COMPANY LAW

Corporate Personality

It's Nature:-

Corporate personality is a creation of law. Legal personality of corporation is recognized both in English and Indian Law. A corporation is an artificial person enjoying in law capacity to have rights and duties and holding property. A corporation is distinguished by reference to different kinds of things which the law selects for personification. The individuals forming the corpus of the corporation are called its members.

Juristic personality of corporations pre-supposes the existence of three conditions.

1) Firstly, there must be a group or body of human beings associated for a certain purpose.
2) Secondly, there must be organs through which the corporation functions, and
3) Thirdly, the corporation is attributed will (animus) by legal fiction.

NOTE:-It is significant to note that a corporation is distinct from its individual members. It has the legal personality of its own and it can sue and be sued in its own name. It does not come to an end with the death of its individual members and, therefore, has a perpetual existence. However, unlike natural persons, a corporation can act only through its agents. Law provides special procedure for the winding up of a corporate body.

In certain cases, the corpus of the legal person is some fund or estate which is reserved for certain special uses. ***For example***, a trust-estate or the estate of an insolvent, a charitable fund etc., are included within the term 'legal personality'. However, English law requires that these estates or funds, to be recognized as legal persons, must be duly incorporated under the existing law. The law does not believe in personification of these estates or funds, instead, it personifies those corporate bodies which administer the estate or fund.

KINDS OF CORPORATIONS

Corporations are of two kinds, namely, (1) Corporation Aggregate, and (2) Corporation Sole.

Corporation Aggregate

A corporation aggregate is an association of human beings united for the purpose of forwarding their certain interests, Limited companies are the best example of a corporation aggregate. Such a company is formed by a number of persons who as shareholders of the company contribute or promise to contribute to the capital of the company for furtherance of a common object. Their liability is limited to the extent of their share-holding in the company. A limited company is thus formed by the personification of the shareholders. The property of the company is not that of the shareholders but its own property and its assets and liabilities are different from that of its members. The share-holders have a right to receive dividends from the profits of the company but not the property of the company.

For certain purposes, company has an independent existence from those of its members. It is for this reason that the company may become insolvent but its members may still be rich and wealthy. Conversely, the insolvency of the members does not adversely affect the company and it may continue to have a flourishing business. The death of members does not finish the existence of the company. Gower cites a unique example of this and writes that in the General Meeting of a company all the members died due to a bomb-explosion but it did not affect the existence of the company and it continued functioning as before.

The facts of the case were that one Saloman was carrying the business of boot and shoe manufacturing. He incorporated a company named **"Saloman & Co. Ltd."** with seven subscribes consisting of himself, his wife, four sons and one daughter. The company took over the personal business assets of Saloman for £38,782 and in turn, Saloman took 20,000 share of £ 1 each, debentures worth £10,000 of the company with charge on the company's assets and the balance in cash. His wife, four sons and a daughter took £1 share each. Subsequently company went into liquidation due to general trade depression. There were various unsecured creditors, who contended that Saloman could not be treated as a secured creditor of the company in respect of the debenture held by him, as he was the managing director of one-man company, which was not different from Saloman and the cloak of the company was a mere sham and fraud.

Lord Mac Naughten observed:

"When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate exercising all the functions of an incorporated Company. The Company is at law a different person altogether from subscribers to the memorandum, and though, it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits; the company is not in law the agent of the subscribers or trustees of them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the Companies Act."

Corporation Sole

Corporation sole is an incorporated series of successive persons. It consists of a single person who is personified and regarded by law as a legal person. In other words, a single person, who in exercise of some office or function, deals in the legal capacity and has rights and duties. A corporation sole is perpetual. The examples of corporation sole are Post-Master-General, Public Trustee, Comptroller & Auditor-General of India, the President of India, The Crown in England etc.

A Corporation sole is distinguishable from "a mere succession of officers or persons exercising the same rights." As Gray rightly pointed out, "If a corporation sole exists, an occupant of an office can generally acquire property for the benefit of his successors as well as himself, he can generally recover for injury inflicted on property pertaining to the office while such property was in the hands of his predecessor and he can sometimes enter into a contract which will bind and endure to the advantage of his successors."

Generally, corporation sole are the holders of a public office which are recognized by law as corporation. The chief characteristic of a corporation sole is its "continuous entity endowed with a capacity for endless duration".

A corporation sole is an illustration of double capacity. For instance, the King of England exercises the function of the Crown and in his capacity as the constitutional had, he can confer rights and duties upon himself as an individual. The natural person may thus owe a duty to himself as a legal person. Same is the position of the President of India. As regards the British Crown, it is generally said, "The kind is dead, long live the king." This proverb indicates the double capacity of the Crown as a corporation sole, the first part refers to the Crown as a natural person i.e., individual, while the latter part expresses his position as a legal personality. In simple words, it means that even after the death of the kind, his legal capacity as a Crown remains in existence as a corporation sole.

The object of corporation sole is similar to that of corporation aggregate. In it a single person holding a public office holds the office in a series of succession, meaning thereby that with his death, his property, right and liabilities etc., do not extinguish but they are vested in the person who succeeds him. Thus on the death of a corporation sole, his natural personality is destroyed but legal personality continues to be represented by the successive person. In consequence, the death of a corporation sole does not adversely affect the interests of the public in general.

Position of Corporate personality in India

The concept of corporate personality is well recognized in India. The position of Karta in a hindu coparcenary is an illustration on the point. In the coparcenary system all members of the family have some right and duty, but the karta is the head of the family who manages the entire family property. He has right to alienate the family property and all the family members are under his control. He can be sue or be sued on behalf of the join family. In juristic terms he is a corporation Sole Having Double Capacity i.e. - As a natural person he is the eldest of the family and as a legal person he is the karta of the family. The reserve bank of India has a corporate existence because it is an incorporated body having an independent existence. But Union Public comm. and Hindu Family both of them are recognized as a legal person because both these cannot hold properties in their own name.

Advantages of Corporate Personality

(1) Incorporation greatly simplifies legal procedure, enabling persons to sue a single incorporated body rather than numerous individuals. The corporation, on its part, can also sue as a single legal entity.

(2) The death or withdrawal of a member or members does not disturb the existence of an incorporated body. The members may come and go but the corporation continues perpetually forever.
(3) The financial liability of shareholders is limited only to the extent of their share-holding and not beyond it.

(4) An incorporated body being a legal entity, can freely dispose of its property in its own name. Its property is clearly distinguishable from that of the shareholder's property.

(5) Incorporation helps the growth of commerce and industries. Even small investors have an opportunity to invest their income in the capital of the corporate body. In this way incorporation enables the petty investors to contribute to the development of national economy.

Disadvantages of incorporation

There are, certain disadvantages an inconveniences with incorporated bodies, some of these disadvantages are-
(1) Incorporation of a company involves a number of legal formalities and the consequent expenses that go with it. The affairs and working of a company have to be conducted strictly in accordance with the applicable legal provisions, non-compliance of which entails penal consequence. Various returns

and documents are required to be filed with the Registrar of companies. Certain books and registers are compulsorily required to be maintained. Approvals and sanctions of the company law Board, the Central Government, the court, the Registrar of companies or other appropriate authority, as the case may be, are required to be obtained for certain corporate activities. Meetings of the directors or shareholders are to be held and conducted in accordance with the provisions of the Act.

Other forms of business organizations are comparatively free from legal compulsions and formalities.

(2) Another disadvantage of incorporation is loss of privacy. Various returns, resolutions and documents required to be filed with the Registrar of companies. The office of the Registrar of companies is a public office. Any member of the public can, on payment of prescribed fees, inspect any of the documents filed by a public company with the Register of companies. Even in the case of private companies the same exposure is there but in a restricted scale.

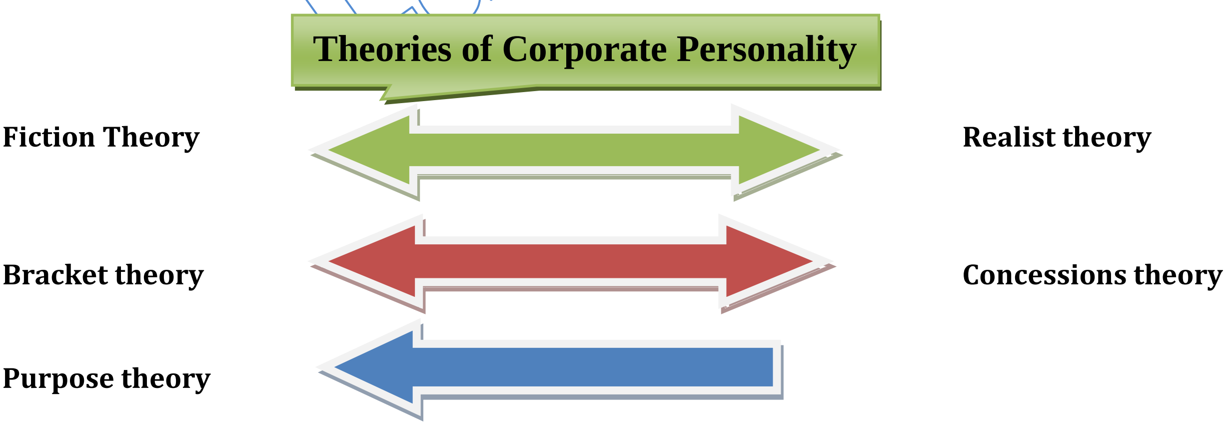
(3) Members of a company cannot have as effective and intimate control over its working as in partnership or proprietary business. This is particularly so where the membership of the company is too large. The company functions through the representatives of the shareholders the directors. Members, therefore, do not have any active and complete control over the company's working as the partners may have over the first's affairs or a sole proprietor may have in his businesses.

(4) The companies Act provides elaborate and detailed procedure of winding-up of companies which is more expensive and time consuming than what is applicable toothier forms of business organization.

(5) Any company and in particular a public company has much greater public accountability inasmuch as, it cannot act against public interest. As and when public interest will come in conflict with the corporate working, intervention by regulatory authorities will come.

(6) Since the control of economic resources is in few hands and in spite of public accountability, it is possible for those few to defraud unsuspecting other people who have contributed founds to the company either as shareholder or debenture holder or creditor or lender by diverting funds of the company to their private channels leaving the company high and dry. There are ample examples of this. By the time the regulatory authorities or other common stockholders come to realize the matter, the damages is already done and cleverness of the manipulator often makes it difficult to fix responsibilities and bring to book the wrong doers.

Jurists have expressed conflicting views regarding the exact nature of corporate personality. These views find expression through different theories of corporate personality.



1 **Fiction Theory**-This theory is expounded mainly by Savigny, Salmond, Coke, Blackstone and Holland. According to this theory, a corporation is clothed with a legal personality. The personality of a corporation is different from that of its members. Savigny regarded corporation as an exclusive

creation of law having no existence apart from its individual members who form the corporate group and whose acts by fiction, are attributed to the corporate entity. As a result of this, change in the membership does not affect the existence of corporation or its unity. Savigny further pointed out that there is double fiction in case of a corporation. By one fiction, the corporation is given a legal entity, by another it is clothed with the will of an individual. Thus fictitious personality of a corporation has also a will of its own which is different from that of its members.

Gray justifies fiction theory on the ground that the main object of incorporation is to protect the interests of persons having common objectives. Like fictitious personality, the will of the corporation is also an imaginary creation of law.

