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SEMESTER - IV (CBCS)

BUSINESS LAW - II

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CONTENTS

Chapter No.	Title	Page No
Module I		
Module I	The Indian Companies Act, 2013	
1.	Nature, Features of Companies	1-18
2.	Types of Companies	
	Memorandum of Association and Articles of Association - I	19-30
3.	Memorandum of Association and Articles of Association - II	31-43
4.	Prospectus And Private Placement (Sections. 2.23, 26 to 32 and S. 42)	44-53
Module II	Companies Act	
5.	Membership of A Company (Sections. 2, 88, 91, 94, 95 of Companies Act 2013)	54-65
6.	Directors of Companies Appointments and Qualifications (Sections.2, 149-183, 196, 203-205)	66-78
7.	Meetings (Sections.96-122, 173-176)	79-87
Module III	The Indian Partnership Act 1932	
8.	Formation of Partnership and Types of Partnership	88-97
9.	Registration of Firms and Consequences of Non-Registration Relations Amongst The Partners and Dissolution of Firm	98-111
10.	Limited Liability Partnership Functioning and Nature of Limited Liability Partnership [Section: 2, 11-12, 55-58]	112-121
11.	Extent and Limitation of Liability of LLP And Partners in LLP Dissolution and Winding Up of The Limited Liability Partnership	122-125
Module IV	Consumer Protection Act, 1986 & Competition Act 2002	
12.	The Consumer Protection Act 1986	126-134
13.	The Consumer Protection Councils	135-139
14.	Consumer Protection Redressal Agencies (Sec. 9 To 27 A)	140-151
15.	Competition Act- 2002	152-160
Module V	Intellectual Property Rights	
16.	Nature and Concept of IPR	161-165
17.	Copyright	166-174
18.	Patent	175-180
19.	Trademark	181-188

Syllabus for Business Law
University of Mumbai
Revised Syllabus of Courses of B.Com. Programme at Semester IV
with Effect from the Academic Year 2017-2018
Core Courses (CC)
Business Law II

Modules	No. of Lectures
Indian Companies Act – 2013 Part - I	12
Indian Companies Act – 2013, Part - II	12
Indian Partnership Act – 1932	12
Consumer Protection Act, 1986 & Competition Act 2002	12
Intellectual Property Rights	12
Total	60

Sr. No.	Modules
1	<p>Indian Companies Act – 2013 Part - I Company –Concept, Features, Role of Promoters (S. 2(69) S. 92), Duties and liabilities of the Promoter Effects of Pre-Incorporation contracts, Consequences of non-registration, and Lifting of Corporate Veil. Classification of Companies Distinction between Private Company and Public Company, Advantages and disadvantages of Private company and Public Company. – Common Procedure for Incorporation of Company, Memorandum of Association (MOA) & Article of Association(AOA) – Concept , Clauses of MOA, AOA-Contents, Doctrine of constructive notice, Doctrine of Ultra Vires, Doctrine of Indoor Management. Prospectus – Concept, Kinds, Contents, Private Placement</p>
2	<p>Indian Companies Act – 2013, Part - II Member of a Company –Concept, Who can become a member, Modes of acquiring membership, Cessation of membership, Right & Liabilities of Members. Director – Qualifications& Disqualification, Classification, Director Identification Number (DIN), Legal Position of Directors. Meetings – Types, Legal Provisions of Statutory Meeting, Annual General Meeting, Extra-Ordinary Meeting, Board Meeting.</p>

3	<p>Indian Partnership Act – 1932 Partnership – Concept, Essentials, True Test of Partnership, Partnership Deed, Types of Partnership, Rights and Duties of Partners, Distinguish between Partnership & Hindu Undivided Family (HUF). Dissolution – Concept, Modes of Dissolution, Consequences of Dissolution. Limited Liability Partnership (LLP) 2008 – Concept, Characteristics, Advantages & Disadvantages, Procedure for Incorporation. Extent of L.L.P.- Conversion of LLP, Mutual rights & duties of partners, Winding up of LLP, Distinction between LLP and Partnership.</p>
4	<p>Consumer Protection Act, 1986 & Competition Act 2002 Consumer Protection Act – Concept, Objects, Reasons for enacting the Consumer Protection Act, Definition of Consumer, Consumer Dispute, Complaint, Complainant, Defect, Deficiency, Consumer Dispute, Unfair Trade Practices, Goods and Services. Consumer Protection Councils & Redressal Agencies – District, State & National. Competition Act 2002 – Concept, Salient Features, Objectives & Advantages. Abuse of Dominant Position, Competition Commission of India, Anti- Competition Agreements,</p>
5	<p>Intellectual Property Rights Intellectual Property Right (IPR) – Concept, Nature, Introduction & background of IPR in India. IPR relating to Patents – Concepts of Invention and discovery, Comparison (S2 (j)), Concept of Patents, General principles applicable to working of patented inventions, Term of Patent. Infringement of Patent Rights & Remedies. (Ss. 104-115) IPR relating to Copyrights- Concept of Copyright (Ss. 14, 16, 54,) Concept of author and authorised acts, (S.2) Ownership of Copy right (S.17) Duration or term of Copy right. (S. 22-27), Original work and fair use, Rights of Copyright holder, Infringement of Copyrights & Remedies. (Ss. 51, 52) IPR relating to Trademarks –Concept, Functions of Trade Mark, types, trademarks that cannot be registered, Registration of Trade Marks and rights of the proprietor of Trade Marks. Procedure for registration of Trade Marks., Infringement of Trademarks & Remedies.</p>

MODULE I

THE INDIAN COMPANIES ACT, 2013.

1

NATURE, FEATURES OF COMPANIES

Unit Structure

- 1.0 Objectives
- 1.1 Introduction
- 1.2 Characteristics of Company
- 1.3 Disadvantage of Incorporation.
- 1.4 Formation of Companies
- 1.5 Lifting of Corporate Veil
- 1.6 Effects of Non- Registration.
- 1.7 Questions

1.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the characteristics of the Company
- Understand the Advantage and Disadvantage of Companies
- Explain how to form the company.
- Understand the meaning and effects Lifting of Corporate Veil
- Understand the Effects of Non- Registration.

1.1 INTRODUCTION

HIGHLIGHTS OF THE COMPANIES BILL, 2012 (as passed by the Lok Sabha on 18.12.12 and by the Rajya Sabha on 08.08.13) The Bill has 470 clauses as against 658 Sections in the existing Companies Act, 1956. The entire bill has been divided into 29 chapters. Many new chapters have been introduced,

Section 2 (20) of Companies Act, 2013" "Company" means a company incorporated under this Act or under any previous company law.

The word "company" has no strictly technical or legal meaning. A body corporate or corporation includes a company incorporated outside India, but does not include a co-operative society registered under the law relating to co-operative societies, and anybody corporate which the Central Government may, by notification, specify for this purpose.

Company” is derived from two words: “com”- group and “panies”- bread. Therefore, it means group that eat their bread together.

A company is: - an association or collection of individuals, whether natural persons, legal persons, or a mixture of both.

- Company members share a common purpose and unite
- in order to focus their various talents and organize their collectively available skills or resources to achieve specific, declared goals
- not merely a legal institution
- a legal device for attainment of social (Section 25/8) or economic end and to a large extent publicly and socially responsible

A company as an entity has many distinct features which together make it a unique organization. The essential characteristics of a company are following:

1.2 CHARACTERISTICS OF THE COMPANY

1. Voluntary association:

A company is a voluntary association formed by an individual or group of individuals. Most companies are formed with the motive of profit-making except the Section 8 companies that is Non-Governmental Organization . Profit earned is divided among the shareholders or saved for the future expansion of the company.

2. Separate Legal Entity:

A company becomes a separate legal entity as compared to its members when it registered with an appropriate authority that is ROC (Registrar of Company). The company is distinct and different from its members in law. It has its own seal and its own name; its assets and liabilities are separate and distinct from those of its members. It is capable of owning property, incurring debt, and borrowing money, employing people, having a bank account, entering into contracts and suing and being sued separately.

Case Law: Salomon v/s Salomon: Salomon had a business in leather and shoe manufacturing. Due to some circumstances, he created his own company and sells his previous business of shoe manufacturing to this company. Salomon gave one share each to his wife, daughter, sons, and the rest of the company’s shares were held by him. After few years, the company was wound up and had some existing liabilities but did not have enough assets to pay off the liabilities. Unsecured creditors sued Salomon for repayment of their money, but the court held that the company was not an agent or a trustee for Salomon. The company is entirely different from the individual, and hence the contentions of the creditors could not be upheld.

3. Limited Liability:

The liability of the members of the company is limited to contribution to the assets of the company up to the face value of shares held by him. A member is liable to pay only the uncalled money due on shares held by him. If the assets of the firm are not sufficient to pay the liabilities of the firm, the creditors can force the partners to make good the deficit from their personal assets. This cannot be done in the case of a company once the members have paid all their dues towards the shares held by them in the company.

The liability of a company may be limited either by Shares or Guarantee.

Company limited by Guarantee: Liability of shareholders is limited to a certain amount of guarantee mentioned in the memorandum payable only at the time of wind up and losses occurred by the company.

Company limited by Shares: Liability of the members shall be limited to the extent of unpaid money or shares held by them.

