

Ch.3 Promotion & Incorporation of Company

The whole process of formation of a company may be divided into four stages, namely,

1. Promotion
2. Registration
3. Floatation
4. Commencement of Business.

1. Promotion

Meaning of Promotion & Promoter	The stage of conceiving an idea to start a business and its working up is termed as promotion. The person, who assumes the task of promotion, are termed as “ Promoters ”. Therefore, promoter is a person, who conceives an idea of starting a business, plans the formulation of co. and actually brings it into an existence.
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Promoter	According to Section 2 (69) of the Companies Act, 2013, “Promoter” means a person – (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act. Provided that sub-clause (c) shall not apply to a person who is acting merely in a professional capacity.
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Further, according to **SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009**, “promoter” includes:

- (i) the person or persons who are in control of the issuer;
- (ii) the person or persons who are instrumental in the formulation of a plan or program pursuant to which specified securities are offered to public;
- (iii) the person or persons named in the offer document as promoters.

Is a director/officer/employee of the company a promoter?	A director/officer/employee who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise is considered as a promoter. However, a director or officer or employee of the company or a person, if acting as such merely in his professional capacity, shall not be deemed as a promoter.
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Not associated with the initial formation	[Lagunas Nitrate Co. V. Lagunas Syndicate] Decision of the Court To be a promoter one need not necessarily be associated with the initial formation of the co., one who subsequently helps to arrange floating of its capital will be regarded as promoter.
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Professional is not a promoter	However, the persons assisting the promoters by acting in a professional capacity do not thereby become promoters themselves.
Example	A solicitor who drafts the articles, or the accountant who values assets of a business to be purchased are merely giving professional assistance to the promoter. However, where he goes further than this, e.g., by introducing his clients to a person who may be interested in purchasing shares in the proposed company, he would be regarded as promoter.
Judiciary has defined the term 'promoter' in various cases	
Twycross vs. Grant	Decision of the Court It was held that promoter is "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose".
Whaley Bridge Calico Printing Co. vs. Green	Decision of the Court It was held that the term "promoter" is a term not of law but of business usually summing up in a single word, a number of business operations familiar to the commercial world are performed by which a company is generally brought into existence". But a person may be a promoter even if he has undertaken a lesser active role in the formation of a company. Any person who becomes a director, places shares or negotiates preliminary agreements, may be covered by this term. A company may have several promoters. A promoter may be a natural person or a company.

When Promotion Begins and Ends	
Relationship	[Twycross v. Grant] Decision of the Court The relationship between promoter and the company that he has floated must be deemed to be fiduciary relationship from the day the work of floating the company starts and continues up to the time that the directors take into their hands what remains to be done in the way of forming the company.
Start and End	Chronologically, the first persons who control or influence the company's affairs are its promoters. It is they who conceive the idea of forming the company, and it is they who take the necessary steps to incorporate it, to provide it with share capital and loan and acquire the property for the business. When these things have been done, they hand over the control of the company to its directors. On handing over the control of the company to the directors, the promoter's fiduciary and common law duties cease. Therefore, the status of a promoter is generally terminated when the Board of directors has been formed and the Board starts governing the company.

LEGAL POSITION OF A PROMOTER

A promoter is neither an agent nor a trustee of the company yet to be formed. But law holds him in a fiduciary relationship [relationship of trust and confidence] towards the company, the subscribers and the original allottees of shares. In this fiduciary capacity, he is supposed to perform the following duties.

Duties of Promoters: This relationship of trust and confidence imposes certain duties on promoters.

1. Not to make secret profits

As per section 102(4) of Companies Act, 2013, where as a result of the non-disclosure or insufficient disclosure in any explanatory statement annexed to the notice of a general meeting, by a promoter any benefit accrues to such promoter either directly or indirectly the promoter shall be liable to compensate the company to the extent of the benefit received by him. The promoters should not make a secret profit from the company.

He should not make any secret profit at the expense of the company he promotes, without the knowledge and consent of the company and if he does so, the company can compel him to account for it.

Note: -The law does not prohibit making of a profit by the promoters or paying any remuneration to promoters. What the law prohibits is making of secret profit by promoters.

In other words, a promoter can make profit in respect of any transaction with the company, only if he makes a full and fair disclosure of such profit.