2. **Realist Theory**-The founder of Realist theory was the noted German jurist Johannes Althusius and its main propounder was Gierke who believed that every collective group has a real mind, a real will and a real power of action. A corporation therefore, has a real existence, irrespective of the fact whether it is recognized by the State or not. The corporate will of the corporation finds expression through the acts of its directors, employees or agents. The existence of a corporation is real and not based on any fiction. It is a psychological reality and not a physical reality. Gray, however, denies the existence of collective will. He calls it a figment. To quote his own words, "to get rid of the fiction of an attributed will be saying that corporation has a real general will is to derive out one fiction by another.

3.**Bracket Theory**.-The Bracket theory is associated with the well-known German jurist Lhring. According to this theory juristic personality is only a symbol to facilitate the working of the corporate bodies. Only the members of the corporation are 'persons' in real sense and a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation.

4. **Concession Theory**. - The theory is basically linked with the philosophy of sovereign state. It presupposes that corporation as a legal person has great importance because it is recognized by the State or the law. According to this theory, juristic personality is a concession granted to corporations by the State. It is entirely at the discretion of the State to recognize or not to recognize a juristic person. The theory closely resembles the fiction theory as it also believes that there is no juristic personality apart from the creation of law. It is for this reason that the supporters of the fiction theory also accept the view point put-forth by concession theory. Notable among them are Savigny, Salmond and Dicey. This theory differs from the fiction theory inasmuch as it emphasizes on the discretionary power of the State in the manner of recognizing the corporate personality of the corporation.

5. **Purpose Theory**. - The main exponent of this theory was the noted German jurist Brinz, E.I. Bekker, Aloys and Demilius also supported this theory. The theory is founded on the view that corporations are treated as 'persons' for certain specific purposes. The assumption that only living persons can be the subject-matter of rights and duties would have deprived imposition of rights and duties on corporations which are non-living entities. It therefore, became necessary to attribute 'personality' to corporation for the purpose of being capable of having rights and duties.

Corporation

Introduction-

Company form of business is considered to be the best form among all other forms.

Corporate form of organization is the greatest invention of the 19th century, of course next after the wheel. It has brought fourth such a radical change in the business world which perhaps, without it could never have imagined. It has got a very long history. After independence the present act of 1956 was enacted by the central govt.

The corporate structure has assumed further significance in the present days of globalization, as a vehicle of economic growth and development throughout the world.

This is a form of business organization capable of mobilizing larger amount of capital with the provisions for limited liability and efficient and specialized management to organize and run the modern large scale business, the answer was a joint stock company.

The companies act is a self-contained act and it contains all the provisions regarding regulating and managing the affairs of a registered company.

Meaning and Definitions: -Literally, the word "company" means a group of persons associated for some common object such as business, charity, research etc.

Section 3 of the companies act, 1956 defines a company as– A company means, a company form and registered under the act, or an existing company.

A judicial definition of the company defines company as – A company is an incorporated association which is an artificial person created by law, having a separate entity, with a perpetual succession and a common seal.

A company is a form of business organization in which the funds of a large no. of investors (Members) are managed by a few persons (called Board of Directors) for the purpose of earning profit which is shared by all the investors.

What is a company?

- A Company is a voluntary association of persons formed for the purpose of doing business, having a distinct name and limited liability.
- They can be incorporated under the Companies Act (it may be any type of company)
- Corporations enacted under special enactments (Even those which are incorporated outside India)
- Corporate sole
- Any other body corporate notified by the central government

Features of company

- A company is considered as a separate legal entity from its members, which can conduct business with all powers to contract.
- Independent corporate entity (Saloman V. Saloman) It is independent of its members and shareholders.

Other features

- Limited Liability (either by share or guarantee)
- It can own property, separate from its members. The property is vested with the company, as it is a body corporate.
- The income of the members are different from the income of the company (Income received by the members as dividends cannot be same as that of the company)
- Perpetual succession: Death of the members is not the death of the company until it is wound up
- As it is a legal entity or a juristic person or artificial person it can sue and be sued
- The company enjoys rights and liabilities which are not as that of the members of the company

Characteristics or Essential features of a company

1. Incorporated association
2. Artificial legal person
3. Separate legal entity
4. Perpetual succession
5. Common seal
6. Limited Liability
7. Transferability of shares
8. Separate property
9. Capacity to sue

1. **An Incorporated Association: -** **A** company has to be incorporated or registered under the prevalent Companies Act. Registration creates a company and it is compulsory for all associations or partnership having members more than 10 in banking and 20 in any other trading activity.
2. **An Artificial person Created by Law: -**A Company is a creation of law and is sometimes called an artificial person. It does not take birth like natural person but comes into existence through law. But a company enjoys all the rights of a natural person. It has right to enter into contracts and own property. It can sue and be sued in its own name. It is a artificial person so it cannot take oath, cannot presented in court and cannot be divorced or married.
3. **Sepate Legal Entity: -**A Company is an artificial person and has a legal entity quite distinct from its members. Being separate legal entity, it bears its own mane and acts under a corporate name. It has a seal of its own, its assets are separate and distinct from those of its members. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not agents of the company and so they cannot bind it by their acts.

   The fact that the company has its own identity separate from its shareholders was highlighted in the case of Soleman V/s Soleman and Co.Ltd.

   The same view was expressed in an interesting American case- " People's Pleasure Park v/s Rehelder 6 South Eastern Rep. 794.

   The facts of the case are: - The Article contained a prohibition that title to land should never pass to a coloured person. The land was sold to a corporation all the members of which were Negroes. It was held that the corporation was distinct from its members and that the transfer was valid."

   The Indian courts have also upheld the independent and separate legal entity of a company. The Calcutta High court recognized this principle even much earlier than the decision given in Saloman & Co. Ltd. Case.
   The facts of the case decided by the Calcutta High court in 1886 are as follows:-

   Certain persons transferred a tea estate to a company and claimed exemptions from *ad valorem* duty on the ground that they themselves were the shareholders in the company and therefore it was nothing but a transfer from them in one to themselves under another name.
   The court rejected the plea and observed: "The Company was a separate person, a separate body altogether from the shareholder and the transfer was as much a conveyance, a transfer of the property, as if the shareholders had been totally different persons."
   {In Re Kondali Tea Co. Ltd. (1886) ILR 13 Cal. 43.}
4. **Perpetual succession:** The life of the company is not related with the life of members. Law creates the company and dissolves it. The death, insolvency or transfer of shares of members does not, in any way, affect the existence of a company.

According to Tennyson: "For men may come, men may go. I go on forever." i.e. in the case of a company it may be said that "members may come and go but company goes on forever. "It is a legal person come into being by law and only law can bring its end, none else.

5. **Common Seal:-**On incorporation , a company becomes legal entity with perpetual succession and a common seal. The common seal of the company is of great impotrtance. It acts as the official signature of the company. The name of the company must be engraved on the common seal. A document not bearing the common seal of the company is not authentic and has no legal importance.
6. **Limited Liability: -**It is also an important feature of the company. If anything goes wrong with the company, the risk of the member is only to the extent of the amount of his shares and nothing more. He is only responsible to pay the remaining amount on the share when called upon by the company.
7. **Transferability of shares:** - A shareholder can transfer his shares to any person without the consent of other members. Under AOA, a company can put certain restrictions on the transfer of the shares but it cannot altogether stop it. Private company can put more restrictionson it shareholders on the transferability of shares.
8. **Limitation of work:** - The area of work of a company is fixed by its charter (MOA). A company cannot do anything beyond the powers defined in it. Its action is therefore, limited.In order to do work beyond the MOA, there is a need for its alteration.
9. **A voluntary association for profit:** - A company is a voluntary association of persons to earn profits. It is formed for the fulfillment of some public good and whatsoever profit is divided among its shareholders. A company cannot be formed to carry on any activity against the public and having no profit motive.
10. **Representative Management:** - Shareholders of a company are widely scattered. It is not possible for all the shareholders to take part in the management of the company. They leave this to the representatives, the Board of Directors and the company is managed by the BOD.
11. **Termination of Existence:** - A company created by law, carries on its affairs according to law and ultimately is affected by law. Generally, the existence of a company is terminated by winding up.

Lifting of Corporate Veil

- As the company is a separate legal entity, is has been provided with a veil, compared to that of individuals who are managing the company.
- But if the court feels that such veil has to been used for any wrongful purpose, the court lifts the corporate veil and makes the individual liable for such acts which they should not have done or doing in the name of the company

Circumstances to lift the corporate veil

The corporate veil can be lifted eitherunder the

- Statutory provisions or
- Judicial interpretations

The statutory provisions are provided under the Companies Act, 1956

The other circumstances are decided through **judicial interpretations**, which are based on facts of each case as per the decisions of the court.

Statutory circumstances for lifting the corporate veil

- **Reduction in membership**- Less than seven in public company and less than two if it is a private company
- **Failure to refund application money**- After the issue of shares to the public, the company has to pay back the initial payment to the unsuccessful applicants (SEBI Guidelines- 130 Days), if they fail to do so, the corporate veil can be lifted.
- **Mis-description of companies' name**- While signing a contract if the company's name is not properly described, then the corporate veil can be lifted.
- **Misrepresentation in the prospectus**- (Derry Vs Peek) In case of misrepresentation, the promoters, directors and every other person responsible in this matter can be held liable.
- **Fraudulent Conduct**- In case the company is carried on with an intent to defraud the creditors, then the court may lift the corporate veil.
- **Holding and subsidiary companies**- A subsidiary has a distinct legal entity from the holding company other than in a few circumstances, so if otherwise shown, the court may under the Act, lift the corporate veil of the subsidiary company.

Circumstances to lift the corporate veil through judicial interpretations

- When the court feels that there are no statutory provisions which can pierce the corporate veil, and the identity of the company is not the one which has to exist, and the court has to interfere in order to avoid the activities that are done in the name of the company by persons managing them, it has been empowered to do so.

The circumstances are:-

Judicial interpretations by the court are as follows:

- **Protection of Revenue**- Whenever a company uses its name for the purpose of tax evasion or to circumvent tax obligations

- **Prevention of fraud or Improper conduct**- The incorporation has been used for fraudulent purpose, like defrauding the creditors, defeating the purpose of law etc.

- **Determination of the character of the company**- Enemy Company or all the members being the citizens of the enemy country. (Daimler Co. Ltd V. Continental Tyre & Rubber Co. Ltd)

Other circumstances

- **Where a company is used to avoid welfare legislation**- If a company is formed in order to avoid the benefits to the workers like bonus, or other statutory benefits.
- **For determining the technical competence of the company**- To look into the competency of the company or the shareholders or promoters.***(New Horizon's Ltd and Another V. Union of India (1994)***

The circumstances under which the courts may lift the corporate veil may broadly be grouped under the following two heads
A. Under statutory provisions
B. Under judicial interpretations.

A. UNDER STATUTORY PROVISIONS- The veil of corporate personality may be lifted certain cases or pierced as per express .provisions of the Companies Act, 1956. In other words, the advantage, of 'distinct entity' and limited liability' may not be allowed to be enjoyed in certain circumstances.

B. UNDER JUDICIAL INTERPRETATIONS- it's difficult to deal with all the cases in which courts have lifted or might lift the corporate veil. Some of the cases where the veil of the corporation was lifted by judicial decisions may be discussed to form an idea as to the kind of circumstances under which the façade of corporate personality will be removed or the persons behind the corporate entity identified and penalized, if necessary.