4. Perpetual Succession:

“Perpetual Succession” in a company is best defined by this line - *Members may come and go but the company goes on forever*. It means company never dies. If any member dies or leaves the company it does not make any difference to the corporate existence of the company. It is one of the fundamentals of a company's existence. Perpetual succession means that a company's life is not determined by the longevity of its members, shareholders, promoters, directors, employees or anyone else. If a shareholder dies, or hypothetically, all the shareholders die, only their shares in the company will be transferred to new people. If even a key director resigns, he/she will be replaced but the company will continue on.

5. Separate Property:

A company is a distinct legal entity. The company's property is its own. A member cannot claim to be owner of the company's property during the existence of the company.

6. Transferability of Shares:

Shares in a company are freely transferable, subject to certain conditions, such that no share-holder is permanently or necessarily wedded to a company. When a member transfers his shares to another person, the transferee steps into the shoes of the transferor and acquires all the rights of the transferor in respect of those shares.

7. Common Seal:

A company is an artificial person and does not have a physical presence. Thus, it acts through its Board of Directors for carrying out its activities and entering into various agreements. Such contracts must be under the seal of the company. The common seal is the official signature of the

company. The name of the company must be engraved on the common seal. Any document not bearing the seal of the company may not be accepted as authentic and may not have any legal force.

8. Capacity to sue and being sued:

A company can sue and be sued in its name and may even sue its members. It also has a right to seek damages where a defamatory matter is published about the company, which affects its business.

9. Separate Management:

A company is administered and managed by its managerial personnel i.e. the Board of Directors. The shareholders are simply the holders of the shares in the company and need not be necessarily the managers of the company.

1.3 DISADVANTAGE OF INCORPORATION OF COMPANY

1. Cumbersome Formalities and Cost
2. Separation of control from ownership
3. Greater Social Responsibility
4. Greater Tax Burden in Certain Cases
5. Winding Up Procedure is lengthy

Cumbersome Formalities and Cost:

Incorporation of a company is a very complex legal process and it involves a considerable amount of time and money. These elaborate procedures have been established so as to discourage people from doing business who not serious and passionate about it.

Even after the incorporation of the company, it has to be run and managed very strictly. In accordance with the legal provisions provided by the Companies Act. The returns and other documents have to be registered at the Registrar of Companies.

Certain particular events or activities such as accounts, corporate audits, meetings, borrowing, lending, investment and issue of capital, dividends etc, are necessarily required to be conducted and carried out by the provisions of the Companies Act.

Separation of control from ownership:

Members of small shareholders of a company do not have any effective control over the functions and decisions of the company because, the number of people in the company is large in number that an individual or even a small group of people cannot have a big effect on the functioning of the organisation.

Greater Social Responsibility:

Companies incorporated under Companies Act have to pay a higher tax. An incorporated company does not get any discounts and any minimum taxable limits. An incorporated company also has to pay income tax on the whole of its income at a fixed rate whereas other companies are charged at a gradual or slab rate.

Winding up Procedure is lengthy:

The Companies Act provides for a very much lengthy and complicated process to explain the winding up of a company. This process takes more time to complete the formalities, time consuming and expensive.

1.4 FORMATION OF COMPANIES

Introduction:

The formation and incorporation of a company are very much similar to the birth of a human like it also goes through various stages of formation of its body parts during the womb stage. Number of preliminary works are to be carried out to bring a company into existence. The process of an idea converting into a company includes various stages, these crucial stages of the pre-incorporation and formation stages are discussed in detail as under. This lesson explains the functions, duties and liabilities of a promoter along with providing in depth knowledge into cases regarding pre-incorporation contract.

Role of Promoters For Incorporation of Company:

“Promoter is the person who originates the idea for formation of a company and gives the practical shape to that idea with the help of his own resources and with that of others.”

A person cannot be held as promoter merely because he has signed at the foot of the Memorandum or that he has provided money for the payment of formation expenses.

The promoters, in fact, render a very useful service in the formation of the company. A promoter has been described as “a creator of wealth and an economic prophet.” The promoters carry a considerable risk because if the idea sometimes goes wrong then the time and money spent by them will be a waste.

A promoter may be an individual, a firm, an association of persons or even a company.

S. 2 (69) of Companies Act 2013 defines Promoter as:

- (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 nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity”

Preliminary Contracts/Pre-Incorporation Contracts Made by the Promoters:

Preliminary contracts are those contracts which are made by the promoters with different parties on behalf of the company yet to be incorporated. Such contracts are generally entered into by promoters to acquire some property or right for and on behalf of the company to be formed.

The promoters enter into preliminary contracts, generally as agents or trustees of the company. Such contracts are not legally binding on the company because two consenting parties are necessary to a contract whereas the company is non-entity before incorporation.

Functions of a Promoter:

The Promoter Performs the following main functions:

1. To conceive an idea of forming a company and explore its possibilities.
2. To conduct the necessary negotiation for the purchase of business in case it is intended to purchase an existing business. In this context, the help of experts may be taken, if considered necessary.
3. To collect the requisite number of persons (i.e. seven in case of a public company and two in case of a private company) who can sign the ‘Memorandum of Association’ and ‘Articles of Association’ of the company and also agree to act as the first directors of the company.

4. To decide about the following:

- (i) The name of the Company,
- (ii) The location of its registered office,
- (iii) The amount and form of its share capital,
- (iv) The brokers or underwriters for capital issue, if necessary,
- (v) The select the bankers,
- (vi) The selection of auditors of company,
- (vii) The legal advisers.

5. To get the Memorandum of Association (M/A) and Articles of Association (A/A) drafted and printed.
6. To make preliminary contracts with vendors, underwriters, etc.
7. To make arrangement for the preparation of prospectus, its filing, advertisement and issue of capital.
8. To arrange for the registration of company and obtain the certificate of incorporation.
9. To defray preliminary expenses.
10. To arrange the minimum subscription.

Promoter of Company and his legal position towards Company:

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.

The promoters of a company stand undoubtedly in a **fiduciary position**. They have in their **hands the creation and molding** of the company. They have the power of defining how and when and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation.”

From the fiduciary position of promoters, the two important results follow:

- (1) A promoter cannot be allowed to make any secret profits. If it is found that in any particular transaction of the company, he has obtained a secret profit for himself, he will be bound to refund the same to the company.
- (2) The 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 he contracts to sell his own property to the company without making a full disclosure, the company may either repudiate/rescind the sale or affirm the contract and recover the profit made out of it by the promoter.

A promoter who wishes to sell his own property to the company must make a full disclosure of his interest.

The disclosure may be made:

- (i) To an independent Board of Directors, or
- (ii) In the articles of association of the company, or
- (iii) In the prospectus, or
- (iv) To the existing and intended shareholders directly.

If the promoter fails to discharge the obligation demanded of his fiduciary position the company may rescind the contract or may in the alternative choose to take advantage of the contract and sue the promoter for damages for breach of his duty to the company.

Secret profits on the sale of property can be recovered from a promoter only when the property was bought and sold to the company while he was acting as a promoter.

Rights of Promoter:

The rights of promoters are enumerated as follows:

1. Right of indemnity:

Where more than one person act as the promoters of the company, one promoter can claim against another promoter for the compensation and damages paid by him. Promoters are severally and jointly liable for any untrue statement given in the prospectus and for the secret profits.

2. Right to receive the legitimate preliminary expenses:

A promoter is entitled to receive the legitimate preliminary expenses which he has incurred in the process of formation of the company such as cost of advertisement, fee of solicitor and surveyors. The right to receive the preliminary expenses is not a contractual right. It depends upon the discretion of the directors of the company. The claim for expenses should be supported by vouchers.

3. Right to receive the remuneration:

A promoter has no right against the company for his remuneration unless there is a contract to that effect. In some cases, articles of the company provide for the directors paying a specified amount to promoters for their services but this does not give the promoters any contractual right to sue the company. This is simply an authority vested in the directors of the company.

However, the promoters are usually the directors, so that in practice the promoters will receive their remuneration.

The remuneration may be paid in any of the following ways:

- (i) A commission may be paid to the promoter on the purchase price of the business or property taken over by the company through him.
- (ii) The promoters may be granted by the company a lumpsum amount.
- (iii) The promoters may be given fully or partly paid shares in consideration of their services rendered.
- (iv) The promoter may be given a commission at a fixed rate on the shares sold.

- (v) The promoter may purchase the business or other property and sell the same to the company at an inflated price. He must disclose this fact.
- (vi) The promoters may take an option to subscribe within a fixed period for a certain portion of the company's unissued shares at par.

Whatever be the nature of remuneration, it must be disclosed in the prospectus if paid within the preceding two years from the date of prospectus.

Duties of Promoter:

The duties of promoters are as follows:

1. To disclose the secret profit:

The promoter should not make any secret profit. If he has made any secret profit, it is his duty to disclose all the money secretly obtained by way of profit. He is empowered to deduct the reasonable expenses incurred by him.

2. To disclose all the material facts:

The promoter should disclose all the material facts. If a promoter contracts to sell the company a property without making a full disclosure, and the property was acquired by him at a time when he stood in a fiduciary position towards the company, the company may either repudiate the sale or affirm the contract and recover the profit made out of it by the promoters.

3. The promoter must make good to the company what he has obtained as a trustee:

A promoter stands in fiduciary position towards the company. It is the duty of the promoter to make good to the company what he has obtained as trustee and not what he may get at any time.

4. Duty to disclose private arrangements:

It is the duty of the promoter to disclose all the private arrangement resulting him profit by the promotion of the company.

5. Duty of promoter against the future allottees:

When it is said the promoters stand in a fiduciary position towards the company then it does not mean that they stand in such relation only to the company or to the signatories of memorandums of company and they will also stand in this relation to the future allottees of the shares.