Gluckstein v. Barnes

In this case, a syndicate of persons was formed to buy a property called 'Olympia' and resells this 'Olympia' to a company to be formed for the purpose.

The syndicate first bought the debentures of the old Olympia company at a discount. Then they bought the company itself for £1,40,000.

Out of this money provided by them, the debentures were repaid in full and a profit of £20,000 made thereon.

They promoted a new company and sold Olympia to it for £1,80,000. The profit of £40,000 was revealed in the prospectus but not the profit of £20,000.

Held, profit of £20,000 was a secret profit and the promoters of the company were bound to pay it to the company because the disclosure of the profit by themselves in the capacity of vendors to themselves (in the capacity of directors of the purchasing company) was not sufficient.

2. Selling his property without disclosure

A promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed. If a promoter contracts to sell his own property to the company without making a full disclosure, the company may either repudiate the sale or affirm the contract and recover the profit made out of it by the promoter. Either way the dishonest promoter is deprived of his advantage.

Erlanger v. New Sombrero Phosphate Co

In this case, a syndicate of which E was the head purchased an island containing mines of phosphate for £ 5,000. E, then formed a company to buy this island. A contract was made between X a nominee of the syndicate and the company for its purchase at £ 10,000. The details of the sale were not disclosed to the shareholders or to the independent Board of directors. The company now sought to rescind the contract of sale.

Decision of the Court

It was held that as there had been no disclosure by the promoters of the profit they were making, the company was entitled to rescind the contract.

The disclosure should be made to an independent and competent Board of directors. This duty is not discharged if he makes the disclosure to the Board of directors who are mere nominees of his own.

Disclosure to Whom?	The fact that the promoters have made a profit, it must be disclosed to an independent Board of directors.
Disclosure to the whole body of shareholders	Where it is, not possible to constitute an independent Board of directors, the disclosure should be made to the whole body of persons who are invited to become shareholders and this can be done through the prospectus. Thus, the promoters have to ensure that 'the real truth is disclosed to those who are induced by the promoters to join the company.

The legal position of promoter can be well understood with the help of following cases: -

Erlanger v. New Sombrero Phosphate Co.	Decision of the Court It was held that a promoter is neither an agent of, nor a trustee for, the company because it is not in existence. But he occupies a fiduciary position in relation to the company and therefore requires to make full disclosure of the relevant facts, including any profit made by him.
Emma Silver Mining Co. v. Grant	Decision of the Court It was held that on the basis of fiduciary relationship, a promoter may not make, any profit at the expense of the company, he promotes. If he does make a secret profit in disregard of this rule, the company can compel him to account for it, and surrender the secret profit.

LIABILITIES OF PROMOTERS

A promoter is subject to the following liabilities under the various provisions of the Companies Act, 2013: -

1. Incorporation of company by furnishing false information	As per section 7(6), where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration shall be liable for fraud under section 447.
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2. Disclosure in the Prospectus	Section 26 of the Act lays down matters to be stated and reports to be set out in the prospectus. The promoter(s) may be held liable for the non-compliance of the provisions of this Section.
3. Civil Liability for misstatements in prospectus	A promoter is liable for any misleading statement in the prospectus to a person who has subscribed for any securities of the company on the faith of the prospectus. By virtue of section 35(1), where a person has subscribed for securities of a company acting on any statement included, or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and the person who so authorized the issue of prospectus, including a promoter of the company shall, be liable to pay compensation to every person who has sustained such loss or damage. No promoter shall be liable under this section, if he proves that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.
4. Punishment for fraudulently inducing persons to invest money	According to section 36, any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into an agreement for acquiring, disposing of, or underwriting securities, shall be liable for punishment for fraud under section 447.
5. Contravention of provisions relating to private placement	If a company makes an offer or accepts monies in contravention of the provisions of private placement as stated in section 42, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty. [Section 42(10)]
<p><u>Private Placement under Companies Act, 2013</u></p> <p>Private placement means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in section 42.</p> <p>If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the 200 persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognized stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of the Companies Act, 2013.</p>	
6. Mis-appropriation	A company may proceed against a promoter on action for deceit or breach of duty under Section 340, where the promoter has misapplied or retained any money or property of the company or is guilty of misfeasance or breach of trust in relation to the company.
7. Criminal Liability for misstatement in prospectus	Besides civil liability, the promoters are criminally liable under Section 34 for the issue of prospectus containing untrue or misleading statements.