1**. Protection of revenue-** In Sir Dinshaw Maneckjee Petit, ReAIR the assessee was a millionaire earning huge income by way of dividend and interest. He formed four private companies and transferred his investments to each of these companies in exchange of their shares. The dividends and interest income received by the company was handed back to Sir Dinshaw as a pretended loan. It was held that the company was formed by the assessee purely and simply as a means of avoiding tax and company was nothing more that assessed himself.

It did no business, but was created simply as a legal entity to ostensibly receive the dividends and interest and to hand them over assessee as pretended loans whole of its shares to be allotted to his wife and an employee of the company. Who were appointed to be its directors? It was held that since the defendant (Horne) in fact controlled the company its formation was a mere 'cloak or sham' to enable him to break his agreement with the plaintiff. Accordingly, an injunction was issued against him and against the company he had formed restraining them from soliciting the plaintiff's customers.

2. **Determination of the enemy character of a company.-** Company being an artificial person cannot be an enemy or friend. However, during war, it may become necessary to lift the corporate veil and see the persons behind as to whether they are enemies or friends. It is because, though a company enjoys a distinct entity, its affairs are essentially run by individuals.

3. **In case of economic offences-** In Santanu Ray v. Union of India, it was held that in case of economic offences a court is entitled to lift the veil of corporate entity and pay regard to the economic realities behind the legal façade. In this case, it was alleged that the company had violated section 11(a) of the Central Excises and Salt Act, 1944. the Court held that the veil of the corporate entity could be lifted by adjudicating authorities so as to determine as to which of the directors was concerned with the evasion of the excise duty by reason of fraud, concealment or willful mis-statement or suppression of facts or contravention of the provisions of the Act and the rules made there under.

4. **Where company is used to avoid welfare legislation-** Where it was found that the sole purpose for the formation of the new company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction.- Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd. The

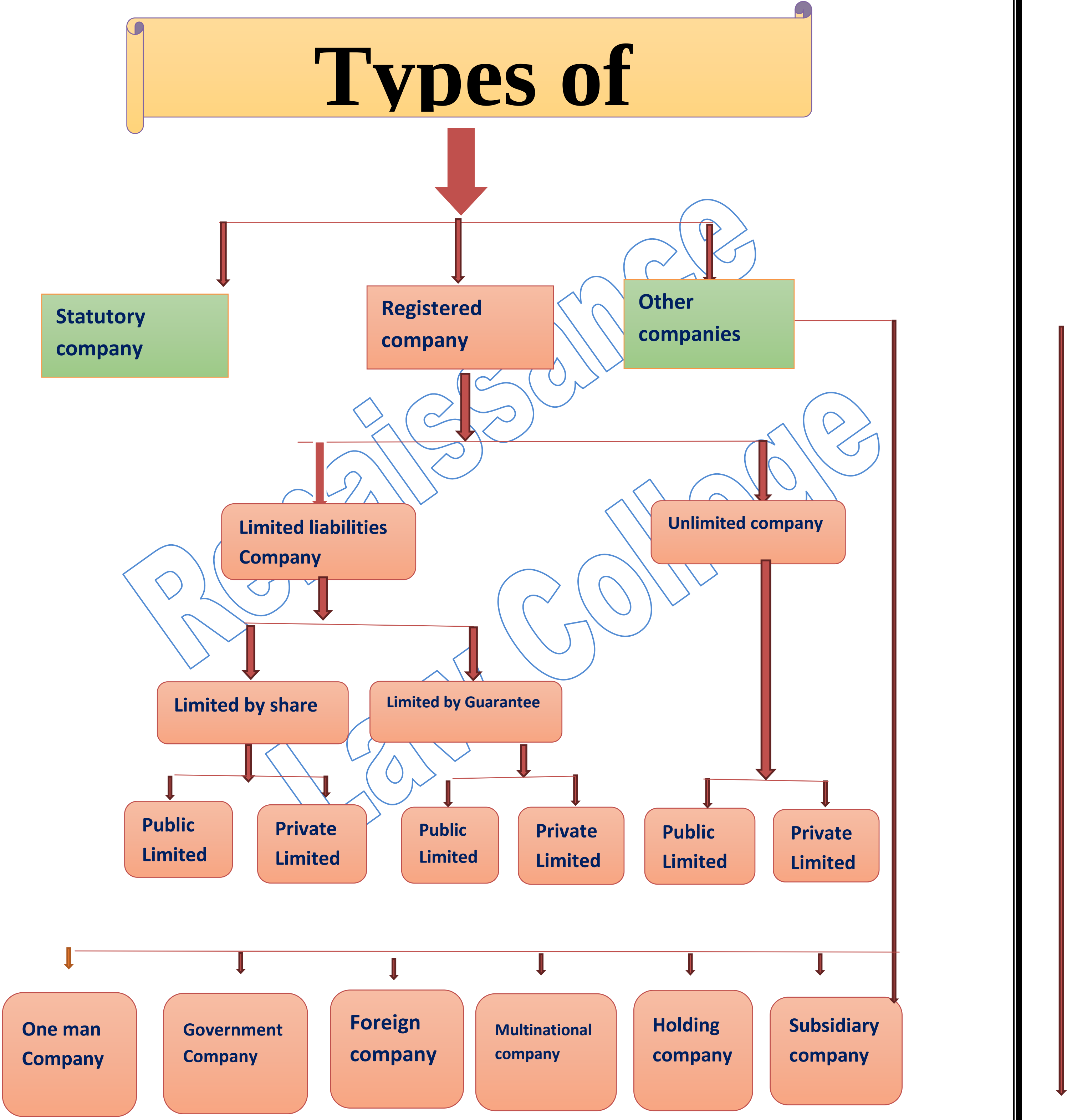
facts of the referred case are quite interesting and may be noted with advantage. A limited had purchased shares of B limited by investing a sum of Rs. 4, 50, 000. It was getting annual dividends in respect of these shares and the amount so received was shown in the profit and loss account of the company year after year. It was taken into account for the purpose of calculating the bonus payable to workmen of the company. Sometime in the course of the year 1968, the company transferred the shares of B limited a subsidiary company wholly owned by it. C limited had no other capital except the shares of B limited transferred to it by the A limited. It had no other business or source of income whatsoever except receiving the dividend on the shares of B limited. The dividend income from the shares of B limited was not transferred to the A limited and therefore it did not find place in the profit and loss account of the A limited and there, it did not find place in the profit and loss account of bonus to the workmen of the company got reduced. On an industrial dispute raised by the workmen of the company got reduced. On an industrial dispute raised by the workmen for including the dividend in the profits of a limited the industrial Tribunal and later the High Court held that A limited and C limited were two independent companies with separate legal existence and, therefore, the profits made by C limited could not be treated as profits of A limited.

5. **Where company is used for some illegal or improper purpose-** Courts have shown themselves willing to lift the veil where device of incorporation used for some illegal or improper purpose.

6. **To punish for contempt of Court-** In Jyoti Limited v. Kanwaljit Kaur Bhasin, a firm of two partners agreed to sell two floors to parties but cancelled the agreement. Litigation followed and the High Court restrained the firm from selling the property. In the meantime, a private company was floated by the two partners who being the only two shareholders became the Chairman and the Managing Director respectively and the property was transferred to the company. In spite of the High Court's restraint order the company sold off the two floors. In answering to the contempt proceedings, the partners of the firm took the plea that the sale had been made by the company and therefore the firm had not disobeyed the court's order.

7**. For determination of technical competence of the company-** The Supreme Court in one of its recent decision has delivered an interesting and very significant judgment with regard to lifting of corporate veil.

8. **Where company is a mere sham or cloak-** In Delhi Development Authority v. Skipper Construction Company. The Supreme Court held that the fact that the director and members of his family had created several corporate bodies did not prevent the court from treatment all of them as one entity belonging to and controlled by the director and his family if it was found that these corporate bodies were mere cloaks and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.


Types of
Statutory company
Registered company
Other companies
Limited liabilities Company
Unlimited company
Limited by share
Limited by Guarantee
Public Limited
Private Limited
Public Limited
Private Limited
Public Limited
Private Limited
One man Company
Government Company
Foreign company
Multinational company
Holding company
Subsidiary company

On the Basis of incorporation

- **Statutory company.**
- **Registered company.**

Statutory company:

- A statutory company is brought into existence under the act passed by the legislature of the country or state. Powers, responsibilities, liabilities, objects, scope etc. of such a company are clearly defined under the provisions of the Act which brings it into existence. Usually, such companies are established to run the enterprises of social or national importance.
- Such companies are not to prepare M.O.A. and A.O.A., since they are governed by the Act which has brought them into existence. Their working report is placed before the parliament or state legislature concerned.
- They are audited by the Auditor Journal and such companies are made with an objective of serving the people and not to earn profit.
- Such companies are the corporations created by the Government.

For Example: - Reserve Bank of India, The life Insurance corporation of India, FCI, MPFC, MPSIDC etc.

Registered company: -

- A registered company is a company which is organized by getting it registered with the Registrar of companies under the provisions of companies Act of the country concerned.
- The formation, working and continuity of such a company are governed by relevant provisions of the companies Act.
- Most of the companies in the field of industry and commerce are registered companies.
- In India such companies are registered under the companies Act, 1956.

On the basis of liability

Limited liability Company:- When the liability of the members of a company is limited to the extent of the nominal value of shares held by them, such companies are known as 'Limited liability companies.

- Companies limited by Shares-Where the liability of the members of a company is limited by the Memorandum of Association to the amount which remains unpaid on the shares. In case of winding up of the company the members cannot be asked to pay more than the amount unpaid on the shares held by them. A company limited by shares may be a public company or a private company.
- Limited by Guarantee not having share capital-In this type of companies the memorandum of Association limits the members' liability. It will be based on the undertaking that has been given in MOA for their contribution in case of a winding up.
- Limited by guarantee having share capital- In such cases, the liability would be based on the MOA towards the guaranteed amount and the remaining would be from the unpaid sums of the shares held by the person concerned.

Unlimited Company

- There is no limit on the liability of the members. The liability in such cases would extend to the whole amount of the company's debts and liabilities.
- Here the members cannot be directly sued by the creditors.
- When the company is wound up, the official liquidator will call upon the members to discharge the liability.
- The details of the number of members with which the company is registered and the amount of share capital has to be stated in the Articles of Association (AOA).

Government Company

- When 51% of the paid up share capital is held by the government.
- The share can be held by the central government or state government. Partly by central and partly by two or more governments.
- As the legal status of the company does not change by being a government company, there are no special privileges given to them.

Foreign Company

- A company incorporated outside India, but having a place of business in India.
- If it does not have a place of business in India but only has agents in India it cannot be considered to be foreign company.

Multinational company: - A company having business in more than one country or in other words having its business in many countries is known as multinational company.

Example:- Cipla, pepsi etc.

On the basis of number of member:-

Private company
Public company

Private Company

- A company which has a minimum of two persons. They have to subscribe to the MOA and AOA
- It should be have a minimum paid up capital of 1 lakh or more as prescribed by the article.
- The maximum number of members to be fifty (it does not include members who are employed in the company, persons who were formerly employed)
- The rights to transfer the shares are restricted in the Private companies
- Prohibits any invitation to the public to subscribe and therefore it cannot issue a prospectus inviting the public to subscribe for any shares in, or debentures of the company
- It prohibits acceptance of deposits from persons other than its members, directors or their relatives.
- If two or more are holding one or more shares in a company jointly, they shall for the purpose of this definition, be treated as a single member.
- As there is no public accountability like a public company, there is no rigorous surveillance.