Liabilities of Promoter:

The liabilities of promoters are given below:

1. Liability to account in profit:

As we have already discussed that promoter stands in a fiduciary position to the company. The promoter is liable to account to the company for all secret profits made by him without full disclosure to the company. The company may adopt any one of the following two courses if the promoter fails to disclose the profit.

- (i) The company can sue the promoter for an amount of profit and recover the same with interest.
- (ii) The company can rescind the contract and can recover the money paid.

2. Liability for mis-statement in the prospectus:

The promoter liable to pay compensation to every person who subscribes for any share or debentures on the faith of the prospectus for any loss or damage sustained by reason of any untrue statement included in it. Sec. 62 also provides certain grounds on which a promoter can avoid his liability. Similarly Sec. 63 provides for criminal liability for mis-statement in the prospectus and a promoter may also become liable under this section.

The promoter may also be imprisoned for a term which may extend to two years or may be punished with the fine up to Rs. 5,000 for untrue statement in the prospectus.

3. Personal liability:

The promoter is personally liable for all contracts made by him on behalf of the company until the contracts have been discharged or the company takes over the liability of the promoter. The death of promoter does not relieve him from liabilities.

4. Liability at the time of winding up of the company:

In the course of winding up of the company, on an application made by the official liquidator, the court may make a promoter liable for misfeasance or breach of trust. Further where fraud has been alleged by the liquidator against a promoter, the court may order for his public examination. (Sec. 478).

Registration Process:

The Companies Act, 2013 provides for the kinds of companies that can be promoted and registered under the Act.

Section 3(1) of the Companies Act 2013 states that a company may be formed for any lawful purpose by—

1. Minimum Members Required:

- (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 that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration

A company formed under Section 3(1) may be either:

- (a) a company limited by shares; or
- (b) a company limited by guarantee; or
- (c) an unlimited company.

2. Approval of the Proposed Name of the Company:

Before the company is registered, it is essential to obtain the approval of the Registrar to its proposed name. There is a specific application form for this purpose that is FORM INC-1. The promoter generally selects a few suitable names in order of preference and apply to the National Company Law Tribunal through the Registrar of the State in which the company is to be registered in with a fee of Rs.1000. On hearing about the available name, the promoter has to decide the name for the company. As per Section 4 (5) the name reserved shall be valid for a period of 60 days from the date on which the application has made.

3. Documents to be Filed with the Registrar during registration

The promoter should then prepare and file the following documents with the Registrar of Companies. He should also pay the necessary filing and registration fees.

A. Memorandum of Association:

The Memorandum is the heart of any company. It is the Constitution of the company and Primary document which is rigid in form. A Memorandum of Association (MoA) represents the charter of the company. It is a legal document prepared during the formation and registration process of a company to define its relationship with shareholders and it specifies the objectives for which the company has been formed. The company can undertake only those activities that are mentioned in the Memorandum of Association. As such, the MOA lays down the boundary beyond which the actions of the company cannot go. It should be printed and signed by the subscriber whose names are there in the Memorandum.

B. The Articles of Association:

Articles of association form a document that specifies the internal rules and regulations for a company's operations and defines the company's purpose. The document lays out how tasks are to be accomplished within the organization, including the process for appointing directors and the handling of financial records.

4. First Directors:

Minimum 02 directors in case of Private company and 3 in case of public company are required to be appointed. The names of first director have to be mentioned. Once the company name has been approved by MCA and registered, the next step is procuring a Digital Signature Certificate for private limited company. Digital Signature Certificate is a form of a digital key, which holds all the vital information about the registered signatory like name, address, email, phone number, and the authority which has provided the certificate. Further an intending directors must have an DIN (Directors Identification Number by filling up the Form No DIR-3. This DIN must be obtained by the director before commencing the procedure for incorporation of the company.

5. Consent of the Directors:

When Directors of a Company are appointed by the or named in the prospectus, a written consent to act as directors and also a written undertaking to take up and pay for the qualification shares if any are mandatory in Incorporation of a Company.

6. Statutory Declaration from the professionals:

A statutory declaration by any one of the following persons stating that all the requirements of the Act regarding Registration have been duly complied with:

- a) An Advocate of the Supreme Court or High Court.
- b) An Attorney or Pleader who is entitled to appear before a High Court.
- c) A Chartered Accountant who is engaged in formation of the company and also practicing in India.
- d) Any individual who is named in the Articles of Association as the Company's Director, Manager or Secretary.

7. An Affidavit:

Subscriber of Memorandum of Association required to file an affidavit stating that he/she is not convicted in any offence in relation with the formation or management of an affairs of any company.

8. Notices of the Address of the Registered Office:

The notice for the address of the registered office of the company should be given within 30 days after its incorporation or on the date from which the company commences its business whichever is earlier.

9. Payment of Fees and Stamp Duty:

After submitting the document to the Registrar of Company, Fees and Stamp duty has to be paid by the proposed company the said fees are depends upon the authorized capital of the company.

Final Procedure:

1. Certificate of Incorporation of the Company:

After the above documents are filed with the Registrar and the prescribed fees are paid and the Registrar is satisfied that all the requirements of the Act regarding the registration have been complied with, he will register the documents and retain them.

The Registrar will then issue a certificate known as **Certificate of Incorporation** and enter the name of the company in the Register kept in his office. This Certificate of Incorporation entitles the company as a legal person. In other words, the company is born upon the issue of Certificate of Incorporation. (Form No INC 11) and Rule 18 of Companies (Incorporation) Rules 2014.

Conclusiveness of the Certificate of Incorporation:

According to Companies Act, the certificate is conclusive evidence that all the requirements of the Act in regard to the formation and registration of the company have been complied with. The effects of the certificate of incorporation can be summed up as follows:

1. Neither the Court nor the Registrar can cancel the Certificate of Incorporation even if the company is formed for an illegal purpose.
2. The validity of the Certificate of Incorporation cannot be debated or argued upon on any grounds whatsoever.
3. When a certificate is issued, the new company is born. In other words, a legal person has come into existence through a legal process.
4. The date mentioned in the certificate is the date of incorporation of the company.

Effect of Certificate of Incorporation:

- 1) The company is born on the day on which it receives its certificate of incorporation.

- 2) It is conclusive evidence that all the requirements of the Act in relation to registration have been complied with. The validity of the certificate cannot be challenged on any ground.

Effect of Pre-incorporation contracts:

Often contracts are entered into on behalf of the company even before it is duly incorporated. Such pre-incorporation contracts are not binding on the company after it comes into existence. This is because at the time of making of the contract, the company is a non-entity. A company cannot even ratify these contracts, after it comes into existence for the simple reason that ratification relates back to the date on which the contract was made. So, the person entering into the contract incurs personal liability on such contracts.

Advantages of Incorporation:

The advantages of incorporation are

- i) The company acquires an independent corporate personality.
- ii) It becomes the owner of its capital, assets and other property.
- iii) It is capable of perpetual succession.
- iv) It can use a common seal.
- v) It can sue in its own name.
- vi) The liability of the members is limited.
- vii) Shares of the company are easily transferable.

Disadvantages of Incorporation:

i) Social Responsibility:

Many companies have billions of dollars in assets and employ hundreds of thousands of people. They have a significant impact on society, and these companies often participate in social activities that are part of their corporate social responsibility (CSR) campaigns. These incorporation companies are so influential that they must adhere to certain social norms and contribute to the development of society.

ii) Formality and expenses:

Incorporation of a company is not only expensive but it also involves a number of formalities. Several requirements have to be complied with - both as to the formation of a company as well as the administration of its affairs. Whereas, constituting a firm is a relatively easy and inexpensive affair.

iii) Lifting the veil of Corporation:

Personality of a company is a legal myth. It ignores reality. And the reality is that a company is an association of persons who are in fact the beneficial owners of corporate property. So in some cases, the courts ignore the legal personality of the company, pierce the veil of corporation and look at persons behind it. Thus, some of the advantages of incorporation may become illusory.

Following are the circumstances in which the courts may lift the veil of corporation:

a) When the company assumes an enemy character:

In *Daimler Co. Ltd. v. Continental Tyre and Rubber Co.* (1916) 2A C 307, the House of Lords, while determining the character of a company registered in England, held that though the company was registered in England it would assume enemy character if the persons in de facto control of its affairs are residents in an enemy country (Germany).

b) When the company is formed for evasion of taxes:

Where the company is formed only for the purpose of evasion of taxes, the court has the power to disregard the corporate personality of the company (*Re Sir Dinshaw Maneckjee Petit*).

c) Where the company is formed for fraudulent purposes:

The courts can pierce the corporate personality if the company is formed for a fraudulent purpose, or for an unlawful object (*Gilford Motor Co. v. Horne*).

d) Where the company is an agent or trustee:

Courts will refuse to uphold the separate and independent existence of a company where it is an agent of its, members or of another company.

e) Under Statutory Provisions:

The courts will crack the shell of corporate personality where, because of the fall in the number of members below the prescribed legal minimum (seven in case of a public company and two in case of private company) the liability has become unlimited.

f) Any other just case:

The courts may, in the interest of truth and justice, set aside the cloak of corporate personality so as to determine liability.

1.5 LIFTING OF CORPORATE VEIL / PIERCING OF CORPORATE VEIL

Lifting the corporate veil, in simple words means disregarding the corporate personality and looking behind the real person who are in the

control of the company and where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. In this regards the court will break through the corporate veil.