	Section 447 imposes severe punishment for fraud on promoters who make untrue or misleading statements in prospectus with a view to obtaining capital. The punishment prescribed is imprisonment for a term which shall not be less than six months but which may extend to ten years and also a fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.
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Right of Promoters to receive remuneration	
Where company has not made any contract to pay	If the company after the incorporation has not made any contract with the promoters to pay remuneration to them, following provisions shall be applicable: -: (a) The promoters shall have no right to any remuneration from the company. (b) The promoters shall not have any right recover the expenses properly incurred by them for incorporation of the company. (c) Even where the articles provide that the company shall pay remuneration to the promoters after incorporation, such a provision in the articles is not binding on the company.
Where company has made contract to pay	If the company, after incorporation, makes a contract with the promoters to pay remuneration to them, the promoters shall have the right to- (a) - receive the remuneration that the company has contracted to pay. (b) - recover the expenses properly incurred by them for incorporation of the company.
Different ways to get remuneration	Remuneration may be paid to the promoters in any of the following ways: (a) He may take commission on the shares sold. (b) He may be paid a lump sum by the company. (c) He may sell his own property to the company for cash or against fully paid shares in the co. at an over valuation after making full disclosure to all independent BoDs or to the intended shareholders.

PROCEDURE FOR REGISTRATION / INCORPORATION OF A COMPANY
Section 3(1) states that a company may be formed for any lawful purpose by— (a) seven or more persons, where the company to be formed is to be a public company; (b) two or more persons, where the company to be formed is to be a private company; or (c) one person, where the company to be formed is to be One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.
INCORPORATION OF COMPANIES - PROCEDURAL ASPECTS
Introduction of New Form INC-29 (Integrated Form)

The Ministry of Corporate Affairs introduced a major reform for businessmen in India. Effective from 1st May, 2015, the incorporation of new business will require only one form to be filled, against earlier five forms. The new Form is INC-29, and it replaces earlier tedious process of filling out several forms for incorporating a new company.

Earlier Form Filing: -

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| 1. Application for obtaining a DIN | ----- DIR-3 |
| 2. Approving the name of the company | ----- INC-1 |
| 3. A separate form for Registration of co. (with MOA, & AOA) | ----- INC- 7 |
| 4. Verification of Regd. Office | -----INC- 22 |
| 5. Separate form should be sent to every director | -----DIR- 12 |

Now only one form is required, i.e., Form INC – 29.

Application for Availability of Name of company

Application for Reservation of Name	As per section 4(4) a person may make an application to the Registrar for the reservation of a name set out in the application as— (a) the name of the proposed company; or (b) the name to which the company proposes to change its name.
	As per Rule 9 of Companies (incorporation) Rules 2014 , an application for the reservation of a name shall be made in Form No. INC- 29 (<i>earlier Form No. INC-1</i>) along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.
Name is not identical	According to section 4(2), the name stated in the memorandum of association shall not— (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or (b) be such that its use by the company— (i) will constitute an offence under any law for the time being in force; or (ii) is undesirable in the opinion of the Central Government.
Name does not show any connection with C. Govt. & S. Govt.	Section 4(3) provides that a company shall not be registered with a name which contains— (a) any word or expression which is likely to give the impression that the company is in any way connected with, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government.
Name Reserved	Section 4(5) lays down that upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 60 days from the date of the application.

Preparation of Memorandum and Articles of Association

The Memorandum of Association is a document which defines the scope of the company's activities and its relations with the outside world.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Act.

Memorandum of Association

This is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by

- (i) seven or more persons, where the company to be formed is a public company;
- (ii) two or more persons, where the company to be formed is a private company; or
- (iii) one person, where the company to be formed is a One Person Company

by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

To subscribe means to append one's signature or mark a document as an approval of its contents.

Section 4(1) states that the memorandum of a company shall state –

- (a) the name of the company with the last word “Limited” in the case of a public limited company, or the last words “Private Limited” in the case of a private limited company
- (b) the State in which the registered office of the company is to be situated;
- (c) the objects for which the company is proposed to be incorporated;
- (d) the liability of members of the company, whether limited or unlimited,
- (e) in the case of a company having a share capital, –
 - (i) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
 - (ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;
- (f) in the case of One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

Article of Association

In terms of section 5(1) of the Companies Act, 2013, the articles of a company shall contain the regulations for management of the company.