Exemption and Privileges of a Private company

- It can have a minimum of two members.
- It can commence business immediately after obtaining certificate of incorporation.
- It need not issue prospectus or statement in lieu of prospectus.
- It can have a minimum of 2 directors.
- It need not hold statutory meeting or file statutory report with the ROC.

Public Company

- A Public company means a company-
  - Which is not a private company
  - Which has a minimum paid-up capital of Rs 5 lakh or such higher paid-up capital, as may be prescribed
  - Which is a private company and is a not a subsidiary of a company, which is private company.

- It includes- any company which is a public company with a paid up capital of less than 5 lakh, then it has to enhance its paid up capital as per the statutory requirement

Conversion of Company

- The Act provides for conversion of public company into a private company and vice versa
- A private company is converted into a public company either by default or by choice in compliance with the statutory requirements.
- Once the action for conversion takes place then, a petition can be filed with the central government with the necessary documents for its decision on the matter of conversion.

On the basis of control:- Holding and subsidiary company.

Holding company: -A company shall be deemed to be the holding company of another, if that other is its subsidiary.

Subsidiary company:A company is said to be subsidiary of another if:

- The other company controls the composition of its Board of Directors.
- The other company holds more than half in nominal value of its equity share capital or more than half of total voting power of such company.
- It is a subsidiary of such a company which is itself subsidiary of any other company.

Registration and Incorporation

- Association of persons or partnership or more than 20 members (10 in case of banking) can register to form a company under the Companies Act, 1956
- If they do not register they can be considered to be illegal association. The contract entered into by this illegal association is void and cannot be validated. Its illegality will not affect its tax liability or its chargeability
- The certification of incorporation is the conclusive evidence, that all the requirements for the registration have been complied with the

Incorporation of a Company

Formation or incorporation of a company: - A Joint stock Company is said to be formed when it is incorporated or registered under the Companies Act, after completion of the formalities as required under the Act. Before a company is formed, a lot of preliminary work or works are to be performed. The formation of a company is a lengthy process.

Steps in formation of a company are as follows

- Promotion
- Incorporation (Registration)
- Capital Subscription
- Commencement of Business
- Only first two steps are required for the formation of a Private and a Public Ltd. Company not having any shares.
- All the four stages are required to be fulfilled by a public ltd company having a share capital.

Promotion:- It is the first stage in the formation of a company. The term 'promotion' refers to the aggregate of activities designed to bring into being an enterprise to operate a business.
According to **Guthmann and Dougall-** " Promotion starts with the conception of the idea from which the business is to evolve and continues down to the point at which the business is full, ready to begin operations in a going concern."

Stages of promotion

- Discovery of an idea. (possibility of starting a new business)
- Detailed investigation.(commercial feasibility of an idea)
- Assembling. (Projecting the fundamental idea, securing all needed property/finance etc.)
- Financing the proposition (Deciding about the capital structure of a company)

Promoters

The persons who conceive an idea of a company decide and do the necessary work for formation of a company are called the promoters of the Company.
The Promoters are the persons who decide on the formation of the company.

The promoters of a company stand undoubtedly in a fiduciary position though they are not the agent or a trustee of a company. They are the ones "who create and mould the company".
They may have to enter into pre-incorporation contracts, which can be validated after the incorporation of the company for obtaining certificate of incorporation.
They can be remunerated for their services, but they have to enter into a contract before the incorporation of the company through a pre incorporation of the company
They will usually act as nominees or as the first directors of the company
They enter into contracts after the incorporation and before the commencement of business.
But they need not compulsorily participate in the formation of the company. Sometimes, a few persons may only act as professionals who help the promoters on behalf of the company like the solicitor, chartered accountant etc. and get paid for their services.
The promoters in most of the cases decide as to what is the type of a company to be formed?
In India promoters generally secure the management of the company that is formed and have a controlling interest in the company's management.
They cannot make profit at the expense of the company, which they have promoted without the knowledge and consent of the company. In case they do so, they may be compelled to account for it.
They cannot sell their property to the company at a profit unless all the material facts are disclosed at the independent board of directors or the shareholders of the company.
If they do so, the company may repudiate the contract of sale or confirm the sale after recovering the profit made by the promoter.

Functions of the promoters

- To conceive an idea of forming a company and explore its possibilities.
- To conduct the necessary negotiation for the development of the business.
- To collect the requisite number of persons who can sign the MOA and AOA of the company and also to act as the first directors of the company.
- **The decide about the**—Name and location of its registered office, the amount and form of its share capital, the brokers or underwriters for capital issue, if necessary, the bankers, auditors and legal advisers.
- To get the MOA and AOA drafted and printed.
- To enter into preliminary contracts with the vendors, underwriters, etc.
- To make arrangements for the preparation of prospectus, its filing, advertisement and issue of capital.
- To arrange for the registration of company and obtain the certificate of incorporation. To defray preliminary expenses.
- To arrange for the minimum subscription.

Legal position of a promoter

- The promoter is neither a trustee nor an agent of the company because there is no company yet in existence. The correct way to describe his legal position is that he stands in a fiduciary position towards the company about to be formed.
- They have in their hands the creation and moulding of the company.
- They have the power of defining how and when and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation.

Rights of promoters

- Right to indemnity.
- Right to receive the legitimate preliminary expenses.
- Right to receive remuneration.

Duties of promoters

- To disclose the secret profit.
- To disclose all the material facts.
- The promoter must make good to the company what he has obtained as a trustee.
- Duty to disclose private arrangements.
- Duty of promoter against the future allottees.

Liability of promoters

- Liability to account in profit.
- Liability for mis-statement in the prospectus.
- Personal liability.
- Liability at the time of winding up of the company.

Important steps in Registration of

- Application for Availability of Name of company.
- Preparation of Memorandum and Articles of association.
- Vetting of Memorandum and Articles, Printing, Stamping and signing of the same.
- Power of Attorney.
- Additional Documents Required.
- Statutory declaration.
- Payment of registration fees. Certification of Incorporation.

Promoters have the following liabilities under the Companies Act, 1956

- They can be liable for non-compliance of the provisions of the Act
- Severe penalty may be imposed
- The court may suspend the promoter from taking part in the management of the company
- Liable for any untrue statement in the prospectus to the person who has subscribed for any shares or debentures on the faith of the prospectus

The liabilities are:-

a) To set aside the allotment of shares,
b) Sued for damages,
c) Sued for compensation
d) Criminal proceedings

The requirements are as follows

- Application for availability of name
- Preparation of MOA and AOA
- Selection and finalization of MOA and AOA- Its printing, stamping and signing
- Preparation of other necessary documents
- Filling of the required documents for Registration to obtain certificate of incorporation and Certificate of commencement of business.

Memorandum of Association

The company to be registered under the companies act is required to have 2 documents stamped, registered and filed with the registrar of companies they be MoA and AoA.

- **MoA has been defined as** – MoA of a company as originally frame or as altered from time to time in pursuance of any previous company's law or of this act.
- MoA is the main document which contains rules regarding its constitution, objective, activities and area of operation of the company. This document is mainly made out for the outside world or in other words we can say that MoA is a mirror of a company in which an outsider can look its image.
- It also defines the extent and powers of the company.
- It is the charter of the company
- It contains the fundamental conditions upon which the company can be incorporated
- It contains the objects of the company's formation
- The company has to act within objects specified in the MOA
- It defines as well as confines the powers of the company
- Anything done beyond the objects specified in the MOA will be ultra vires. Their transactions will be null and void
- The outsider have to transact looking into the MOA

Conditions of the MOA

- It should be printed
- Divided into paragraph and numbers consecutively
- Signed by at least seven persons or two in case of public and private company respectively.
- The signature should be in the presence of a witness, who will have to attest the signature
- Members have to take shares and write the number of shares taken with full address

The MOA of the Limited Company

- The name of the company with 'limited' as the last word
- The name of the state where the registered office of the company is to be situated
- The objects of the company stating the 'Main objects' and the 'other objects'
- The declaration about the liability of the members is limited (limited by shares or guarantee)
- The amount of the authorized share capital, divided into shares of fixed amounts.

The Compulsory Clauses in MOA

- **The Name Clause**– it decides on the name of the company based on the capital involved
- The Registered Office Clause- where it has registered its head office and other branch office (The registered office can be changed with the permission of the ROC)
- **The Object Clause-**Main object, ancillary object and the other objects of the company are clearly specified (**Ashbury Railway Carriage Co V. Riche**). The applicable doctrine here is the " Doctrine of Ultra Vires" beyond the powers of the company (opposed to Intra Vires)

- **<u>The Liability Clause</u>**- What is the liability of its members limited by shares or guarantee or unlimited, there can be alteration in the liability clause
- **<u>The Capital Clause</u>** - The amount of the nominal capital of the company, number of shares in which it is to be divided… alteration of the capital clause etc.
- **<u>The Association or Subscription clause</u>**- Where the subscribers to the MOA declare that they respectively agree to take the number of the shares in the capital. It has to have the following:
  a) They have to sign in the presence of two witnesses, who attest the signatures,
  b) The subscriber to take at least one share.
  c) After the name the subscriber has to write the number of shares take

<u>"Doctrine of Ultra Vires"</u>

↓

- The powers exercisable by the company are to be confined to the objects specified in the MOA.
- So it is better to define and include the provisions regarding the acquiring of business, sharing of profits, promoting company and other financial, gifts , political party funds etc
- If the company acts beyond the powers or the objects of the company that is specified in the MOA, the acts are considered to be of *ultra vires*. Even if it is ratified by the all the members, the action is considered to be ineffective.
- Even the charitable contributions have to be based on the object clause. ***<u>(A Lakshmanaswami Mudaliar V. LIC of India)</u>***

<u>The consequences of the *ultra vires* transactions are as follows:</u>

a) Injunction
b) Directors' personal liability.
c) If a property has been purchased and it is an *ultra vires* act, the company can have a right over that property.
d) The doctrine to be used exclusively for the companies' interest.
e) But the others cannot use this doctrine as a tool to attack the company

Articles of Association

The articles of the association are subordinate to the MoA. It is a bundle of rules and regulations made for the internal management of a company. They help out in carrying out the objects set out in the memorandum. The functions of articles is to define the duties, rights and powers of board of directors and the members of the company. It also provides the mode and form in which the affairs of the company is to be carried on and also the manner in which the internal management of the company is to be carried out.
A company can either prepare its own article or can adopt table "A of the companies act having a model AoA.
The following companies must prepare their own articles and filed along with MoA are:
Pvt. Ltd. Co., Companies limited by guarantee and unlimited companies.

- It is the company's bye- laws or rules to govern the management of the company for its internal affairs and the conduct of its business.
- AOA defines the powers of its officers and also establishes a contract between the company and the members and between the members *inter se*

- It can be originally framed and altered by the company under previous or existing provisions of law.

AOA

- AOA plays a subsidiary part to the MOA
- Anything done beyond the AOA will be considered to be irregular and may be ratified by the shareholders.
- The content of the AOA may differ from company to company as the Act has not specified any specific provisions
- Flexibility is allowed to the persons who form the company to adopt the AOA within the requirements of the company law
- The AOA will have to be conversant with the MOA, as they are contemporaneous documents to be read together.
- Any ambiguity and uncertainty in one of them may be removed by reference to the other.

Contents of the AOA may be as follows

- Share capital
- Lien on shares
- Calls on shares
- Transfer and transmission of shares
- Forfeiture of the shares
- Surrender of the shares
- General meetings
- Alteration of the capital
- Directors etc.
- Dividends and reserves
- Account and audit
- Borrowing powers
- Winding up
- Adoption of the preliminary contracts etc.