Corporate personality of a company should ordinarily be respected. The whole law of corporations is still based on this basic principle of corporate entity. There are umpteen instances in which the courts have upheld this principle and resisted the temptation to break through the veil. But when the benefit is misused, the court is not powerless and it can lift the veil of corporate personality to see the realities behind the veil. In doing so, the court sub serves the important public interest, namely, to arrest misuse or abuse of benefit conferred by law. 27 Thus, it is quite evident that 'Piercing the veil' law exists as a check on the principle that, in general, investor shareholders should not be held liable for the debts of their corporation beyond the value of their investment.

Statutory Provisions for Lifting the Corporate Veil:

1. Reduction of Number of Members:

If an organization carries on business for over a half year after the number of its members has been diminished to seven if there should arise an occurrence of a public company and two in the event of a privately owned business, each individual who knows this fact and is a member during the time that the organization so carries on business after the half year, becomes liable severally and jointly with the organization for the payment of debts contracted following a half year. It is just that part who stays after a half year who can be sued.

2. Fraudulent Trading:

If any business of an organization is gone ahead with the aim to defraud creditors of the organization or creditors of some other individual or for any deceitful reason, who was intentionally a party to the carrying on of the business in that way is subject to imprisonment or fine or both

3. Misdescription of the Company:

If any officer of the organization or other individual acting on its benefit signs or approves/authorized to be signed by the organization any promissory note, bill of exchange, order or cheque for money or goods, endorsement in which the organization's name is not specified in readable letters, he is obligated to fine and he is personally liable to the holder of the instrument unless the organization has effectively paid the sum.

4. Failure to Refund Application Money:

If the executives of an organization are mutually and severally at risk to reimburse the application cash with premium if the organization neglects to refund the cash within 130 days of the date of issue of the prospectus.

5. Failure to deliver Share Certificate etc. within stipulated time:

If the Company fails to deliver the share or debentures stipulated within the period of 3 months of allotment or within 2 months of application for transfer, then the company as well as every officer of the company who is at fault shall be punishable with fine up to Rs.5000/- per day till such default continues.

6. Investigation of ownership of Company:

Central Government if deems fit may order to evaluate or check who are the persons who are financially interested and also control its decision making, appoint one or more investigators for investigation and reporting in respect of membership of the company.

7. Liability for Ultra Vires acts:

The Directors and other officers of the company may be held personally liable under the provisions of other statutes for example, for the recovery of tax arrears of a Private Company while being wound up, every director jointly and severally liable for the tax during the tenure for which the arrears is due.

1.6 EFFECTS OF NON-REGISTRATION

Company gets the status of body corporate on immediate effects of its registration with ROC which mandatory under Companies Act 2013 and any other previous Act. On registration company gets a status of Separate Legal Entity and carries Perpetual Succession. Company can enjoy all the rights as the common man enjoys the rights conferred by the constitution. Likewise when the company is registered with the ROC can enter into number of contracts, can acquire and disposed off the movable or immovable property with its own. Company can sue and can be sued in its corporate name.

When company is not registered with appropriate authority that is Registrar of Company will not enjoy the benefits of companies which are registered. **For Example :** Unregistered Company can not enjoy the Perpetual Succession status, Such companies will be treated as illegal association and Director or the Members are personally Liable for tortious acts. Such association can not enter into any contract with any other companies lawfully.

1.7 SUMMARY

Characteristics of the Company:

Voluntary association. Separate Legal Entity :.Limited Liability: Perpetual Succession Separate Property: Transferability of Shares: Common Seal:.

Capacity to sue and being sued: Separate Management:

Functions of Promoter:

1. To conceive an idea of forming a company and explore its possibilities.
2. To conduct the necessary negotiation for the company.
3. To collect the requisite number of persons to form the company.

Rights of Promoter:

Right of indemnity: Right to receive the legitimate preliminary expenses:

Right to receive the remuneration:

Duties of Promoter:

The 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:

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

1.8 QUESTIONS

1. Define Company and Explain the features of company
2. What do you understand by lifting up of corporate veil ?
3. What do you understand by pre incorporation or preliminary contracts?
4. Explain the role of Promoter in formation of Company.

Write Short Notes

1. Body corporate
2. Government company
3. Subsidiary company
4. Promoter
5. Pre incorporation contract

TYPES OF COMPANIES

MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION - I

Unit Structure

- 2.0 Objectives
- 2.1 Introduction
- 2.2 Types of Company
- 2.3 Advantage and Disadvantages of Public and Private Company
- 2.4 Difference between Private and Public Company.
- 2.5 Conversion of Private Company into Public Company
- 2.6 Summary
- 2.7 Questions

2.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the different types of Companies
- Understand the difference between Public and Private of Companies
- Understand the procedure for conversion of Public company into Private and Private Company in to Public Companies.
- Understand the advantages and disadvantages of Public and Private Companies.

2.1 INTRODUCTION

Classification of companies are essential for smooth understanding the functions and procedures. Companies are classified according to the Nature, Formation, Place of registration, Managerial Control, Liability Number of Shares held, Number of Directors etc.

2.2 TYPES OF COMPANY

Kinds of Companies:

For better understanding the body corporate of the companies are broadly divided in to number of classes on the following grounds:

- A. Modes of formation.
- B. On the basis of liability of members
- C. Allowed number of members.

D. Management Control.

E. Miscellaneous Category

A. On The Basis of Mode of Formation/ Incorporation:

There are two modes under which a corporate body may be formed; one, through a special Act of parliament, and two, through registration under the Companies Act.

Based on Incorporation:

- Statutory Company
- Chartered Company
- Registered Company

Statutory Companies: Corporations created under the special legislations of parliament or state legislatures may be called statutory companies;

A statutory company are companies created to provide public service and has limited liability; they are not always required to utilize limited title. Such companies can be approved can by either the Central or State Legislature Statutory Company. A statutory company is usually created with the intention of serving people rather than the traditional business goal of creating profits. Further The provisions of the Companies Act applies to statutory companies except where the said provisions are inconsistent with the provisions of the Act creating them.

They are required, however, to provide annual reporting to the Legislature-Parliament. A few well-known statutory companies include the following:

- Reserve Bank of India (RBI)
- Life Insurance Corporation of India (LIC)
- Industrial Finance Corporation (IFC)
- State Bank of India (SBI)
- Food Corporation of India (FCI)
- Unit Trust of India (UTI)

2. Chartered Companies:

Companies which are established under a special charter or by order of monarch or kings or a queen. Such companies are come into in an existence under Royal Chartered Act. The nature and powers of a ventures are specified by the charter. Following are the examples of Chartered Companies.

- **British Broadcasting Corporation,**
- **Bank of England**
- **East India Company**

3. Registered Companies:

Such companies incorporated or registered under the Companies Act passed by the government of the country are termed as a registered company. These companies can come into existence after they have registered themselves by observing the necessary procedures laid down under Indian Companies Act from the time to time. Companies Act and the registrar of companies (ROC) has granted a certificate of incorporation/Certificate of Commencement of Business which are known to be conclusive evidence that the company has observed all the necessary formalities of incorporation and later on such certificates cannot be challenged on the ground whatsoever.

Example: Google India Pvt Ltd is a registered or an incorporated company.

(B) On the Basis of Liability:

On the basis of liability, the company can be classified into:

- Companies limited by shares
- Companies limited by guarantee
- Unlimited companies.

i. Companies limited by shares:

When there is the liability of the members of a company is limited up to the amount unpaid on the shares if any, such a company is termed as a company limited by shares. In a company limited by shares the liability of the members is restricted to the unpaid amount on the shares held by them. The liability can be enforced during existence or life time of the company as well as during the winding up. Where the shares are fully paid up, no further liability leviable on them.

ii. Companies limited by guarantee:

These are the companies whereby the liabilities of members are limited up to the amount that they have agreed by the memorandum to contribute in the companies' assets at the time of liquidation. Therefore, it is a companies registered under Companies Act. In the case of such companies the liability of its members is limited to the amount of guarantee undertaken by them. Trade Associations, Research Associations, Clubs are examples of such companies. They promote various objects are various examples of guarantee companies.

iii. Unlimited Companies:

A company not having a limit on the liability of its members is known as unlimited company. In case of such a company every member is liable for the debts of the company as in an ordinary partnership in proportion to his interest in the company. As far as popularity is concerned, such companies are not so popular in India.

(C) On the basis of number of members.

(Allowed number of members)

- i. Private Company
- ii. Public Company
- iii. One Person Company

(i) Private company:

A private company means a company which by its articles of association:

- (i) It Restricts the right to transfer shares.
- (ii) There is Limits the number of its members to fifty (excluding members who are or were in the employment of the company) and
- (iii) Prohibits any invitation to the public to subscribe for any shares or debentures of the company.
- (iv) Where two or more persons hold one or more shares in a company jointly, they are treated as a single member. There should be at least two persons to form a private company and the maximum number of members in a private company cannot exceed 50. A private limited company is required to add the words "Private Ltd" at the end of its name.

ii. Public company:

A public company means a company which is not a private company. A company the ownership of which is open to the public is a public company. In other words, anyone can purchase the shares of this company. There is no restrictions to the number of members or to the transferring right of its shares. There must be at **least seven** members to form a public company. It is of the basics fundamental of a public company that its articles do not contain provisions restricting the number of its members or excluding generally the transfer of its shares to the public or prohibiting any invitation to the public to subscribe for its shares or debentures. Only the shares of a public company are capable of being assigned in on a stock exchange.

iii. One Person Companies (OPC):

The Companies Act, 2013 completely transformed corporate laws in India by introducing many new concepts that did not there previously. One person company is also one of new concept introduced by companies act 2013. One person company (OPC) means a company formed with only sole or single person as a member, unlike the traditional manner of having at least two members. In one person company there is no mandatory requirement of minimum share capital. It is recognition of single person economic entity lightens a path for small traders, service providers to venture into business by expanding their opportunities through corporate existence.

