for Preparation, Signing and Compilation of Minutes of General Meeting.

The AGMs of large companies are often impressive affairs; with large spreads for food and entertainment. In contrast, smaller companies may simply hold their AGMs in their lawyer's offices. Regardless of how lavish the event is, AGMs can often be quite monotonous due to the large volume of legal and administrative updates to get through.

Unit-5

*The whole process of bringing a legitimate end to the life of a firm is broken into two steps. These two processes are **winding up of companies** and **dissolving them**. Company winding is described as a mechanism by which a company's life is put to an end and its property is handled for the benefit of its members and creditors. That is the last step that brings an end to a company's existence.*
The primary aim of winding up is to identify the properties and make the instalments of the loans of the business equitable. Thus, winding up is the mechanism by which control of the activities of a corporation is separated from its directors, a liquidator discovers its assets, and discharges its debts from the proceeds of realisation.

I. Introduction

There may be many reasons for the company's winding – up, including shared arrangement between creditors, loss, insolvency, death of promoters, etc. A business may be wound up either by a tribunal or by voluntary winding up, as per **section 270** of the **Companies Act**, 2013. The provisions of the Act provide appropriate processes for the liquidation of a corporation.
A formal process for permanently closing down a corporation is the winding up of the company. That is a mechanism by which the legal life of the Company meets an endpoint in which the Company falls under the control of a Liquidator for dissolution.

At this critical stage of the lifespan of the Company, the Liquidator controls and maintains the funds of the Company to ensure that the benefit of the creditors is not hindered. Dissolution finally kicks in, in which the Corporation is disbanded and the Registrar of Companies strikes the name off. Thus, the life of the company draws to a close.

II. Winding Up v. Dissolution

The corporation does not cease to exist as such upon winding up, even that it is dissolved. The company's operating equipment is altered when the management is passed to the liquidator's side and after the winding-up begins, the company's properties belong to the company before the breakup takes place. The corporation ceases to exist on dissolution as a single company and becomes unable to retain, sue and be sued on its own property. Thus, between the time of winding-up and closure, the legal existence of the corporation continues to exist.

In **Pierce Leslie & Co. Ltd. V. Violet Ouchterlony** [1], the Supreme Court held that the dissolution was followed by a winding-up. There is no statutory clause vesting in a trustee or having the effect of abrogating the assets of the dissolved company. A dissolved company's owners or creditors cannot be considered as its descendants and descendants. Its assets, if there are any, vest in the government upon dissolution.

It has been difficult to enforce rules concurrently with the enactment of the **Insolvency and Bankruptcy Code, 2016** and to determine precedent. A lot of changes to the Act were also contained in the IBC. The Code presents organisations with a proactive structure. There are only two forms of winding up after the passage of the Insolvency and Bankruptcy Code: either under the Companies Act of 2013 or the IBC Code of 2016. Winding up under this Act i.e., the Companies Act or the Insolvency and Bankruptcy Code, 2016, under section 2(94A).

III. Winding up Under Company's Act, 2013

There were two ways of winding up up prior to the Insolvency and Bankruptcy Code, the first being the voluntary winding up of sections 304 to 323 under the Companies Act and the second being winding up by the tribunal. With the passage of the code, the first was deleted and instead, compulsory winding up, i.e., winding up, but the current method under the 2013 Act is the Tribunal.

IV. Winding Up by the National Company Law Tribunal (Compulsory Winding Up)

The Tribunal can perform a winding-up if any of the conditions mentioned in section 271 are satisfied. The Tribunal may order the winding up of the company at the request of any individual who is authorised under section 272.

- A Company Can be Wound Up by the Order of the Tribunal:

1. Where the company has agreed, by special resolution, that the company should be wound up by the Tribunal;
2. Where the company has operated against the interests of India's sovereignty and integrity, security of state, good ties with foreign nations, public policy, decency or moral standards;
3. Where an application is filed by the Registrar or any other individual approved by the Central Government and the Tribunal finds that the company's affairs have been carried out in a fraudulent manner.

- If the Company was Designed for Fraudulent and Unlawful Purpose or

Where the individuals in the administration of the company's affairs are guilty of fraud, misconduct or misconduct and should be winded up in the interest of justice;

1. The company refused to file its financial statements or annual accounts with the Registrar for the immediately preceding five successive financial years; or
2. When the Tribunal is of the view that it is right and fair that it can no longer be in business, the firm must be wound up.