Doctrine of Constructive notice and Indoor Management

- Persons dealing with the company have to satisfy themselves. But need not know the internal irregularity. **Royal British Bank V. Turquand (Turquand Rule**) Directors issuing a bond.
- The doctrine of Constructive notice can be invoked by the company to operate against the persons dealing with the company.
- The outsider cannot embark, but only can acquaint upon the MOA and AOA. **(Official Liquidator, Manasube &Co Pvt Lid V. Commissioner of Police)**

Exceptions to the Doctrine of Where the outsider cannot claim the relief on the grounds of "Indoor management"

- Knowledge of irregularity
- No knowledge of articles
- Negligence
- Forgery
- Non- Existent authority of the company

Raising of Capital from Public

- The companies can raise money by offering securities for sale to the public.
- They can invite the public to buy shares, which is known as public issue.
- For this purpose the company may issue a prospectus, which may include a notice circular, advertisement or other documents which are issued to invite public deposits.

Prospectus

Introduction: - After having obtained the certificate of incorporation, the promoters of a public company will have to take steps to raise the necessary capital for the company. A public company may invite the public to subscribe to its shares or debentures. For this purpose a documents known as Prospectus has to be issued.
Public company which can manage its own capital privately need not to issue prospectus. But in such a case, a statement in lieu of prospectus must be filed with the Registrar.
A private company is not allowed to issue a prospectus since it cannot invite general public to subscribe to its shares or debentures.

Meaning of Prospectus: A document containing detailed information about the company and an invitation to the public for subscribing to the share capital and debentures issued is called prospectus.
Definition of prospectus:- According to section 2(36) of the companies Act-" Prospectus means any document described or issued as a prospects and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscriptions or purchase of any shares in or debentures of a body corporate".
Objects of prospectus: -To bring to the notice of the public that a new company has been formed.
To preserve an authentic record of the terms and allotment on which the public have been invited to buy its shares or debentures.
To secure that the directors of the company accept responsibility of the statement in the prospectus.

- It is an invitation issued to the public to purchase or subscribe shares or debentures of the company.
- **Every prospectus must be dated**. The date of publication and the date of issue must be specifically stated in the prospectus.
- The golden rule of the prospectus is that every detail has to be given in strict and scrupulous accuracy. The material facts given in the prospectus are presumed to be true. (New Brunswick and Canada Railway. Land & Co. vs. Muggerridge).

Nature of prospectus: - A document is not prospectus unless it is an invitation to the public to subscribe for shares in, or debentures of a company.

Requirement as to prospectus:- Issue of prospectus, in order to be valid, must satisfy the following requirements:-

- Issued after the incorporation.
- Prospectus must be dated.
- Prospectus must be registered.
- Expert to be unconnected with the formation of the company.
- Consent of expert to be obtained.
- Terms of the contract not to be varied.
- Every application form to be accompanied with a copy of prospectus.
- Consequences of applying for shares in fictitious names to be prominently displayed.
- Contents as per schedule II.

Various forms in which the prospectus can be issued.

- **Shelf Prospectus**: Prospectus is normally issued by financial institution or bank for one or more issues of the securities or class of securities mentioned in the prospectus.
- **There can be deemed prospectus** also if it is issued by the issue house. (If the prospectus is issued by an intermediary called 'issuing house' and not by the company)
- **'Information Memorandum'**: It means a process, which is undertaken prior to the filing of prospectus.
- **Even an Advertisement** , that the shares are available is considered to be prospectus

Contents of the prospectus:-

- General information
- Capital structure
- Terms of present issue
- Management and projects
- Management and perception of risk factor

It is compulsory to register the prospectus with the Registra

Civil Liability for Misstatements In case of any untrue statement in the prospectus

- The liability will be on the director of the company , whose name was written during the time of issue
- The persons who have authorized their names to be theirs in the prospectus to be named as directors
- Promoter
- Every person including the person who is an expert and has authorized his name to be issued with the prospectus

Remedies for misstatements in the prospectus

- Relying on the prospectus if any person buys shares, the person may
- Rescind the contract (only when there is misrepresentation relating to the material facts.

The rescission has to be done within a reasonable time

- **Claim damages**- it can be claimed from the directors, promoters or other persons who has authorized their name to be written during the issue of the prospectus

SHARE

- **Share:** Share is defined as "an interest having a money value and made up of diverse rights specified under the articles of association".
- **A share is the interest of a shareholder in a definite portion of the capital.**
- A share is the interest of a shareholder, measured by a sum of money, for the purpose, of liability in the first place and of interest in the second.
- A share is a personal estate capable of being transferred in the manner laid down by in the Articles of the company.
- It is incorporeal in nature and it consists merely of a bundle of rights and obligations.
- Every share issued by a company must be numbered so that one share may be distinguished from another share.
- A certificate of shares issued by a company under its common seal specified the shares held by any member.

STOCK

Stock:When shares are fully paid-up, they may be converted into stock.

- Stock is simply a set of shares put together in a bundle.
- It is the aggregate of fully paid-up shares legally consolidated.
- The aggregate can be split up into fractions of any amount without regard to the original nominal amount os shares.

Conversion of shares into stock:- A company may, if so authorized by its Articles, convert all or any of its fully paid-up shares into stock, and recovered that stock into fully paid-up shares of any denomination.

"So every stock is a share while every share may not be a stock".

Method of conversion of shares into stock is as follows:-

- To pass a resolution in the General meeting of shareholders.
- Information of conversion to the registrar.
- To make alteration in the Articles.
- To close transfer books and to inform the shareholders.
- To issue stock certificate and prepare register.
- Transfer of stock.

Share Capital

Share capital meaning: -

- The term capital usually means a particular amount of money with which a business is started.
- Capital, in fact, represents the assets with which the undertaking is carried on.
- The sum total of nominal value of shares of a company is known its shares capital.
- Capital to be stated in the MOA and AoA of the company.
- Share capital means the capital raised by the company by issue of shares.
- A share is a share in the share capital of the company including the stock.

- Share gives a right to participate in the profits of the company, or a share in the assets when the company is going to be wound up.

Other features of a share

- A share is not a negotiable instrument, but it is a movable property.
- It is also considered to be goods under the Sale of Goods Act, 1930.
- The company has to issue the share certificate.
- It is subject to stamp duty.
- The 'Call' on Shares is a demand made for payment of price of the shares allotted to the members by the Board of Directors in accordance with the Articles of Association.
- The call may be for full amount or part of it.

Types of Capital

1. **Registered, authorized or nominal capital---(capital mentioned in the MOA)**
2. **Issued capital.-- (A part of the authorized capital which is offered to public for subscription in the form of shares)**
3. **Unissued capital.-- (Balance of the nominal capital remaining to be issued)**
4. **Subscribed capital.-- (It is the part of the issued capital for which applications are received from the public)**
5. **Called up capital.—(It is that part of the subscribed capital which has been called up by the company)**
6. **Uncalled up capital.—(It is the uncalled portion of the allotted capital and represent contingent liability of the shareholder on the shares)**
7. **Paid up capital.—(It is the part of the called up capital against which payment has been received from the members on their respective shares)**
8. **Reserve capital.—(The amount which is not called by the company except in the event of the company being wound up.)**
9. **Fixed capital: -- (The fixed capital of a company is what the company retains in the shape of fixed assets such as land and building, plant, machinery, furniture, etc.)**
10. **Circulating capital: -- (The circulating capital is a part of subscribed capital which is circulated in business in the form of using goods or other assets such as books debts, bill receivable, cash, bank balance etc.)**

Kinds of shares

Preference shares- It can be further classified as

- Participating preferential shares.
- Cumulative preferential shares
- Non-Cumulative preferential shares
- Redeemable Shares and
- Irredeemable Shares

Equity or ordinary shares

Shares at premium (The issue price of the shares is higher than their nominal or face value, The difference between issue price and face value is called premium.)

Shares at discount (The issue price of the shares is less than their nominal or face value)

Bonus shares (The issue of bonus shares implies the payment of dividend in the formof Shares instead of cash.)
Right shares (The shares which are meant for the existing shareholders are known as right Shares)

Preference share capital is the part of the capital of the company which**—**

- Carries a preferential right as to payment of dividend at a fixed rate during the life time of the company.
- Carries, on the winding up of the company, a preferential right to be repaid the amount of capital paid up.

Equity share capital with reference to a company, limited by shares, means a company which Is not preference share capital

After satisfying the rights of preference shareholders, the equity shareholders shall be entitled to share in the residual (remaining) amount of distributable net profit of the company.

Equity share capital is the sum total of equity shares. The dividends on equity shares is not fixed It will be changing according to the magnitude of available profit for distribution in the form of Dividends.

Equity share capital of a company may consist of equity shares:

- With voting rights,
- With differential rights as to dividend, voting or otherwise in accordance with such rules and subject to such conditions as may be prescribed.

Transfer and Transmission of shares

- AOA provides for the procedure of transfer of shares. It is a voluntary action of the shareholder.
- It can be made even by a blank transfer –In such cases the transferor only signs the transfer form without making any other entries.
- In case it is a forged transfer, the transferor's signature is forged on the share transfer instrument.
- Transmission of shares is by operation of law, e.g. by death, insolvency of the shareholder etc.

Buy-Back of Securities

- The company may purchase its securities back and it is popularly known as buy back of shares
- To do so, the company has to be authorized under the AOA.
- The company has to comply with the provisions of the Company law to buy back its securities.

The listed company has to seek permission from the SEBI (SERA 1998). Specifically for the private company etc. the Buy Back Securities Rules1999 will be applicable

Share Certificate and Share Warrant

Share certificate: Meaning and definition-

According to section 84- A share certificate is a certificate issued by the company under its common seal specifying the share held by any member. It is an evidence, of the title of the allottee or transferee of shares.

- **Share Certificate**: The Share Certificate is a document issued by the company and is prima facie evidence to show that the person named therein is the holder (title) of the specified number of shares stated therein.
- Share certificate is issued by the company to the (share holder) allottee of shares.

- The company has to issue within 3 months from the date of allotment. In case of default the allottee may approach the central government.(sec.113)
- A certificate may be renewed or a duplicate of a certificate may be issued if such certificate:- is proved to have been lost or destroyed, or having been defaced or mutilated or torn and the same is surrendered to the company (sec.84(2))

Contents o Share Certificate

- Name and address of the registered office of the company.
- Serial number of the share certificate.
- Day and date of issue of the share certificate.
- Name and address of the shareholder.
- Number of the shares held by the shareholder.
- Distinctive numbers of shares.
- Class of shares.
- Nominal value of each share.
- Amount paid on each share.
- Revenue stamp.
- Impression of the common seal of the company.
- Space for the signature of two directors and the secretary.

The share certificate form consists of the three parts:-

- The counterfoil for reference.
- The certificate proper, and
- The receipt to be signed by the shareholder on receiving the certificate.

The share certificate forms are consecutively numbered and invariably bound in a book form.

Every share certificate shall be issued under the common seal of the company to be affixed in the presence of at least two directors and the secretary of the company. Also, all these persons must sign the share certificate.

Share Warrant

- The share warrant is a bearer document issued by the company under the common seal of the company stating that the bearer is entitled to the shares mentioned therein.
- As share warrant is a negotiable instrument, it is transferred by endorsement and by mere delivery like any other negotiable instrument.
- A public company, limited by shares, may if so authorized by its Articles, with the previous approval of the central Government and in respect of fully paid-up shares, issue a share warrant under its common seal. A private company cannot issue share warrant. (Section 114).