D. Companies on the basis of Control or Holding. (On the basis of Management Control):

i. Holding and Subsidiary Companies:

Some companies', shares shall be held fully or partly by another company. In this case, the company controlling these shares becomes the holding company. Likewise, the company whose shares the parent company controls known as its subsidiary company. Holding companies exercise control over their subsidiaries by governing the composition of their board of directors. Further, parent companies also exercise control by controlling more than 50% of their subsidiary companies' shares.

ii. Associate Companies:

In such companies other companies have significant or important influence. This "significant influence" amounts to ownership of at least 20% shares of the associate company. The other company's control can exist in terms of the associate company's business decisions under an agreement. Associate companies can also exist under joint venture agreements.

iii. Government Company:

It means any company in which not less than 51 percent of the paid-up share capital is held by the Central Govt, and/or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments. The subsidiary of a government company is also a government company.

E. Miscellaneous Category:

I. Foreign Companies:

Definition of Company under Companies Act, 2013 Section 2(20):
"Company means a company incorporated under this Act or under any previous company law."

In General, a foreign company is a company which is incorporated outside India which,

- has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- conducts any business activity in India in any other manner.

II. Dormant Company:

In common parlance, the word “Dormant” means inactive or inoperative.

When a Company is formed and registered for future project or to hold any intellectual property or an asset and not having any significant accounting transaction, such company apply for obtaining the status of Dormant Company. The provisions regarding Dormant Company has been given in Section 455 of Companies Act, 2013 read with Rule 3 to 8 of Companies (Miscellaneous) Rules, 2014 under Chapter XXIX. The Act prescribed lesser compliances for dormant companies in these provisions and rules.

iii. Small Company [S. 2(85)]:

A New concept has introduced by the Companies Act, 2013 that is ‘small company’. Its just a type of Private Company but with less capital and turnover size. It was proposed initially that the minimum paid-up capital requirement in such companies will be Rs 50 lakh and the minimum turnover of Rs 2 crores. Therefore, as per the latest amendment in Companies Act, 2013 the definition of Small Company is as follows: paid up share capital of not more than 50 lakhs or such higher amount as may be prescribed which shall not be more than 10 crores; AND annual turnover of not more than 2 crores or such higher amount as may be prescribed which shall not be more than 100 crores. here to become a small company both the conditions are required to be fulfilled.

2.3 ADVANTAGE AND DISADVANTAGES OF PUBLIC AND PRIVATE COMPANY

Advantages and Disadvantages of Private Company:

A Private Limited Company is a company which held privately by small businesses enterprises. The liability of the members of a Private Limited Company is limited to the number of shares respectively held by them. Shares of such companies are not publicly traded Shares of Private Limited Company cannot be publicly traded.

1. Separate Legal Entity:

A Private Limited Company is a separate legal identity in the court of the law, meaning assets and liabilities of the business are not the same as the assets and liabilities of the Directors. Both are different form each other.

2. Limited Liability:

If the company undergoes financial crises because of any reasons, the personal assets of members will not be liable for payment of the debts of the company as the liability of members of the companies are limited.

3. Easy formation:

A Private Limited Company can be formed and registered easily, It does not requires cumbersome procedures of formation. Secondly no need to wait for certificate of commencement of business.

4. Transferability of shares:

Shares of a company limited by shares are transferable by a shareholder to any other person if articles permit, without taking any permission or authorization from any of the higher authority.

5. Existence is uninterrupted:

As companies are featured with Perpetual Succession, means company never dies, which is continued existence until it is dissolved legally . A company, being a separate legal person, is unaffected by the death or other departure of any member but continues to be in existence irrespective of the changes in membership. 'Perpetual Succession' is one of the most important characteristics of a company.

Disadvantages of a Private Limited Company:

1. There is a restricts to transferability of shares by its Articles:

Articles of Association is the internal rules and regulations of the company which restricts the transferability of the shares if no provisions are in this regard.

2. Restriction on maximum number of memberships:

Companies Act 2013 provides that in any case number of members should not increase exceed 200. This leads to less financial liquidity.

3. It cannot issue prospectus to the public:

Private companies cannot issue prospectus to the public and hence it cannot use public money. Private companies are raising the capital by their internal sources.

Advantages and Disadvantages of Public Company:

Advantages:

Public Company Registration is done under the Companies Act, 2013. The registration of Public Company is subject to strict compliances. Further, such companies are required to have huge capital investment, Companies intend to have huge capital investment it can go for Public Company Registration.

1. Limited Liability of the members:

In Public Company the liability of the shareholder and Directors is limited to the extent of the shares they hold in the company or they can be called for any unpaid shares. **For example**, if the company suffers from any financial irregularities because of primary business activity, then in such case personal properties of shareholders and Directors will not be liable by the Banks, creditors, and government.

2. Separate Legal Entity:

Members of the company, Directors may come and go, but the existence of the company continues to exist. i.e., the absence or movement of any shareholder in the company will not affect the existence of the company.

3. Unlimited source of raising fund:

Public Company has a great advantage of an unlimited source of raising fund through Public which results in carrying out new projects and for getting the new market.

1. Easy Transferability

There is an easy transferability of share in Public Company. Shares of the company are listed on a stock exchange; the shareholders find it is easy to transfer the share in the company.

Disadvantages:

1. Difficult Legal Requirements and High cost of formation:

Setting up and maintaining a public company is much more difficult than setting up and maintaining a private company. Public Companies are subject to many legal requirements that do not apply to private corporations. Further the registering the company as a Public Company requires a huge cost. To come up with the formation of a public company huge investment, time and procedural things are required to be complied with. The returns of the company relied upon the investment you have done.

2. Increased Governmental Interference:

Public Companies are subject to a high level of government interference that does not apply to private companies held. Such interference has increased over the last 15 years in the wake of the many public corporations mismanagements that caused harm to people at large. The government intervention, though often required, slow down and decrease the flexibility of the operations of public companies.

3. Lack of secrecy:

To maintain the transparency and trust of the shareholders, the company provides full disclosure to the public due to which secrecy cannot be

maintained. The Public is involved in decision making, the company cannot maintain the secrecy.

Memorandum of Association and
Articles of Association - I

2.4 DIFFERENCE BETWEEN PUBLIC COMPANY AND PRIVATE COMPANY

Criteria	Public Company	Private Company
Meaning:	The public company refers to a company that is listed on a recognized stock exchange.	A private company is one that is not listed on a stock exchange and its securities are restricted or held privately by its members only
Name:	A public company need not affix the word “private”	private company, it is mandatory to affix the words “private limited” at the end of its name
Number of Members:	There must be minimum seven members to start with a public company and no maximum number of members restricted.	Private company can be started with a minimum of two members. Private companies can have a maximum of 200 members.
Transfer of Shares	The shares of a public company are freely transferable.	The shares of a private company are not freely transferable. Transferability is allowed subject to the provisions in the Articles of Association.
Issue of Prospectus	Public Company issues the Prospectus for public subscription.	A Private Company is restricted from issuance of prospectus as these companies cannot invite public for subscription.
Statutory Meeting	Compulsory to hold statutory meeting to obtain the certificate of commencement	Not required to hold statutory meeting.
Place of Holding AGM	Annual General Meeting can be held at the registered office or any other place where the registered office is situated	Place of Holding AGM

2.5 ¹CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY

Most of the business concern most of the time preferred for formation of Private Limited Company because the advantages and special privileges offered by it. Such companies don't issue the prospectus and invites from the near and dear and close friends of the directors and other members Capital is sourced Therefore, the Companies Act, 2013 does not impose stringent rules and regulations as those imposed on Public limited companies. In certain circumstances, a private limited would become a public company.

In the following circumstances a Private Limited Company can become a Public Limited Company

1. Conversion by default
2. Conversion by operation of law
3. Conversion by choice or by option

Once a private company becomes a public company under any of the above-mentioned circumstances, it would lose the privileges it enjoyed as a private company. On conversion, the rules and regulations applicable to public limited companies would become applicable.

1. Conversion by default:

A private company prohibits the right to transfer shares. There is a limit of the maximum number of members to 200 and prohibits invitation to the public for subscription of shares or debentures. In violation of any of these conditions laid down Private Company would become a public Company by default.

2. Conversion by operation of law:

In the following cases, a private company becomes a public company by the operation of law: When not less than 25% of the paid-up share capital of a private company is held by one or more public companies,

- a. When the average total turnover of the private company is not less than Rs.25 crores for three consecutive years,
- b. When the private company holds not less than 25% of the paid up share capital of a public company.
- c. When the private company invites, accepts or renews deposits from the public.

¹ <https://accountlearning.com/under-what-circumstances-a-pvt-company-be-converted-to-public-company/>

The Companies Amendment Act 2000 has given an option to these companies, either to continue as public limited companies or convert themselves into private limited companies by making the necessary changes in their articles.

3. Conversion by Choice or Option:

A private company out of its own free will can choose to convert itself into a public company. Generally, when private companies plan to expand and require more capital resources, they would convert themselves into public companies.

By becoming public companies, they can issue shares or debentures to the public and get the required amount of capital. In India, many organizations which commenced operations as private companies have got themselves converted into public limited companies in order to expand and diversify.