The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. It deals with the rights of the members of the company inter se. Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out.

FILING OF DOCUMENTS WITH REGISTRAR OF COMPANIES

Section 7(1) of the Companies Act, 2013 states that the following documents shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, namely: –

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| (a)
Application
for | Rule 12 of Companies (Incorporation) Rules 2014 states that an application for incorporation shall be filed with ROC in Form No. INC-2 in case of one- |
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Incorporation of Companies	person company or Form No. INC-29 (<i>earlier Form No. INC-7</i>) in case of other companies.
(b) M. A. and A.A. of the company duly signed	According to Section 7(1)(a) the memorandum and articles of the company duly signed by all the subscribers to the memorandum shall be filed, in such manner as may be prescribed.
	Rule 13 of The Companies (Incorporation) Rules 2014 states that the Memorandum and Articles of Association of the company shall be signed in particular manner. This point is discussed under the Ch. MOA.
(c) Declaration from the professional	Section 7(1) (b) of the Companies Act, 2013 requires filing of a declaration in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act have been complied with. Rule 14 of The Companies (Incorporation) Rules 2014 states that the declaration by an advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice shall be in Form No. INC- 8 .
(d) Affidavit from the subscribers to the Memorandum	Section 7(1)(c) of the Companies Act, 2013 requires the filing of an affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief; Rule 15 of The Companies (Incorporation) Rules 2014 states that the affidavit shall be submitted by each of the subscribers to the memorandum and each of the first directors named in the articles in Form No. INC- 9 .
(e) Furnishing verification of Registered Office	Under Section 12 of the Companies Act, 2013, a company shall, on and from the 15th day of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The company can furnish to the registrar verification of registered office within 30 days of incorporation in the manner prescribed. As per rule 25(1) of Companies (Incorporation) Rules 2014 , the verification of registered office shall be filed in Form No. INC- 29 (<i>earlier Form No. 22</i>).
(f) Particulars of subscribers	Rule 16 of Companies (Incorporation) Rules requires the filing of the particulars of name, including surname or family name, residential address,

	nationality and such other particulars of every subscriber to the memorandum along with proof of identity, as prescribed.
(g) Particulars of first directors along with their consent to act as directors	<p>Rule 17 of Companies (Incorporation) Rules 2014 states that – The particulars of each person mentioned in the articles as first director of the company along with his consent to act as director of the company shall be filed in Form No. INC -29 (<i>earlier Form No. DIR.-12</i>) along with the fee.</p> <p>As per section 152 (3), no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154.</p> <p>Section 152(4) provides that every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number.</p> <p>By virtue of section 153 every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number in Form No. INC 29 (<i>earlier Form No. DIR- 3</i>).</p> <p>Any individual who intends to be a director of a company will have to mandatorily apply for DIN first.</p> <p>DIN has to be obtained by the directors of the company before commencing the procedure for incorporation of a company.</p>
(h) Power of Attorney	With a view to fulfilling the various formalities that are required for incorporation of a company, the promoters may appoint an attorney empowering him to carry out the requirements stipulated by the Registrar. This requires execution of a Power of Attorney on a non-judicial stamp paper of a value prescribed in the respective State Stamp Laws.
Issue of Certificate of Incorporation by Registrar	
Section 7(2) of the Companies Act, 2013 states that the Registrar on the basis of documents and information filed under sub-section (1) of section 7, shall register all the documents and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act. From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum would become the members of the company.	

Effect of Registration

The effect of registration of the company is as follow: -

- (a) The company becomes a body corporate.
- (b) The company acquires a legal recognition.
- (c) The company gets a name in which it shall carry on business on its own name.
- (d) The company comes into existence from such date as is mentioned in the certificate of incorporation.

CERTIFICATE OF INCORPORATION

After scrutinizing the documents filed and on being satisfied that they are in order, that the requisite fee has been paid and that all other legal requirements have been duly complied with, the Registrar will enter the name of the company in the Register of Companies and shall certify under his hand that the company is incorporated.

The certificate so issued by the Registrar is called the 'Certificate of Incorporation.'