<u>Conditions for the issue of share warrants:--</u>

- The shares must be fully paid up.
- The Articles of the company must authorized to do so.
- The company must obtain the permission of the central Government.
- The share Warrants must be issued under the common seal of the company.
- Only public companies limited by shares can issue share warrants and a private limited company cannot issue share warrants.

Contents of share warrants: - Share warrants consists of three parts:
Counterfoil, share warrant and dividend coupon.

- Name of the company.
- Address of the registered office of the company.
- Serial number of the share warrant.
- Number of the share held by the shareholder.
- Distinctive number of shares.
- Nominal value of each share.
- Day and date of issue of the share warrant.
- Space for the signature of two directors and the secretary.

Dividends

- The sharing of profits in the going concerns and the distribution of the assets after the winding up can be called as dividends
- It will be distributed among the shares holders
- The dividends can be declared and paid out of:

Current profits
Reserves

Monies provided by the government and the depreciation as provided by the companies.
It can be paid after presenting the balance sheet and profit and loss account in the AGM

- Other than the equity shareholders, even the preferential shareholders can get the dividends. Rather they are the first ones to get the dividends.
- Dividends are to be only in cash, if otherwise specified in the AOA.
- In exceptional cases, even the central government may permit the payment of interest to shareholders, even though there is no profit.

Shareholder or member

Introduction:-
The term shareholder refers to a person who holds or owns share in a company while the term "member" on the other hand, refers to a person whose name appears on the register of members.
For all the purpose of the words shareholder and member are used interchangeably and synonymous because in normal course a shareholder will also be a member and a member will also be a shareholder.
However, there are a few exceptional cases where a person may become a member of a company without, being its shareholder and vice versa.

For example: Unlimited companies or companies limited by guarantee having no share capital will have only members but no shareholder. On the other hand, the holder of a share warrant is a shareholder but not a member as his name is removed from the register of members immediately after the issue of such share warrant. Similarly, a transfers or the legal representative of the deceased person may be a shareholder but he may not be a member until he gets his name entered in the register of the members.

Definition of member: - It is defined in section 41 of the Act as follows:

1. The subscribers of the MOA of a company shall be deemed to have agreed to become members of the company, and on the registration of the company, shall be entered as members in its register of members.
2. Every other person who agrees in writing to become a member of a company and whose name is entered in its Register of Member of the company.

Methods of acquiring membership of a company-

- **By subscribing to the MOA of the company before its registration**. (Statutory members) “Deemed to be members from the date of the incorporation of the company without any allotment of shares and without any entry in the register of members.” He acquires full status of a member on the registration of the company with all rights and liabilities. The subscriber to the Memorandum must take the agreed number of shares directly from the company and must make the payment in cash.
- **By agreeing with the company to take shares and being placed on the register of members. (Two conditions must be fulfilled** – written agreement to take the shares and the person name to appear on the register of members)
- **By acquiring qualification shares** (**By the directors who have signed and delivered to the registrar a written undertaking to take qualification shares and to pay for them becomes members of the company and they are treated as if they are subscribers to the MOA.**)
- **By taking a transfer of shares and being placed on the register of members.** (**This can be done by sending an instrument in writing to the company completed in all respect and when the name of the transferee is entered in the records of the company he becomes a member.**)
- **By transmission of shares** (**In transmission of shares, the ownership of shares passes to the legal representative of the deceased member by operation of law. In the case of transmission there is no need of any instrument of transfer only the willingness to become member of the legal representative is required.**)
- **By registration on succession to a deceased or bankrupt member.**
- **By allowing his name apart from an agreement to become member to be on the register of members.**

Termination or cessation of membership-

- When he transfer his shares.
- When his shares are validly forfeited by the company.
- When he makes a valid surrender of his shares to the company.
- When his shares are expropriated.
- When his shares are sold by the company under power in its Article to enforce a lien.
- When he is holding redeemable preference shares which are being redeemed. When he dies and his shares are passed on to his legal representative.
- When he is declared insolvent and his shares are passed on the Official Receiver.
- When ha has been issued share warrant in exchange of fully paid-up shares and Article of the company do not recognize the holders of share warrants as members.
- When the company is being wound up, but he remains liable as contributory and is also entitled to his share in the surplus assets, if any.

Who may become a Member

Introduction:-

Law has not prescribed any qualification to become member of the company. But any person who is competent to contract as per section 11 of the Indian contract Act, 1872 may become a member of a company. This is subject to the provisions of the MOA and AOA of the company. Articles of a company may also provide that certain persons cannot become members of the company.

Minors are not competent to become the members of a company because an agreement with a minor is void. (**Mohri Bibi vs. Dhamadas Ghosh, (1903) I.L.R, 30 Cal. 539.**
In case if a contract of allotment of shares is signed between company and the minor in ignorance of the fact of the minority, either party has a right of repudiation of the contract.
In England, an infant may become a member of a company unless this is forbidden by the AOA of the company.

Firm-A partnership firm cannot become the member of a company because it has no separate legal status from the partner.
The partner of the firm can have the shares as joint holders and become member of the company.

Company- A Company may**, if so authorized by its AOA, become a member of another company.**

Hindu Undivided Families (HUF)- If the HUF purchases shares of a company in the name of ***Karta,*** then only Karta shall be the member of a company, not the Hindu Undivided Family.

Insolvent- An insolvent can remain a member until his name appears on the Register of Members. He is also entitled to vote and attend meetings although his shares pass on the Official Receiver.

Fictitious person- A person who takes the shares in the name of a fictitious person becomes liable as a member. However, such a person shall be imprisoned up to 5 years under section 68 (a).

Foreigners- Foreigners can become members of companies in India but permission of Reserve Bank of India has to be obtained for this purpose. The right of the foreigner as a member will be suspended if he becomes an alien enemy.

Rights of members

Rights of members:- It can be classified into the following three groups:

1. Statutory rights.
2. Rights given by the MOA (Documentary rights)
3. Rights given by the general law, especially that relating to contracts and members corporation i.e. Legal rights.

"Statutory rights cannot be taken away or modified by any provisions in the MOA or the Articles", for example:

Right to transfer shares U/s 82, right to receive share certificate for his shares U/s 113, right of priority to have shares offered in case of increase of capital U/s 81 and right to receive notice to move resolution, to vote at meetings, to demand a poll etc.

Individual rights-

- **Right to obtain certain documents or copies of the same, they are-**
  MOA, AOA, Resolution and agreement, share certificate, any trust deed, the register of members and index numbers and minutes of proceedings of General meeting.
- **Right to inspect certain books or register, they are-**
  Register of investments of company not held by it in its own name, Register of members, Index of members and debenture holders, copies of all Annual returns and minute books of General meeting.
- Right to transfer shares or other interest subject to the AOA (sec.108).
- Right to priority to have shares offered in case of increase of capital.(sec. 81)
- Right to share in the assets of the company after distribution to creditors etc. (sec.511 and 475).
- Right in relation to meeting of the company, viz;{ To attend meeting, to receive notice of meeting, to vote at meeting and to move resolution}
- Right to apply to central Government for relief in certain cases.
- Right to apply to the tribunal in cases of oppression and mismanagement(sec.397&398)
- Right to apply to the tribunal for winding up etc.
- Right to receive dividend.

Collective Rights: -- Following cases may be mentioned in relation to collective rights:

1. To require the directors to convene an extra-ordinary general meeting and to hold a meeting on refusal. Member holding 1/10th of the paid up capital or those representing 1/10th voting power can exercise this right. {sec. 169}.
2. To demand a poll {sec. 179} .Five member in case of a public company and one member in case of a private company.
3. Right to apply to the central Government to investigate the affairs of the company. {sec. 235}.
4. Right to appoint auditors and to fix their remuneration. {sec. 224}.
5. Right to appoint directors at the AGM. {sec. 225,226 & 227}.
6. Right to remove directors. {sec. 284}.

Liability of members

The liabilities of the members are as follows:

1. Apart from the express agreement, a shareholder/ member is liable to make the payment in cash of the whole nominal amount of shares held by them.
   In case of company limited by guarantee, a member is liable to the extent of his guarantee and in an unlimited company to an unlimited extent. The amount of shares may not be paid all at once, but from time to time as and when the company makes calls on the shareholders. All moneys payable by any member to the company under the Memorandum or articles of the company shall be a debt due from him to the company. {sec. 36}
2. Liability in case of reduction of members below 7 in a public company and 2 in a private company for the payment of whole debts of the company. {sec. 45}.

Register of members Section 150 of the companies Act requires every company to keep a register of its members. The following particulars are required to be entered in the register:-

1. The name, address and occupation of each member.

2. In case of a company having a share capital, the share held by each member and the amount paid on each share.
3. The date at which each person was entered in the register as a member.
4. The date at which any person ceased to be a member.
   If default is made in maintaining the register of members, the company and every officer of the company, who is in default, shall be punishable with a fine which may extend to rupees 500 for every day during which the default continues. {Sec. 150(2)}.

Section 164 of the companies Act lays down that the register of members or that of debenture holders is a prima facie evidence of membership
Every company with more than 50 members shall keep an *index of members along with the register.* The index may be in the form of a card index.
Both these things shall be kept at the registered office of the company and shall be kept open to inspection by members and debenture holders free and by other persons on nominal payment.
The register of the members shall be kept close during the general meeting of the shareholders, interim dividend or at the time of call is made.

Directors

<u>The Legal Status of the director</u>
The director occupies the position of a:

- As a Trustee- In relation to the company
- As Agents- When they act on behalf of the company
- As Managing Partner-As they are entrusted with the responsibility of the company
  Qualification Shares
  In case there is requirement as per the AOA for the director is bound to buy qualification shares
  If acts are done by the director prior to he or she being disqualified, the acts are considered to be valid

Disqualifications
As per the company law, the followingpersons are disqualified from been appointed as a director:

- Unsound mind
- An undischarged insolvent
- A person who is convicted by the court
- Who has applied for being adjudged insolvent
- Not paid for the call on shares
- Persons who are already directors in maximum number of companies as per the provisions of the Act or
- Any other person who has been disqualified by the court for any other reason

Appointment of Directors
- The appointment can sometimes be by based on the proportional representation like minority shareholders.
- There can be alternate directors, additional directors, casual directors.
- The third parties can appoint the directors
- Other than the shareholders and the first directors,the central government andNCLT may also appoint directors.

Duties and Liabilities of the Directors

Fiduciary Duties

- To act honestly and with good faith
- Not to use confidential information of the company for their own purpose
- Duty of Care and to act reasonably while acting for the company

Statutory Duties

- Not to contract with company, where he/she or his relative has an interest in the contract
- where he/she has a interest, they need to inform the board or seek prior approval while entering into contract, otherwise the contract is voidable
- Duty to attend and convene meetings
- Duty not to delegate

The Directors liabilities

- The liability of the directors can be either civil or criminal.
- If provided in the MOA, the liability may be unlimited, for a limited company, otherwise it may be altered.
- Liability may be for breach of fiduciary duties
- The directors are personally liable for the following:

a) Ultra vires acts
b) Malafide acts
c) Negligent acts
d) Liability for the acts of third parties

Criminal Liability

- Liability of the director for any untrue statement in the prospectus
- Inviting any deposits in contravention of the law
- Liability for false advertisement
- Failure to repay the application money, which was excess
- Concealing the names of the creditors
- Failure to lay the balance sheet.
- Failure to provide information to the auditor etc.