Any private company which desires to get converted into a public company should make the necessary changes in the Articles and follow the below mentioned steps:

- a. It should convene a general meeting and pass a special resolution duly altering the Articles.
- b. The copy of the resolution along with the amended Articles should be filed with the Registrar within 30 days of passing the special resolution.
- c. The number of members should be increased to seven.
- d. The company has to apply to the Registrar for obtaining a fresh certificate of incorporation with the words 'Private' deleted from its name.

2.6 SUMMARY

Modes of formation. On the basis of liability of members. Allowed number of members Management Control. Miscellaneous Category.

- i. Types of Companies: A. Statutory Company, Chartered Company, Registered Company. Chartered Companies: Registered Companies: Companies limited by shares, Companies limited by guarantee, Unlimited companies. Companies limited by guarantee, Private Company, Public Company, One Person Company, Holding and Subsidiary Companies, Associate Companies, Government Company, Foreign Companies, Dormant Companies.

Advantages and disadvantages of private company:

- I Separate Legal Entity. Easy formation:** Transferability of shares. Existence is uninterrupted.

1. There is a restricts to transferability of shares by its Articles. Restriction on maximum number of memberships: It cannot issue prospectus to the public:

Advantages and Disadvantages of Public Company:

- I Limited Liability of the members, Separate Legal Entity, Unlimited source of raising fund.
- II Difficult Legal Requirements and High cost of formation: Increased Governmental, Interference: Lack of secrecy

2.7 QUESTIONS

1. What are the types of Company?
2. What is the procedure for converting public company into private company?
3. What is the procedure for converting private company into public company?
4. Distinguish Between Public Company and Private Company
5. Define the following terms:
 - a. Chartered Company
 - b. Private Company
 - c. Public Company
 - d. One man Company
 - e. Holding Company
 - f. Subsidiary Company

MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION - II

Unit Structure

- 3.0 Objectives
- 3.1 Introduction
- 3.2 Definition and Meaning
- 3.3 Clauses under Memorandum of Association
- 3.4 Doctrine of Ultra Vires
- 3.5 Effects of Ultra Vires Transaction
- 3.6 Articles of Association
- 3.7 Distinction between Memorandum and Articles of Association
- 3.8 Doctrine of Constructive Notices
- 3.9 Doctrine of Indoor Management / Turquand (And Rule)
- 3.10 Summary
- 3.11 Questions

3.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the Meaning of Memorandum of Association and Articles of Association and their contents.
- Understand the Doctrine of Ultra Vires, Constructive Notice and Indoor Management
- Understand the Distinction between Memorandum of Association and Articles of Association.
- Understand the Provisions for Alteration of Memorandum of Association and Articles of Association.

3.1 INTRODUCTION

Memorandum of Association is the fundamental and most important document as to the formation of the company. A company is formed where number of members come together for achieving a specific purpose. This objective is usually commercial in nature. Companies are generally formed to earn profit from business activities. To incorporate a company, an application has to be filed with the Registrar of Companies (ROC). This application is required to be submitted with a number of documents. One of the fundamental documents that are required to be submitted with the application for incorporation is the Memorandum of Association.

3.2 DEFINITION AND MEANING

As per Section 2(56) of the Companies Act, 2013 “memorandum” means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. Memorandum Of Association: Section 4 of the Companies Act, 2013 deals with MOA.

A Memorandum of Association (MOA) represents the charter of the company. It is a legal document prepared during the formation and registration process of a company to define its relationship with shareholders and it specifies the objectives for which the company has been formed.

3.3 CLAUSES UNDER MEMORANDUM OF ASSOCIATION

Memorandum of every company shall state:

1. Name of the company with “Limited” as the last word of the name in case of a public company and “Private Limited” in case of a private company.
2. Registered office of the Company
3. Objects of the Company
4. Liability of the members
5. Details of Share Capital of the Company
6. Subscription or Association Clause.

1. Name Clause:

The name gives a personal existence; therefore, every company must have its own name. Company is a legal person possessing a separate identity; it must have a name with which it can be identified. Promoters of the Company have to make an application to the Registrar of Companies for the availability. The company can adopt any name if:

- i. There is no other company registered under the same or under an identical name;
- ii. The name should not be considered undesirable and prohibited by the Central Government. A name which misrepresents the public is prohibited by the Government under the Emblems & Name (Prevention of Improper Use) Act, 1950, for example, Indian National Flag, name and pictorial representation of

Mahatma Gandhi and the Prime minister of India, name and emblems of the U.N.O., and W.H.O., the official seal and Emblems of the Central Government and State Governments.

A name which is identical with or too nearly resembles:

- i. The name by which a company in existence has been previously registered, or
- ii. A registered trade mark, or a trade which is subject of an application for registration, of any other person under the Trade Marks Act, 1999 may be deemed to be undesirable by the Central Government. The Central Government, before deeming a name as undesirable, may consult the Registrar of Trade Marks.

Where the name of the company closely resembles the name of the company already registered, the court may direct the change of the name of the company.

- iii. Once the name has been approved and the company has been registered, then:
 - a. The name of the company with registered office shall be affixed on outside of the business premises;
 - b. If the liability of the members is limited the words “Limited” or” Private Limited” as the case may be, shall be added to the name
 - c. The name and address of the registered office shall be mentioned in all letter-heads, business letters, notices and Common Seal of the Company.
 - d. However, the Central Government has the power to grant a license to a company to drop the word “limited” from its name. The license is granted if:
 - i. The company is formed for the promotion of commerce, art, religion, science, charity or any other useful object, and
 - ii. The company intends to apply its income, if any, in promoting its objects and prohibits the payment of dividends to its members.

Alteration of Name Clause:

Section 13 of the Companies Act, 2013 associated with change of name which states that.

- The name of the company can be changed by a passing a special resolution and with the approval of the Central Government. Approval of Central Government is not required if the change relates to the addition/deletion of the words “private” to the name.
- Sub Section- 2 of Section 4 of the Companies Act, 2013 provides further that “no company shall be registered by name which: Is identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law

Alteration of Name shall not allow to following Companies:

- Company who has not filed annual returns or financial statements due for filing with the Registrar or
- Companies who has failed to pay or repay matured deposits or debentures or interest thereon

On the alteration of the name of the company, the Registrar must enter the new name of the company in the register and issue a fresh certificate of incorporation. Change of name becomes effective only on the issue of the new certificate

Alteration of name does not, in any way, affect the rights and obligation of the company.

2. Registered Office Clause:

The memorandum of Association must contain the name of state in which the registered office of the company is to be situated. Every company must have registered office. The company shall from the date on which it commences its business or² within thirty days of incorporation, whichever is earlier, have a registered office. Intimation should be given to Registrar within thirty days of incorporation. All communication and notices are to be sent to its registered office. All the important documents and books of the company such as the Registrar of Members, Minutes and book are kept at the registered office.

Where the securities are held in a depository, the records of the beneficial ownerships may be served by such depository on the company by means of electronic mode or by delivery of floppies or disk.

Alteration of Registered Office Clause:

- a) Registered office if shifts from one place to another within the same city, town, or village it can be made by passing a resolution by Board of directors.
- b) Where registered office shifts from one place to another within the same state and is within the same office of Registrar of Companies it could be done by passing a special resolution at the shareholders meeting. Even if the change is within the state it may fall within the jurisdiction of another Registrar of Companies, in which the change shall not be effective unless approved by Regional Director. Intimation of the change is to be filed with the Registrar within 30 days of the change.
- c) But, shifting of registered office from one state to another state involves alteration of memorandum itself.

¹ Proposed amendment under companies (Amendment Bill 2016 S. 12 (1) for the words “ on and from the fifteenth day of its incorporation “ the words, “ within thirty days of its incorporation” can be substituted.

The alteration comes into force only when it is registered with the Registrar of Companies of both the States i.e. the State in which the registered office was originally situated and the state to which the office is being situated.

A change in the registered office of the company is permitted from one state to another on the following grounds: Substantive Limits:

- i) To enable the company to carry on business more economically or more efficiently
- ii) To attain its main purpose by new or improved means (E.g. by new scientific discoveries); or
- iii) To enlarge or change the local area of its operations; or
- iv) To carry on some business which under the existing circumstances may conveniently or advantageously be combined with the business of the company; or
- v) To restrict or abandon any of the objects specified in the memorandum; or
- vi) To sell or dispose of the whole, or any part of the undertaking, or of any of the undertakings of the company; or
- vii) To amalgamate with any other company or body of persons.

3. Object Clause:

The third clause in the memorandum states the object which the company, on its incorporation will pursue. The objects clause, also called the objective clause, is considered the most important in the MOA. It defines and limits the scope of the company's operations. It details the company's scope of activity for the members and explains how the members' capital will be used.

The object clause explained why the company has come into existence. Companies aren't lawfully permitted to do any kind of business other than the kind of business that is specifically stated in the object clause of MOA. An object clause should contain:

- A list of the main objects the company will be pursuing after its Incorporation
- Incidental objects or the relative objects that are necessary to achieve the main object
- Any other objects that which are not included in the main objects or incidental object
- Nothing that's against the public interest and nothing that's against the country's general rule of law

The object clause to be divided into:

- i) Main objects of the company to be pursued by company on its incorporation
- ii) Objects incidental or ancillary to the attainment of the main objects; and
- iii) Other objects

Alteration of Object Clause:

The procedure for alteration of the Object clause is the same as the alteration of registered office from one state to another.