With the passage of the Insolvency and Bankruptcy Code, reasons for failure to pay debt and winding up have been removed.

- Winding Up by Special Resolution (Section 271)

The company's special resolution could determine that the Tribunal must wound up the Company. It is possible to pass the resolution for any reason. The Tribunal would see, though that the liquidation is not contrary to the general interest or to the needs of the corporation as a whole.

The Tribunal has also to take into account the company's potential to have a financial turnaround as the company suffered damages that forced the company to pass a special winding-up resolution. This provision is based on the presumption that as corporate bodies, shareholders have the necessary right to judge and determine whether or not the corporation can go out of existence.

It is the owners who have created the business and hence it is for them to dismantle the business. Without the control of the general meeting, the directors are not allowed to file a winding up motion. Subject to approval of the resolution, the directors will file this document.

The company must hold a general body meeting to pass a special resolution containing, in particular, its intention to wind up the Tribunal and set out the reasons for the explanatory note attached to it stating why it is imperative to wind up the company. It should be remembered that the court has the right to order the winding-up and is not under any obligation.

Company acting against the interests of sovereignty and integrity of India or of the security of the State or even of the friendly relations with foreign States.

Because of the geo-political scene and its contours, the remaining grounds of public order, decency and morals, such grounds as behaving against the interests of Indian sovereignty and integrity or the protection of the State or even friendly ties with foreign States, do not seem to belong to the same strain. The other factors remain a point of contention as there are enforcement bodies that can regulate them if the companies indulge in public indecency [2].

V. Company Affairs Conducted in a Fraudulent and Unlawful Manner

Any person authorised by the Central Government or the Registrar can apply for the winding-up proceedings before the Tribunal. The Tribunal may order the winding up on-premises such as –

i. Conducting the company's affairs and management in a fraudulent manner;
ii. The organisation was established for unlawful or fraudulent purposes; or
iii. The parties involved are responsible for bribery, misconduct or neglect in connection with the establishment of the company or the administration of its affairs.
iv. The company made a default in the filing of its financial statements with the Registrar.

Section 271(d) sets out the conditions for the winding-up of the company in the case of a breach in the reporting of the annual financial statements or in the annual returns. It is a significant feature to ensure that in organisational company administration there is no reward for non-accountability and indiscipline and that government corporations are not exceptions. If a default is made over five successive financial years, the winding up clause can be invoked. In any financial statements or annual returns, there may be defaults. This is therefore true if the annual return has been filed for five straight financial years, but the financial statements have not been filed on a regular basis. The opposite is also applicable. The crux and the main measure is that for five straight financial years, there may have been a default in one of the two cases. The immediate precedent of five straight years must be further emphasised [3].

VI. Just and Equitable

The Tribunal also may order that a company be winded up if it finds that the company should be wound up for fairness and equity. For a winding-up order, this is a fully separate and independent ground. To the degree that this is applicable, it is meaningless that the conditions should conform to those which, on one of the six grounds, warrant an order.

In exercising its authority on this ground, the Tribunal shall give due consideration to the interests of the company, its employees, its creditors and shareholders and to the public at large. The relief is like a last solution where the other solutions are not successful enough to safeguard the company's general interests.

When the company has neglected to build the company's key assets; the basic overview here is the case of **German Date Coffee Co**, where a corporation was set up to produce coffee on the basis of a patent to be issued by the Government of Germany and to be granted various licences. The German patent was not issued and separate and distinct licences were established by the company. In any event, on the investor's appeal, it was held that the company's substratum had ran its course and that the papers for which it was framed were impossible to complete; and so, it was fair and equal for the company to be winded up. [4]

In **Seth Mohan Lal v. Grain Chambers Ltd**., the Court can make an order to wind up a company pursuant to Section 162 of the Indian Companies Act, 1956, if the Court is of the opinion that it is reasonable and appropriate for the company to be wound up. The Court would weigh the interests of the owners as well as of the creditors when issuing an order to wind up on the basis that it is fair and rational that a company should be wound up.