Company Meetings

Company Meetings & Proceedings

There is an old proverb that "Two heads are always better than one"

When two or more than two persons comes together to discuss matters of common interest, there is said to be a meeting.

Generally the purpose of meeting is to consider issues of common interest to its members.

A company meeting may be defined as a concurrence or coming together of at-least a quorum of members in order to transact *either ordinary or special business of the company.*

"Meeting is the congregation of several persons in a particular place for the purpose of discussing some important matter and expressing their opinion on the questions raised"

A 'meeting may be defined as any, assembly or coming together of two or more persons for the transaction of some lawful business of common concern.

Like any other association, a company must also hold meetings for its proper functioning. The shareholder or members of a company, who are the real owners, must have the opportunity to collectively discuss the affairs of the company and to exercise their ultimate control over the management of the company. Similarly, the directors, in whom the management of the company is vested, must come together periodically to function as a team and take collective decisions regarding the business policy of the company and to exercise overall supervision over the management. **Thus, the management of a company is really carried on through meetings of shareholders and directors and the resolutions adopted therein.**

"A company meeting may be defined as a concurrence or coming together of at least a quorum of members in order to transact either ordinary or special business of the company."

According to P.K. Ghosh, "Any gathering, assembling or coming together of two or more persons for the transaction of some lawful business of common concern is called meeting."

After knowing the purpose and concept of the meeting it can be concluded that meeting is the congregation of several persons in a particular place for the purpose of discussing some important matters and expressing their opinion on the questions raised.

In comparison of any ordinary meeting company meetings are of a great importance, because all the policy matters of the company are being decided in the meetings of the company in the presence of the members called the shareholders and the company's management called the Board of Directors, after following all the procedures as required by the law and the A.O.A. of a company

Characteristics of a company meeting:-

The characteristics of a company meeting are as follows:--

1. Two or more persons (members and the mgt. of the company) must be present at the meeting.
2. The assembly of the persons must be for discussion and transaction of some lawful business.
3. A previous notice would be given for convening a meeting. (21 days' notice is common in all type of meetings).
4. The meeting must be held at a particular place, date and time.
5. The meeting must be held as per provisions/ rules of companies Act.

6. Notice to be given by the secretary after the time and place have been fixed by the directors
7. Even the shareholders can call a meeting as an extraordinary general meeting (EGM)
8. The NCLT can call an Annual General Meeting (AGM)

Significance of company meeting: --Company meetings are of considerable importance. Meetings may be of shareholders and directors. The business polices of a company are discussed and decided at different meetings held according to the rules laid down in the A.O.A.

Kinds of company meetings

The meetings of a company may be classified into the following categories:--

1. **Meetings of the shareholders:--**

   a. **Statutory meeting** (To be conducted once in life time by the company Ltd. By shares, either within one month from the date of commencement of the business or within six month.
   b. **Annual general meeting (AGM) :--** The first meeting can be held within 18 months of the incorporation. There after subsequent AGM must be held by the company every year within 6 months of the closing of the financial year but the interval between any two AGM must not be more than 15 months.
   c. **Extra ordinary general general meeting:** -- It is a general meeting which is held between two AGM'S. It is being called to discuss any particular matter of urgent importance to the company. This meeting is called for the consideration of any specific subject, decision of which cannot be postponed to the next AGM.

It can be called for the following reasones: --
They are as follows:--
(1) Alteration of any clause of MOA,
(2) Changes in the AOA,
(3) Scheme of the reduction of share capital etc.

Class meetings: -When the meetings of particular class of a shareholders takes place it is knows as class meeting. Such as preference shareholders etc. The AOA defines the procedure for calling such meetings. Such a meeting is called for the alteration in the rights and privileges of the shareholders and for the purpose of conversion of one class of shares into another.

2 **Meeting of Board of Directors:-**The directors of a company exercise most of their powers in a joint meeting called the meetings of the Board. In the case of every company, a meeting of the Board of Directors must be held:-

- At least one meeting in every three months.
- At least four such meetings shall be held in every year (section 285)

The object of this section is to ensure that the Board meetings are held at reasonably frequent intervals so that the directors may be in touch with the management of the affairs of the company.

Notice of the meeting:-Notice of every meeting of the Board of Directors must be given in writing to every director in India and also to a director who is outside India for the time being (section 286).

There is no need to send notice, if the Articles provide for meetings to be held at regular intervals e.g. monthly, the time and place being fixed. But the practice says a reasonable notice must be given of the meeting.

The notice should mention the place, time and date of the meeting. The day must be a working day and time should be during business hours unless agreed otherwise by all the directors.

Agenda: -It means things to be done or it is a statement of the business to be transacted at a meeting. It also sets out the order in which the business is to be dealt with. It helps directors to come prepared for the meeting.

Quorum: -There must be proper quorum for every meeting. The quorum for the Board meeting should be at least two directors or one third of total strength of the Board of directors, whichever is more subject to a minimum of two directors.

Directors who are interested in any of the resolution to be passed at the Board meeting shall not be counted for the purpose of quorum of that resolution. The directors who are not interested in the resolution shall be the quorum for that item, provided there number is not less than two (section 283).

If the meeting could not be held for want of quorum then unless the Articles otherwise provides the meeting shall automatically stand adjourned till the same day in the next week and at the same time and place. If the adjourned day is public holiday it shall shift to next day.

Board meetings are called for the following business:-

- Share related—To issue shares and Debentures, makes calls on shares, forfeit the shares and transfer the shares.
- Financial related--- To fix the rate of dividend, to take loan in addition to debentures and to invest the wealth of the company.
- Administrative matters like--- to think over the difficulties of the company and to determine the policies of the company.

Meeting of the committees of Directors: - The BOD may form certain committees and delegate some of its power to them, these committees should consist of only directors. Such delegation of powers to such committees is to be authorized by the AOA and should be subject to the provisions of the companies act.
In large companies routine matters like allotment, transfer, and finance are handled by such sub-committees of the BOD.

Meetings of creditors: -This type of meetings are called when the company proposes to make a scheme for arrangement with its creditors.
Section 391 to 393 of the companies Act laws down the procedure and give power to the company to compromise with the creditors.

Meeting of debenture holders: -Meetings of the debenture holders are held according to the conditions contained in the debenture trust deed.
These meetings are called from time to time where the interests of debenture holders are involved at the time of reconstruction, reorganization, amalgamation or winding up of the company.
Debenture trust deed contains all rules and regulations related to conduct of meeting and all things related to it.

Essentials of a valid meeting

- **Proper convening authority.** **(**Directors or Tribunal) The resolution to call a general meeting must be passed at a Board meeting**.**

- **Notice.** (A proper notice to every shareholder, auditor and directors of the company at least 21 days before the date of the meeting. Notice to be in writing containing agenda (subject matter) and the date & time of the meeting.
- **Quorum. (**By quorum we mean the minimum number of the members who must be present in a meeting to proceed with the work of meeting as required by the rules.**)** **The main object of the quorum is to avoid decision taken by small majority which may not be acceptable to vast majority of members.**

  The AOA of the company lay down the quorum for different meetings of the company.(**The company Act has fixed two as the minimum numbers to complete the quorum in private company and *five* in case of a public company)**

  If the quorum does not complete within half an hour of the prescribed time, meeting will be adjourned to the same time place and day in the next week.

- **Chairman of the meeting.** (The chairman of the meeting is the person who presides the meeting. He can be explained as "the umpire of debate. The judge of admissibility and the upholder of order and decorum.

  As per section 175 of the companies Act, 1956 unless the articles otherwise provide the members present in the meeting shall elect one of them as Chairman by showing of hands.

  The entire responsibility for the smooth conducting of the meeting rests on the shoulders of the chairman of the meeting. So, he should be an efficient and experienced person.

Rights and powers of chairman

1. To maintain the order and decorum of the meeting.
2. To decide the priority in which the members will speak.
3. To stop discussion if it has become sufficiently long and endless.
4. To order and take a poll.
5. To get disorderly persons removed from the meeting.
6. To use casting vote.
7. To exclude any matter from the minutes of the proceedings of the meeting which is irrelevant, etc.

Duties and responsibilities of the chairman

1. To act in the interest of the company.
2. To see the regularity of the meeting.
3. To follow strictly the rules of company law and AOA.
4. To conduct the business of the meeting according to its agenda.
5. To preserve peace and order in the meeting.
6. To act within the jurisdiction of his powers.
7. To listen to the minority.

8. To take correct and valid decisions.
9. Correct use of powers of adjournment of the meeting.
10. Bonafide use of the casting vote.
11. To sign the minutes having seen that they are properly and correctly entered in the minute Book.

- **Proxy**.(A proxy is an authorized agent of the member for the purpose of voting. The term proxy is also applied to the instrument by which the appointment to act on his behalf is made by the member)

The provisions relating to proxies are given in the section 176 of the Act.

- **Voting and poll. (**In order to ascertain the sense of a meeting voting may be: By show of hands or by poll.

Resolutions

Business transacted at all the meetings of the company is recorded in the form of resolution. Every item included in the agenda is put before the meeting in the form of written approval, motion for discussion and decision. When the motion is approved by the required majority of members present, it becomes a resolution.

Types of the resolutions: - Three types of resolutions are recognized by the act and they are—

- Ordinary resolution.
- Special resolution.
- Resolutions requiring special notice.

An ordinary resolution is that which is passed by a simple majority at any general meeting of the shareholders. The resolution may be passed by a show of hands or by a poll.

Following are some matters which can be decided by an ordinary resolution:-

- Approval of statutory report.
- Approval of director's report.
- Approval of final accounts.
- Declaration of dividends.
- Appointment of directors.
- Election of directors.
- Issue of shares at discount.
- Appointment of auditors and their remuneration.
- Alteration of share capital.
- Change in the rights of shareholders of any class.
- Creation of reserve fund.
- Conversion of fully paid-up shares into stock.
- Sale of the whole or part of the company's undertaking or business.

Classification of Meetings

Meetings of shareholders

a) Statutory meeting
b) Annual General Meeting (AGM)
c) Extra-ordinary General Meeting
d) Meeting of Directors
e) Meeting of Committee of Directors
f) Class Meeting of different shareholders
g) Meeting of Creditors
h) Meeting of Debenture Holders

Shareholders meetings

a) Statutory meetings (which happens only once in the lifetime of the company)
b) EGM- Convened to transact some special or important decision to be taken
c) Class meetings-This is the meeting of the shareholders- which is convened by the class of shareholders based on the kind of shares they hold.

- **AGM**-it can be conducted based on the provisions given in the Articles or by passing a resolution in one AGM for the subsequent AGM's
- **Board Meetings**- This is conducted for the smooth running of the company and for collectively taking the decisions. The meetings may be conducted to call on shares, issue debentures, borrow money, to make loans, to invest the funds etc.
- **Meeting of shareholder/members**.
- **Class meeting**.
  In all such meeting a previous notice of 21 days should be given to all the concern members regarding the type of meeting and details of conduct

Compromise, Reconstruction and Arrangement

- Reconstruction includes reorganization, arrangement and amalgamation.
- Arrangement includes all forms of reconstructing.
- It has been broadly defined as all forms of capital reorganizations either by consolidation of shares or division of shares or both
- Reorganization and arrangement are done when there is only one company is involved
- Reconstruction can be effectively done through a compromise or arrangement.
- To do so the meeting or the members or the separate class of the shareholders has to be conducted or in case of winding up the meeting to be called by the liquidator
- Even a banking company (sick bank) may be reconstructed or amalgamated by the central government on the basis of the Reserve Bank's application for a fixed period of time.
- The reconstruction or amalgamation can be done with any other banking institution.