CONCLUSIVENESS OF 'CERTIFICATE OF INCORPORATION'

Conclusiveness	A certificate of incorporation issued by the registrar shall be conclusive evidence that: (a) all the requirements of the Companies Act have been complied with in respect of to be registration; (b) the association is a company authorized to be registered; (c) the association has been duly registered under Companies Act.
Meaning	The term 'conclusive evidence' means that no inquiry shall be allowed to be made regarding the correctness or incorrectness of any particulars contained in the certificate of incorporation.
Instances of conclusiveness	The certificate of incorporation shall remain valid even in the following cases: (a) Where one person has signed on behalf of all the subscribers. (b) Where all the signatories to memorandum are minors. (c) Where all the signatures on the memorandum are forged. (d) Where the memorandum was altered after signing by subscribers, but before its registration.

Read the following cases carefully

Peel's case	If memorandum is found to be materially altered after signature but before registration or is signed by only one person for all the seven subscribers or the signatories be all infants. Decision of the Court The certificate would be nevertheless conclusive and would not affect the status and existence of the company as a legal person although such irregularities might give rise to claims between the subscribers.
Moosa v. Ibrahim	MOA of a company was signed by two adults and by a guardian of other five members, who were minors. The Registrar, however, registered the company and issued under his hand a certificate of incorporation. Decision of the Court The Court held the certificate to be conclusive for all purposes.

Jubilee Cotton Mills Ltd v. Lewis	<p>The Registrar issued a certificate of incorporation on January 8, but dated it January 6th, which was the date he received the documents. On January 6, the company made an allotment of shares to Lewis.</p> <p>Decision of the Court</p> <p>Held, that the certificate was conclusive evidence of incorporation on January 6 and that the allotment was not void on the ground that it was made before the company was incorporated.</p>
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Allotment of Corporate identity number	Section 7(3) of the Companies Act, 2013 states that on and from the date mentioned in the certificate of incorporation issued under sub-section (2), the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.
Documents of incorporation to be preserved	Section 7(4) states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

Powers of the Tribunal in case of incorporation of a company by furnishing false or incorrect information [Section 7(7) is yet to be notified.]

As per Section 7(7), where a company has been got incorporated by furnishing any false or incorrect information or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it,-

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles of the company; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit:

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

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

Commencement of Business

NOTE Amendment

No declarations for commencement of business, etc.: Section 11 Companies Act 2013 required all companies to file following additional declarations with the Registrar of Companies prior to commencement of business or exercising any borrowing power: (i) declaration by a director that minimum paid-up share capital has been paid; and (ii) company has filed verification of registered office.

The CA Amendment 2015 has removed the above requirements and deleted Section 11 of CA 2013. This reduces the filings to be made by companies in India.

CONTRACT WITH COMPANIES

Earlier there were three situations in the case of every company having a share capital (whether public or private) in which contracts are made:

1. Preliminary or pre-incorporation contracts	Contracts made on behalf of the company before its incorporation.
2. Provisional contracts	<p>Contracts made after incorporation but before the company could commence business were termed as Provisional Contracts.</p> <p>No declarations for commencement of business, etc.: Section 11 Companies Act 2013 required all companies to file following additional declarations with the Registrar of Companies prior to commencement of business or exercising any borrowing power: (i) declaration by a director that minimum paid-up share capital has been paid; and (ii) company has filed verification of registered office.</p> <p><i>The CA Amendment 2015 has removed the above requirements and deleted Section 11 of CA 2013. This reduces the filings to be made by companies in India.</i></p>
3. Post-Incorporation contracts	Contracts made after the incorporation of the company (earlier after getting the certificate of incorporation).

Now, we have Pre-incorporation and Post-Incorporation Contract.

PRE-INCORPORATION OR PRELIMINARY CONTRACTS

Those contracts which are entered into by the promoters before the formation of the company are termed as preliminary or pre-incorporation contracts.

For example, the promoters of the company may enter into contracts to acquire some property or right for the co. which is yet to be incorporated.

The promoters generally enter into such contracts as agents for the co. about to be formed. But the legal position is that two consenting parties are necessary to a contract where as a co. before incorporation is a non-entity.

The promoters, therefore, cannot act as agent for a co. which has not yet come into existence.

Therefore, the co. is not liable for the acts of the promoters done before its incorporation. A Pre-incorporation contract purported to be made by a co. which does not exist is a nullity. As such the co., when it comes into existence, can neither sue nor be sued on that contract.