The Company's substratum and aims are said to have vanished if the purpose for which it was incorporated has failed significantly, or if the Company's operation is difficult to carry on even at a loss, or if the remaining and future assets are deficient to satisfy the current liabilities. In the event of a substantive failure of the purpose with which the Company was formed, it cannot be claimed that the Company is not in a position to carry out its operations even at a loss, nor that its assets are insufficient to satisfy its responsibilities [5].

In the exercise of the Court's powers and on the grounds of equity and fairness pursuant to Section 443(1)(b) of the Act, the Court deferred the final judgement on that petition for a period of one year, given that during that period, the parties take such measures to assert their cases as to establish a clear balance of equities either in favour of or against a liquidation order in the case of **Aluminium Corporation of India Ltd. v. M/s. Lakshmi Rattan Cotton Mills Co. Ltd**. **[6]**

In the landmark case of **Yenidje Tobacco Co. Ltd**., the relationships between the two directors, who were the only shareholders, worsened to the point that they ceased to talk to each other at the same time the company itself began to thrive and in fact, the company made rather greater profits than it did until the conflict became so intense. The Court of Appeal unanimously ruled that it be wound up, regardless of this fact [7].

It can also be seen that the learned Judge applied to the facts of that case the principle of a just and equitable clause, since the conditions occurring, in that case, were of an extraordinary type. In any case, however, we must decide whether a theory which is usually confined to the two types of cases, viz., can be applied to the facts or to the particular instance where the substratum of the company has gone or where there is a full dead-lock in the administration of the company's affairs [8].

VII. The Procedure of Winding Up [9] (Section 274 to Section 365)

A sequential process of winding up under the Act is important to understand. The process provided for under the law shall be as follows:

If it is convinced that a prima facie case exists, the Tribunal can order the Company to be wound up. The Tribunal also orders the Company to file its appeals within 30 days of the order along with a statement of its affairs (this timeline may be extended under special circumstances).

Furthermore, the Tribunal shall also name a temporary liquidator or company liquidator at the time of the issuance of the order. The liquidator shall, upon appointment, file a statement of the specified form within seven days of the date of appointment, stating a conflict of interest or a loss of discretion with reference to his appointment.

If the Tribunal has issued a winding-up order, then the directors and such other officials shall compulsorily send the Company's completed and audited books to the provisional Liquidator within 30 days of that order. If the director or other officers fails to apply the audited books submitted, they shall be individually responsible for fines and incarceration for violation of the provisions of the Act.

The Tribunal shall notify the Liquidator and the Registrar within 7 days of the date on which the order for the appointment of the provisional liquidator is given. The Registrar shall, upon receipt of a copy of the document, accept it and notify the Official Gazette of the order. The Registrar shall, in the case of a public company, notify the stock market or markets where the company's shares are listed.

The winding-up order shall be considered to be a notice of discharge to the Company's officers, staff, and personnel, even when the Company's operation is continued.

Within 3 weeks of the date of issuance of the liquidation order, the liquidator of the company shall apply to the Tribunal an application for the creation of a liquidation committee to support and track the progress of the liquidation order. The liquidator, the representative of the secured creditors, and the competent nominee of the Tribunal will constitute such a body.

No suit or other legal action shall be instituted, or ongoing, for by, or against the Company, except with the leave of the Tribunal, when the order for winding-up is issued.

The Tribunal shall, following the issuance of the order of winding – up, issue an order to set up an advisory committee to assist the liquidator and to report to the Tribunal on matters which the Tribunal may guide. The committee shall not exceed 12 members, headed by the liquidator of the company and composed of the creditors and contributors of the company, or of other individuals, to the degree that the Tribunal may order.

The liquidator must deliver a report to the Tribunal within 60 days after the winding-up order has been released. The text, consisting of the existence and details of the properties, the value of the assets, the amount of capital given, the actual and contingent liabilities, etc., should be exhaustive. It shall also report to the Liquidator on the measures to be taken to increase the valuation of the properties. To check on the success of the Company from time to time, the Liquidator should put periodic reports before the Tribunal.
After scrutinising the Liquidator's report, the Tribunal shall decide the date during which the entire proceedings are to be concluded and the Company is to be dissolved, or the Tribunal may upon review of the report, order the disposal of the Company as a continuing entity or its properties or part thereof. A sales committee composed of the creditors, promoters, and officers of the Company is then formed to assist the Liquidator in the transaction.