4. Liability clause:

The liability of the members is limited to the extent of the shares subscribed by the members if the company is formed with share capital or to the extent of the guarantee given by the members if the company is formed with guarantee. In the absence of this clause it is deemed that liability of its members is unlimited.

Alteration of liability clause:

The liability of the members cannot be altered so as to increase the liability of the members, or prejudice their interests. The alteration can be affected only with the consent of the members in writing, either before or after a particular alteration is made by passing a special resolution and to file **form No.MGT 14**.

5. Capital Clause:

In case of a company having share capital unless the company is an unlimited company, memorandum shall also state the amount of share capital with which the company is to be registered and division thereof into shares of a fixed amount.

Alteration of Capital Clause:

The capital can be increased by passing a ordinary resolution in the general body meeting and shall not require to be confirmed by the court. It should be noted that cancellation of shares shall not be deemed to be a reduction of share capital. A notice of alteration of capital must be filed with the registrar within 30 days of such alterations.

6. Subscription or Association Clause:

It is a declaration made by the subscribers who have signed the memorandum of their intention to form a company. The signature of the subscribers shall be attested by at least one witness.

3.4 DOCTRINE OF ULTRA VIRES

Object Clause is the heart of Memorandum of Association of the company. It lays down the objectives which the company has to observe on incorporation of the company under this Act. It is expected that the company must observe and work within the object set by the object clause under MOA. If the company acts beyond the objective set such act is termed as an Ultra Vires and neither Board or any highest authority can justify or confirm such act as, it is void ab initio in nature.

Anything that a company does which is beyond the scope of the object clause is called ultra vires the object clause and is null and void. Since the Act is void it cannot be ratified by the shareholders either. When the company does an act in furtherance of its objects, it is intra vires (intra vires means within; and vires means power) the company. But, where the company does an act which is outside the scope of the object clause, it is ultra vires (outside the powers of) the company. This rule was first time laid down by the House of Lords in *Ashbury Railway, Wagon Co. v/s Riche* (1875), The objects of the Ashbury Company were: -

- a. To manufacture and sell railway carriages etc. and
- b. To act as mechanical engineers and general contractors.

The directors of the company entered into a contract with Riche to finance the construction of railway line in Belgium. Subsequently, they repudiate the contract, claiming it to be ultra vires the company. Riche brought an action for damages for breach of contract. The House of Lords held that the contract was ultra vires the company and hence null and void.

3.5 EFFECTS OF ULTRA VIRES TRANSACTION

1. Ultra Vires Contracts:

A contract that is ultra vires the company is absolutely null and void. Such a contract cannot become intra vires by reason of estoppels, ratification, acquiescence, delay or lapse of time. The company is not liable on such contract however:

- a. If the company has lent money and this lending is ultra vires the company, it can recover the money from the debtors. The debtors would be stopped from contending that the company had no power to lend.
- b. If the company has rendered any particular service which is ultra vires, it is entitled to receive the charges for the service rendered.
- c. If the property of the company has been delivered to an outsider through an ultra vires act, the company has a right to retrieve its property provided it existing specie or if it can be traced.

2. Ultra Vires Property:

If a company's money has been utilized in acquiring some property and such an act is ultra vires the company, the company is entitled to the ownership of that property. This is because; the property through wrongly acquired represents the capital of the company.

3. Personal Liability of Directors:

If the director of a company makes an ultra vires payment, he becomes personally liable, for that amount, to the company. He can be compelled to refund the money.

4. Breach of Warranty of Authority:

If the directors induce, however innocently, an outsider to contract with the company in a matter that is ultra vires the company the directors shall be personally liable to the outsider for any loss caused to him, provided he has no knowledge of the fact that the act was ultra vires the company.

5. A company is liable for any tort, if the following conditions are fulfilled:

- i) The activity, in the course of which the tort has been committed, falls within the scope of the memorandum of association; and
- ii) The servant of the company must have committed the tort within the course of his employment

(A tort is a civil wrong, not arising out of a contract, and the remedy for which is damages)

3.6 ARTICLES OF ASSOCIATION

Definition and Meaning:

As per Section 2(5) of the Companies Act, 2013 "articles" means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

Articles of association is a document containing rules and regulation for the administration of the company. The following companies are required to file with the Registrar, their articles along with the memorandum:

- a. Unlimited companies
- b. Companies limited by guarantee; and
- c. Private companies limited by shares

In case of public company limited by shares, articles of association may be submitted along with the Memorandum of Association. But in other case namely unlimited company, company limited by guarantee and private

company limited by shares, articles of association must be submitted along with the memorandum of association.

Schedule I of the Act sets out several tables containing model forms of articles applicable to different companies. The model set out in Table A applies to a public company limited by shares. Thus, if a company limited by shares does not frame its own articles, the form set out in Table A will automatically apply to it.

Contents of Articles of Association:

Articles of a public company limited by shares usually provide for the following rules:

- i. Share Capital and alteration thereof
- ii. Meetings of company
- iii. Rights of shareholders
- iv. Accounts & audit
- v. Dividends
- vi. Indemnity
- vii. Winding up
- viii. Appointment, remuneration, qualification, powers, etc. of Board of Directors
- ix. Share Certificates and warrants
- x. Payment, calls, transfer, lien, transmission, forfeiture, etc. of shares
- xi. Votes to members
- xii. Capitalization of profits.
- xiii. Seal
- xiv. Adoption to preliminary contracts

Alteration of Articles of Association:

A company can, at any time, alter its articles subject to the following conditions or restrictions:

- i. Alterations of Articles can be made only by a Special Resolution of the shareholders of the Company to that effect. Even if, the articles prescribe an ordinary resolution for its alteration or even if the members agree.
- ii. No alteration of Articles will be allowed, which will violate the provisions of the Companies Act, or any other provisions of general law which may be applicable

- iii. No alteration of Articles will be allowed, which will violate the conditions, contained in the Memorandum of Association of the Company.
- iv. Alteration must not contain anything illegal.
- v. An alteration cannot require a member, or any class of members, to purchase more shares or increase his/their liability without his/their consent in writing
- vi. Alteration of certain provision of Articles, such as provisions relating to the number of directors and their remuneration, etc. requires the previous consent of the Central Government.
- vii. An alteration must not constitute a fraud on the minority. In other words, an alteration must not affect the interests of the minority shareholders.
- viii. An alteration of Articles which has the effect of converting a public company into a private company shall have effect only if the alteration is approved by the Central Government.
- ix. Alteration must be made bonafide in the interest of the company as a whole, even though the private interests of some members may be affected.
- x. Lastly, Articles of Associations may be altered with retrospective effect.

3.7 DISTINCTION BETWEEN MEMORANDUM AND ARTICLES OF ASSOCIATION

- i. The Memorandum is the character of the company which defines its objects and powers. The Articles are bye laws of the company for the internal management of the affairs for achieving the objects set out in the Memorandum
- ii. The Memorandum is the supreme document of the company while the Articles are subordinate to the memorandum. In case of inconsistency between the memorandum and articles, the provision of the memorandum will override the provisions of the articles.
- iii. The Memorandum of Association should not contain any provision contrary to the Companies Act. The Articles must not include any provisions contrary to Companies Act as well as the Memorandum of Association.
- iv. Every company must have its own Memorandum. But a public company limited by shares may or may not have its own Articles. It may adopt Table A of Schedule I of the Act.

- v. The Memorandum defines the relationship between the company and the outsiders while the Articles defines the relationship between the company and its members and among the members themselves.
- vi. A new company must prepare its Memorandum and file it with the registrar before the registration of the company is affected. But the Articles are not required to be filed for the purpose of registration. The company can adopt Table 'A' if it does not prepare its own Articles.
- vii. Any act of the company which is *ultra vires* the Memorandum is wholly void and cannot be ratified, even by the whole body of shareholders. But any act which is *ultra vires* the Article but *intra vires* the Memorandum can be ratified by the shareholders by passing a special resolution.
- viii. The Memorandum cannot be altered easily. The procedure laid down in the Act must be followed for altering the various clauses of the Memorandum. In some cases the approval of the Central

Government is required. But the alteration of Articles is not difficult. The Articles can be altered by passing a special resolution and the approval of the Central Government is not necessary.

3.8 DOCTRINE OF CONSTRUCTIVE NOTICES

Memorandum and articles of association of a company are public documents. These documents are pre-requisite for registration of a company. These documents are available for public inspection either in the office of the company or in the office of the Registrar of Companies on the payment of fee.

Any person who is dealing with a company is presumed to have read and understood the proper meaning of the documents. Every person, dealing with the company must inspect these documents to ensure whether they are in conformity with the respective provisions. A party cannot take a plea that he was ignorant of what has been stated in memorandum or articles of association.

It comes to the aid of a company vis-à-vis the outsiders. If a person deals with the company, and the transaction is beyond the powers of the company, he cannot enforce it against the company and he shall be personally liable to bear the consequences of such dealings. If a person deals with the company in good faith and the person with whom he is dealing has 'Ostensible authority' to deal on behalf of the company.

The above doctrine is subject to one exception that is, so far as the internal proceedings of the company are concerned the outsiders dealing with the company, can assume that everything has been regularly done. This is known as the "Doctrine of indoor management".

3.9 DOCTRINE OF INDOOR MANAGEMENT / TURQUAND (AND RULE)

The principle of constructive notice operates against the person dealing with the company by protecting the latter against the former. Whereas the doctrine of indoor management protects the outsider against the company.