Position of Promoters as to Preliminary Contracts

<p>1. Co. is not bound by pre-incorporation contracts-even where it takes the benefit</p>	<p>[English & Colonial Produce Co. Ltd., Re] A solicitor had prepared necessary documents such as the MoA etc. for the incorporation of a company and made payment of the required registration fee and other expenses. He claimed these expenses from the company after its incorporation.</p> <p>Decision of the Court He was not allowed since the company was not in existence at the time when expenses were incurred, and ratification was impossible.</p>
<p>2.Co. cannot enforce pre-incorporation contracts</p>	<p>[Natal Land & Colonization Co. Ltd. Vs. Pauline Colliery & Development Syndicate Ltd.] N Co. made an agreement with Mr. K, who acted on behalf of syndicate to give lease of coal mining rights to syndicate, yet to formed. After this, the syndicate was registered as a company. The syndicate (newly formed Company) claimed the performance of the agreement which N Co. refused to perform.</p> <p>Decision of the Court It was held that the Syndicate could not enforce the contract because it was not in existence when the contract was entered into.</p>
<p>3.Promoters personally liable</p>	<p>Where a contract is made on behalf a co. known to both the parties to be non-existent, the contract is deemed to have entered into personally by the promoters.</p> <p>[Kelner v. Baxter] In this case three persons A, B and C purported to enter into a contract as agents on behalf of a company before its incorporation for the purchase of certain goods from Kelner and signed it: “A, B and C, Directors”. The company later obtained the certificate of incorporation but collapsed before the money was paid for the goods which were supplied to it by Kelner.</p> <p>Decision of the Court It was held that A, B and C were personally liable on the agreement and no subsequent ratification by the company would relieve them from that liability. Therefore, where promoters have made a pre-incorporation contract presenting themselves as the agent of the company, yet to be formed, they would be personally liable under it to pay damages to the third party for any loss suffered.</p>
<p>4. No Ratification of Pre-</p>	<p>A co. cannot ratify a contract entered into by the promoters on its behalf before its incorporation. The co. can neither ratify those contracts nor sue the vendors</p>

incorporation contract	<p>after its incorporation because ratification requires the existence of principal at the time when the contract was entered into. [Howard v. Patent Ivory Co.]</p> <p>Decision of the Court A company cannot ratify a pre-incorporation contract, but it is open to it to enter into a new contract after its incorporation to give effect to a contract made before its formation.</p>
5. No Adoption	<p>A co. cannot adopt contracts entered into before its incorporation even by passing a special resolution or by making adoption of such contracts as one of the objects of the co. in its M.A. Thus, preliminary contracts will either have to be left as mere “gentlemen’s agreements” or the promoters will have to undertake personal liability.</p>
<p>What to do?</p> <p>The co. can, if it desires, enter into a new contract, after its incorporation, with the other party. The contract may be on the same basis and terms as given in the pre-incorporation contract made by the promoters.</p> <ul style="list-style-type: none"> • In such cases, it is safer for the promoters, acting on behalf of the co. about to be formed, to provide in the contract that – • If the co. makes a fresh contract in terms of the pre-incorporation, the liability of the promoters shall come to an end; and • If the co. does not make a fresh contract within a limited time, either of the parties may rescind the contract. • However, the principles enunciated above have no application in our country on account of provisions of Sec. 15(h) and 19(e) Specific Relief Act, 1963 	
<p>As regards ratification of promoters’ contracts, the view taken in Kelner v. Baxter was that the company could not ratify contract made by a promoter before its incorporation. Specific performance of a contract may be enforced against a company in respect of contracts entered into by promoters on behalf of the company, if such a contract is warranted by the terms of incorporation and the company has accepted the contract and communicated the acceptance to the other party. (Section 15 of the Specific Relief Act, 1963). Section 19 of the same Act provides that the other party can also enforce the contract if the company has adopted it after incorporation and the contract is within the terms of incorporation.</p>	
<p>Specific Performance of Pre-Incorporation Contract</p>	
<p>These sections provide that a contract entered into by the promoters on behalf of the co. before its incorporation can be enforced by or against the co. If two conditions are satisfied: -</p> <ol style="list-style-type: none"> 1. If the contract is entered into for the working purpose of the co. and such contract is warranted by the terms of incorporation. 2. The co. accepts the contract after its incorporation and communicates such acceptance to the other party to the contract. 	