Subsequently, the liquidator of the company shall, on the order of liquidation, take into custody and manage all the properties, results and actionable claims of which the company is or appears to be entitled. The property shall be considered to have been in the possession of the Tribunal as of the date of the winding-up order.

The Liquidator is obligated to send to the Tribunal the records of the receipts and transfers of the Company to be audited and a copy of the audit report to be submitted to the Tribunal and other copies to be submitted to the Registrar for review by any interested borrower, contributor or employee [10].
The Tribunal then directs the donors to pay him some cash owed to the venture. If any money is owed to the contributory by the corporation and the contributory has not paid the entire sum of the share, it is permitted to set off. In addition, the Tribunal may issue summons to those accused of possessing the property of the company and investigate such individuals. Apart from this, a declaration of the same must be submitted by the Liquidator if some other entity has any property of the Company.

The liquidator of the company has the right to call on the creditors to prove their cases, on which a list of creditors is prepared by the liquidator. Each creditor is then told about the approval or denial of their claims. The Liquidator, therefore, guarantees that a notice that the company is being wound up should be included in any invoice, order or business letter provided by or on behalf of the company.

The Liquidator shall make an appeal to the Tribunal for the winding up of the Company after all the formalities have elapsed and the operations of the Company have been fully wound up. If the Tribunal is of the view that it is appropriate and rational to disband the Company following the receipt of the complaint, an order of dissolution is given. The Liquidator shall send a copy of this order to the Registrar.

VIII. Conclusion

The procedure of a company's winding-up is not very easy; it involves many complications and technicalities within it. There was only one Act previously that traditionally regulated this area, but it has now become more difficult to enforce these laws concurrently and to determine precedent with the implementation of the Insolvency and Bankruptcy Code, 2016. Therefore, because of its technical details, the area of corporate law has now become a specialist sector but it still perpetrates other disadvantages because their association with the legal running of the company is broken up by the individual who manages the company.

For companies and limited liability partnerships, the Code and Legislation have a favourable structure. While the procedure is almost identical to the former regime, the biggest shift in the initiation of the winding-up process has taken place. Earlier, a company or any of its creditors could file a voluntary winding up motion, but the winding-up process will now be started by the company, directors, appointed partners or individuals responsible for exercising their corporate powers. In addition, the consent of creditors covering two thirds of corporate debt is compulsory in compliance with the Code for the initiation of voluntary winding-up proceedings.

To sum it up, a corporation that intends to wind up is now expected to comply with the Insolvency and Bankruptcy Code, 2016. As with the Businesses Act, 1956, the Code is very detailed and broader. Owing to the involvement of four adjudicating bodies, the High Court, the Company Law Board, the Board for Industrial and Financial Rehabilitation and the Debt Recovery Tribunal, the Code is intended to help resolve the delays and difficulties inherent in the method. As all cases would be filed under the Code, it will also reduce the pressure on the courts.

For the purpose of conducting the proceedings in winding-up a Company, and assisting the Court therein, there shall be appointed a person or persons to be called an Official Liquidator or Official Liquidators

Appointment of Official Liquidator (Sec. 359)

For the purposes of this Act, so far as it relates to the winding up of companies by the Tribunal, the Central Government may appoint as many Official Liquidators, Joint, Deputy or Assistant Official Liquidators as it may consider necessary to discharge the functions of the Official Liquidator. The liquidators so appointed under this section shall be whole-time officers of the Central Government. The salary and other allowances of the Official Liquidator, Joint Official Liquidator, Deputy Official Liquidator and Assistant Official Liquidator shall be paid by the Central Government.

Powers and duties of Company liquidator

Powers and duties of Company Liquidator in case of winding up by tribunal (Sec. 290):

1. Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power:

a. to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

b. to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;

c. to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;

d. to sell the whole of the undertaking of the company as a going concern;

e. to raise any money required on the security of the assets of the company;

f. to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;

g. to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;

h. to inspect the records and returns of the company on the files of the Registrar or any other authority;

i. to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

j. to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

k. to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;

l. to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;

m. to take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary,—

1. for winding up of the company;
2. for distribution of assets;
3. in discharge of his duties and obligations and functions as Company Liquidator; and

n. to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.