Scheme to be approved

- Any kind of scheme to be accepted, it has to get approval from the members or the members may reject the scheme.
- After the scheme is approved by voting, the court has to sanction the scheme or reject, if it is against the public interest or if it feels that the scheme is not beneficial.
- The legal provisions vary based the mode of scheme adopted by the company.

Modes of Reconstruction or Amalgamation

- By sale of undertaking- it can be the whole or part of sale (the court will decide)
- By sale of shares (Maximum number of companies adopt this scheme- In such schemes the shares are sold and registered in the name of the purchasing company or on its behalf. The shareholders selling the shares are compensated either by cash or with the shares of the acquiring company.
- Amalgamation can take place even for the sake of Public interest by the central government. In such cases, it will be notified in the official gazette.

Mergers, Acquisitions and Takeover of companies

- Merger connotes union of two or more commercial interests, corporations, undertakings, bodies or any other entities.
- Fusion of two or more corporations by the transfer of all property to a single corporation. It is used as a synonym for amalgamation. Even the Act makes no distinction between merger and amalgamation.

The changing of legal entity after mergers and acquisitions

- In a merger- one of the company loses its corporate existence and the survivor company acquires the assets as well as the liabilities of the merger company.
- In acquisition, it is acquiring the ownership in the property is the purchase of a controlling interest in the share capital of another existing company. It is an act of acquiring asset and management of the company.

Winding up

WINDING UP OF A COMPANY

INTRODUCTION:- A company is created by law and the end of a company also takes place only by a legal procedure. The process for the dissolution of a company may take any of the following procedure.

1. under a scheme of reconstruction and amalgamation, a company may be dissolved if the court (now Tribunal) orders.(section 394)
2. when company is defunct the registrar may strike off the name from the records.(section 560)
3. Through winding up process.(section 425)

- The term w/up or liquidation of a company means the end of a company's affairs and operations. All the assets of a company are sold and debts are paid out of the proceeds. If there is any surplus left with the company that is divided among the different members of the company.
- It is the process whereby the life of the company is ended and its property is administered for the benefit of its creditors and members.
- During this process a liquidator is appointed to take control of the company. The liquidator will be responsible for the assets, debts and final distribution of the surplus to the members.
- It is the process for discharge of liabilities and returning the surplus to those who are entitled for it.
- But even a company which is making profit can be wound up is the special feature of winding up, which is different from that of the process of insolvency.

According to Pennington, winding up is a process by which the management of a company's affairs is taken out of its directors hands, its assets are realized by a liquidator and its debts are paid out of the proceeds of realization and any balance remaining is returned to its members. At the end of the winding up, the company will have no assets or liabilities, and will therefore be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation to be brought to an end.

How can be company be wound up?

- By passing a special resolution
- If there is a default in holding the statutory meeting
- Failure to commence the business
- If there is reduction in the membership of the minimum number of members as per the statutory requirement
- If it not able to pay its debts

Modes of winding up

- Compulsory winding up under the supervision of the court
  Compulsory winding up may happen for just and equitable reasons also.
  The just and equitable grounds can be like loss of substratum, where there is dead lock in the management, etc.
- Voluntary winding up (Members voluntary winding up and creditors voluntary winding up)
- Voluntary winding up subject to the supervision of the court.

Winding up procedure

- A petition for winding up has to be filed by the concerned person to the prescribed authority
- Liquidator to be appointed to safeguard the property of the company
- Then the court will hear the matter and pass necessary orders. It can dismiss the petition or pass an order of winding up

Dissolution of the company

- When the company ceases to exist as a corporate entity for all practical purposes it is said to have been dissolved.
- Dissolution has to be declared by the court.
- It will not be extinct and will be kept under suspension for 2 Years.
- The order has to be forwarded by the liquidator to the Registrar of the Companies within 30 days from the date of the order of dissolution.

DIFFERENCE BETWEEN WINDING UP AND DISSOLUTION: -- Generally, winding up and dissolution are used interchangeably. But a company is not dissolved immediately on the commencement of winding up proceedings. Winding up precedes dissolution. During winding up stage, a liquidator is appointed who takes control of the company, collects its assets, pays its debts and distributes the surplus, if any, among the members in accordance with their rights.

Dissolution (section 481) provides that when the affairs of the company have been completely wound up or for want of assets or other reason, it is not possible to proceed with winding up and the tribunal considers it just and reasonable, it may order the dissolution of the company.

MODES OF WINDING UP

The company may be wound up in any of the following ways under section 425(1) of the companies Act.

1. **Compulsory winding up (under the order of the Tribunal(section 433)**
2. **Voluntary winding up. This can be(under section 484) :--**
   (a) Member's voluntary winding up.(when company is solvent)
   (b) Creditor's voluntary winding up .(when company is not solvent)
   (c)

Grounds for compulsory winding up:-(According to sec.433, the Tribunal may order winding up on the following grounds):

1. By special Resolution.
2. Default in holding statutory meeting or delivering statutory report to the registrar.(By the registrar or a contributory)
3. Failure to commence business within 1 year of incorporation or suspend business for a whole year.
4. Reduction in number of members below minimum.
5. Inability to pay its debts.(where the creditor to whom company owes a sum exceeding to Rs. 500 and fails to pay it within 3 weeks from the date of demand.)
6. Just and equitable.(under this clause entire matter is left to the wide and wise judicial discretion of the Tribunal depending upon the facts and circumstances of each case) Some of such grounds are:
   (a) Where the substratum of the company is gone.
   (b) Where there is complete deadlock in the management of the company.
   (c) Oppression of minority.
   (d) Where the company is formed for illegal purpose.
   (e) Insolvency of the company.
   (f) A bubble company.
   (g) Sick industrial company.
   (h) Where company is working against (sovereignty and integrity of India, security of state, public order, morality etc.)

UNDER SEC.439 OF THE COMPANIES ACT, THE PETITION FOR THE WINDING UP OF A COMPANY MAY BE PRESENTED BY ANY OF THE FOLLOWING:--

1. Petition by the company in case of special resolution has been passed in the meeting of the company.
2. Petition by the creditors in case company is unable to pay its debts and the same is not time-barred under the limitation act.
3. petition by the contributors in case of any default by the company in filing any statutory report or meeting or in case there is deadlock in the mgt. or it does not commence it business in the prescribed time.(The contributory has to be original allot tee or through transmission.
4. Petition by the Registrar in case of any default in conducting statutory meeting / or sending statutory report, if fails to commence it business, if the numbers fall below minimum, unable to pay its debts etc.

5. Petition by any person authorized by central or state Government (if the company's business is being conducted to defraud the creditors, members or any other person as per investigation made by the investigator.

Effect of the winding up order will be as follows:-

1. The company and the petitioner are bound to file a certified copy of the winding up order with the Registrar within 30 days of the order.
2. .The powers of B.O.D. are terminated.
3. No suit or legal proceeding pending against the company can be proceeded with after the order of the winding up, without the permission of the Tribunal.
4. Any debts payable at future will be payable immediately on the issue of winding up order.
5. The official liquidator by virtue of his office will act as the liquidator of the company.
6. The winding up order will be executed in such a way as to favor all the creditors and contributories of the company as if such an order has been made on their joint petition.
7. The tribunal issuing the winding up order shall have the right to dispose of any pending or new suit against the company. Any suit or proceeding lying pending in another Tribunal shall be transferred to the Tribunal which has issued the winding up order

VOLUNTARY WINDING UP:-

Voluntary winding up means winding up of the company by the members or the creditors without interference by the Tribunal.
The following are the conditions for voluntary winding up of a company under sec. 484 of the companies act. 1956.

1. Expiry of the duration or happening of event. (Fixed by the Articles, provide to dissolve the company.)
2. By passing special resolution to wound up the company voluntarily.

Consequences of winding up:

After passing the resolution for winding up of the company, it must cease to carry on the business except for the benefit of winding up of company. (sec. 487)
After the commencement of the winding up of company, transfer of shares is restricted.

Types of voluntary winding up:-

Members voluntary winding up: A members voluntary winding up is possible only in case the company is solvent and has to carry out the following:--

1. **Declaration of solvency** :-- According to **sec. 488** of the companies Act, the B.O.D. will have to make a declaration of solvency , stating clearly that after full enquiry in the matter they are of the **opinion that company is able to pay its debts in full within three years from the commencement of the winding up.**
2. **It must be made within five weeks from the date of passing of resolution for winding up of a company,** and one copy to Registrar must be delivered.
3. **Appointment of liquidator and determination of his remuneration**: -- According to sec.490 of the Act. A meeting of the members is called for the winding up of the company, liquidator is appointed and his remuneration is also fixed in the same meeting. Very often the secretary of the company is appointed as liquidator of the company.

   Board power to cease on appointment of liquidator (sec.491)

   According to sec.492 if the office of the liquidator is vacated due to death, resignation or any other reason than liquidator is appointed in the general meeting according to an agreement made with the creditors.

A notice of appointment of liquidator and any change in it must be notified to the Registrar within 10 days of the same. (sec.493)

As per sec.494 of the Act the liquidator cannot accept shares of the company without the sanction of a special resolution of the company.
To liquidator must call the every year general meeting of the company and must lay out the progress of winding up before the members. (sec.496

4. **Final meeting and dissolution: --** The liquidator calls the last meeting of the company when all the affairs have been completely over. This meeting is called by giving a notice in the official Gazette and in leading newspapers but the time should not be less than one month. The object of holding such meeting is to discuss the details of accounts and explanations of them in the general meeting of the company.Withen one week of such meeting a copy of final account is sent to the Registrar. The Registrar on receipt of it enters the details and the company is dissolved after three months from the date of registration. (sec.497)

Creditors voluntary winding up:
Such type of winding up takes place when the company is not in a position to pay its debts and no declaration of solvency is made in it. The various provisions applicable to it may be enumerated as follows:-

1. **Meeting of creditors**: --- The meeting of the creditors is called on the same day or on the next day in which the meeting of the members has been called regarding the winding up of the company. Information of the meeting must be given through official Gazette and in two leading newspapers.(sec. 501& 502)
2. All the statements of affairs are placed in the meeting of creditors. Specifying therein the name of the creditors and their claims against the company.{sec.500(3) }
3. A copy of the resolution for the winding up of the company must be filed with the Registrar within 10 days.(sec. 501)
4. Appointment of liquidator and committee of inspection. This is being done at the time of passing of the resolution of the winding up by the creditors and members of the company, as per sec. 502 & 503 of the Act. Committee of inspection is consists of maximum five members appointed by the creditors.
5. The remuneration of the liquidator is fixed either by the committee of inspection or by the creditors. If it is not fixed by the both, then it is decided by the Tribunal itself.(sec. 504)
6. Board powers ceases just after the appointment of the liquidator.(sec.505)
7. AS per sec.506 of the Act in case of death, resignation or for any other any reason office of the liquidator is remains vacant, such vacancy is filled by the creditors in the General meeting of the company.
8. The liquidator cannot take shares of any company as a consideration for the transfer without the permission of the Tribunal or the committee of the inspection.(sec. 507)
9. Final meeting and dissolution: -- when all the affairs of the company are wound up, liquidator calls the final meeting of the members and creditors. The entire Books of Accounts are presented there in the meeting. The information must be made by giving an advertisement in a leading newspaper and in the official Gazette also. Lastly, the liquidator files the copy of last meeting proceeding with the Registrar and he registers the same in his records. The company in this way is wound up after three months from the date of registration.