2. The exercise of powers by the Company Liquidator under sub-section (1) shall be subject to the overall control of the Tribunal.
3. Notwithstanding the provisions of sub-section (1), the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

Powers and duties of Company Liquidator in voluntary winding up (Sec. 314):
1. The Company Liquidator shall perform such functions and discharge such duties as may be determined from time to time by the company or the creditors, as the case may be.

2. The Company Liquidator shall settle the list of contributories, which shall be prima facie evidence of the liability of the persons named therein to be contributories.

3. The Company Liquidator shall call general meetings of the company for the purpose of obtaining the sanction of the company by ordinary or special resolution, as the case may require, or for any other purpose he may consider necessary.

4. The Company Liquidator shall maintain regular and proper books of account in such form and in such manner as may be prescribed and the members and creditors and any officer authorised by the Central Government may inspect such books of account.

5. The Company Liquidator shall prepare quarterly statement of accounts in such form and manner as may be prescribed and file such statement of accounts duly audited within thirty days from the close of each quarter with the Registrar, failing which the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.

6. The Company Liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

7. The Company Liquidator shall observe due care and diligence in the discharge of his duties.

8. If the Company Liquidator fails to comply with the provisions of this section except sub-section (5) he shall be punishable with fine which may extend to ten lakh rupees.

Contributories mean all those persons who are responsible to make payment to the company at the time of its winding up. Unless the court dispenses with the settlement of a list of contributories, the liquidator prepares the list of contributories. If the name of a shareholder falls in the list of contributories, he becomes liable to pay only such amount which has so far not been called and paid by him on the shares held by him. He can save himself from paying this amount only when he proves that his name has been wrongly included in the list of contributories.

List of Contributories:

The following two lists of contributories are prepared at the time of dissolution of a company:

(1) Contributories (List A):

Those shareholders who are members of the company at the time of its winding-up are included in list ‘A’. They are primarily liable for making payment to the company at the time of its winding-up up to the extent of the amount which remains unpaid on their shares up to that time. They are also called existing contributories.

(2) Contributories (List B):
Those persons who cease to be the members of the company within one year before the date of winding-up of a company are included in the List B. If the company is not in a position to pay its creditors, and the amount of deficiency is not recovered from contributories of List A, Liquidator makes a call on the contributories of List B. They are liable to contribute only towards those debts of the company which were in existence at the time when they ceased to the member of the company.

They are never liable for those debts of the company which were incurred by the company after they ceased to be the members of the company. All the contributories of this list shall share the liability of the company proportionately. These contributories are never liable to pay more than the amount which remains unpaid on their shares.

In the case of company limited by guarantee no contribution shall be required from any past or present member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up.

Points to be noted:
(1) The shareholders who ceased to be the members of the company for 12 months before the winding up of the company are never liable as contributories.

(2) If the liability of a shareholder is limited by share, he cannot be asked to pay more than the unpaid amount on his shares.

(3) A member of a company, whose liability is limited by guarantee, is not liable to pay more than the amount of guarantee.

Illustration :
A Limited company went into liquidation having the following liabilities:

(a) Secured creditors Rs 20,000 (securities realised Rs 25,000)

(b) Preferential creditors Rs 600

(c) Unsecured creditors Rs 30,500

Liquidator's expenses amount to Rs 252. The Liquidator is entitled to a remuneration of 3% on the amount realised and I'A % on the amounts distributed to unsecured creditors. The various assets (excluding securities) realised Rs 26,000.

Prepare Liquidator's Final Statement of Account.

Liquidator's Final Statement of Account

	Rs.			Rs.
Securities Realised	25,000	Liquidator's Expenses		252
Assets Realised	26,000	Liquidator's Commission:		
		@ 3% of Rs 51000	1530	
		@ 1.5% on Rs 28195	423	1,953
		Preferential Creditors		600
		Secured Creditors		20,000
		Unsecured Creditors		28,195
		(Paise 92.44 in the Rupee)		
	51,000			51,000

Assumption:

1. Liquidator has taken over the securities from secured creditors. Therefore his commission is calculated on Rs 51,000.
2. If gross amount is Rs 101.50, commission is Rs 1.50. If gross amount is Rs 28,618, commission

$$\frac{28{,}618 \times 1.5}{101.50} = \text{Rs. } 423$$