It is the duty of every person to read the memorandum and Articles of the company, but he is not bound to inquire into the internal affairs of the company whether they are being conducted in accordance with the Articles of the Company. He has a right to assume that internal proceedings and affairs of the company are being regularly carried on in accordance with the rules and regulations. The limitation to doctrine of constructive notice is called 'indoor management'

The directors of a company (Royal British Bank), borrowed a sum of money from Turquand and issued a bond to him. The articles of the company provided that the directors might borrow on bonds such sums, as may, from time to time, be expressly authorized by resolutions of shareholders. The shareholders claimed that there had been no such resolution authorizing the loan.

The company was held bound by the loan because Turquand, the plaintiff, had the right to assume that the necessary resolution must have been passed.

Exception to the Rule of Indoor management:

The doctrine of indoor management is subject to five exceptions:

a) Knowledge of internal irregularities of the company:

Where the third person dealing with the company has actual or constructive notice regarding the non-compliance and irregularity of the internal procedure prescribed by the articles of association, they cannot claim protection under this rule.

b) Suspicion of irregularity:

The doctrine also does not apply when the circumstances are so suspicious that an inquiry is invited by the person dealing with the company.

c) Acts void ab initio:

This doctrine does not apply to acts that are void ab initio. Eg: Where the documents is a forged one.

d) Acts, outside the apparent authority of the company:

Where the acts of an officer do not fall within the apparent authority of such an officer, the contract is not binding on the company.

e) No knowledge of articles:

A person who at the time of entering into a contract with a company, has no knowledge of the company's articles of association, cannot be saved or protected by the doctrine.

3.10 SUMMARY

Clauses under Memorandum of Association

Name Clause, Registered Office Clause, Object Clause: Liability clause: Capital Clause: Subscription Clause.

Effects of Ultra Vires Contracts: Ultra Vires Property: Personal Liability of Directors: Breach of Warranty of Authority: A company is liable for any tort, -

Contents of Articles of Association: Meetings of company, Rights of shareholders, Accounts & audit, Dividends, Indemnity, Winding up procedures etc.

Exception to the Rule of Indoor management: Knowledge of internal irregularities of the company: Suspicion of irregularity: Acts void ab initio: Acts, outside the apparent authority of the company: No knowledge of articles:

3.11 QUESTIONS

1. What are articles of association? Compare the relation of the articles to memorandum of association.
2. **Answer the following**
 - a. To what extent and how are the articles of association amended.
 - b. What is the binding force of memorandum and articles of association?
3. Discuss fully the Doctrine of Indoor Management.
4. Critically examine the principle of the Constructive notice.
5. Examine the Effects of Doctrine of Constructive Notice and Indoor Management
3. **Define the following terms:**
 - a. Memorandum of association
 - b. Articles of Association
 - c. Doctrine of Ultra vires

PROSPECTUS AND PRIVATE PLACEMENT (SECTIONS. 2.23, 26 TO 32 AND S. 42)

Unit Structure

- 4.0 Objectives
- 4.1 Introduction
- 4.2 Types of Prospectus
- 4.3 Contents of the Prospectus
- 4.4 Misstatement in the prospectus
- 4.5 Legal Requirements of Prospectus
- 4.6 Private Placement
- 4.7 Summary
- 4.8 Questions

4.0 OBJECTIVES

After studying the unit students will be able to:

- Define the various terms like prospectus, statement in lieu of prospectus and Shelf prospectus.
- Explain the contents of Prospectus.
- Discuss about the legal requirements of prospectus.
- Explain the liabilities against misstatement and how to defence against this liability.

4.1 INTRODUCTION

Chapter III of the Act deals with “Prospectus and allotment of securities”, the chapter is divided into two parts, Part I deals with Public Offer and Part II deals with Private Placement. Section 23 of the Act provides that a company whether public or private may issue securities. A public company may issue securities:

- a) To public through prospectus (“public offer”) by complying with the provisions of Part I of Chapter III of the Act; or
- b) Through private placement by complying with the provisions of Part II of Chapter III of the Act; or
- c) Through a rights issue or a bonus issue in accordance with the provisions of this Act and in case of a listed company or a company which intends to get its securities listed also with the provisions of the SEBI Act, 1992 and the rules and regulations made thereunder.

For a private company the section provides that a private company may issue securities (a) by way of rights issue or bonus issue in accordance with the provisions of this Act; or

Prospectus and Private
Placement (Sections. 2.23, 26
To 32 and S. 42)

The section deals with issue of securities, which is a wider term not restricted to equity, preference or debentures. Securities has been defined under section 2(81) to mean the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.

The relevant section says that securities include:

Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

- a) Derivative;
- b) Units or any other investments issued by any collective investment scheme to the investors in such schemes;
- c) Government securities;
- d) Such other instruments as may be declared by the Central
- e) Government to be securities; and
- f) Rights or interest in securities.

PROSPECTUS:

“Prospectus means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of a body corporate”

Definition of prospectus includes any invitation to the public to subscribe to shares or debentures. A document by which an invitation is issued to the public to take shares or debentures of the company is called a prospectus. Prospectus is thus a document described or issued as a prospectus. Even inviting offers from the public for subscription to shares or debentures is a prospectus.

4.2 TYPES OF PROSPECTUS

Abridged Prospectus: [S. 2(1)]:

Section 2(1) of the Indian Companies Act, 2013 described an abridged prospectus as a memorandum that has all the salient features of the prospectus as specified by the SEBI.

It is a summary of a prospectus filed before the registrar of the companies. It includes all the features of a prospectus. An abridged prospectus has all the information of the prospectus in short form so that it should be easy

and quick for an investor to know all the useful information in short and to arrive at the investment decision.

There is a provision under section 33(1) of the Companies Act, 2013 that when any form for the purchase of securities of a company is issued, it must be accompanied by an abridged prospectus.

Deemed Prospectus [S. 25(1)]:

A deemed prospectus has been stated under section 25(1) of the Companies Act, 2013. When any company to offer securities for sale to the public, allots or agrees to allot securities, the document will be considered as a deemed prospectus through which the offer is made to the public for sale. The document is deemed to be a prospectus of a company for all purposes and all the provision of content and liabilities of a prospectus will be applied upon it.

Red Herring Prospectus: – [S.32]:

Red herring prospectus does not contain all information about the prices of securities offered and the number of securities to be issued. According to the act, the firm should issue this prospectus to the registrar at least three before the opening of the offer and subscription list.

Shelf prospectus – [S.31]:

Shelf prospectus is described under section 31 of the Companies Act, 2013. Shelf prospectus is issued when a company or any public financial institution offers one or more securities to the public. The validity period of such prospectus will be not more than 1 year. The validity period starts with the commencement of the first offer. There is no need for a prospectus on further offers. The organization must provide an information memorandum when filing the shelf prospectus

4.3 CONTENTS OF THE PROSPECTUS

For filing and issuing the prospectus of a public company, it must be signed and dated and contain all the necessary information as stated under section 26 of the Companies Act, 2013:

- Name and registered address of the office, its secretary, auditor, legal advisor, bankers, trustees, etc.
- Date of the opening and closing of the issue.
- Statements of the Board of Directors about separate bank accounts where receipts of issues are to be kept.
- Statement of the Board of Directors about the details of utilization and non-utilization of receipts of previous issues.
- Consent of the directors, auditors, bankers to the issue, expert opinions.

- Authority for the issue and details of the resolution passed for it.
- Procedure and time scheduled for the allotment and issue of securities.
- The capital structure of the company in the manner which may be prescribed.
- The objective of a public offer.
- The location of the business and its objectives
- Particulars related to risk factors of the specific project, gestation period of the project, any pending legal action and other important details related to the project.
- The details of the acts of material frauds committed against the company in the last five years, if any
- The related party transactions entered during the last five financial years immediately preceding the issue of prospectus.
- Minimum subscription and what amount are payable on the premium.
- Details of directors, their remuneration and extent of their interest in the company.
- The aggregate amount proposed to be raised through all the stages of offers of specified securities made through the shelf prospectus,
- Reports for the purpose of financial information such as auditor's report, report of profit and loss of the five financial years, business and transaction reports, statement of compliance with the provisions of the Act and any other report.

4.4 MISSTATEMENT IN THE PROSPECTUS

Every person authorizing the issue of prospectus has a primary responsibility to see that the prospectus contains the true states of affairs of the company and does not give any fraudulent picture of the public. People invest in the company on the basis of information published in the prospectus. They have to be safe guarded against all wrong or false statement in prospectus. Prospectus must therefore make full and honest declaration of material facts without concealing or omitting any relevant fact. This is known as the golden rule for framing prospectus. The true nature of companies venture should be disclosed. The statement which does not qualify to the particulars mentioned in the prospectus, or any information is intentionally and willfully concealed by the director of the company, would be constructed as misstatement. They are in other words, either false or untrue statement in the prospectus or information which ought to have been disclosed is concealed, or omission of any material fact. Statements which produce wrong impression of actual facts would also be constructed as misstatements.

Misstatements includes:

- i. Untrue statements
- ii. Statements which produce wrong impression
- iii. Statement which are misleading
- iv. Concealment of material fact
- v. Omission of facts

The prospectus must make all statements with absolute accuracy and not state the facts which are not strictly correct. A statement may be false not only because of what it states but also because of what it conceals or omits.

A statement included in prospectus shall be deemed to be untrue if:

- i. Statement is misleading in the form and context in which it is included
- ii. The omission from prospectus of any matter is calculated to mislead

The prospectus which contains misstatements or misleading statements is called “Misleading Prospectus”

Example:

1. A statement in the prospectus that share capital has been subscribed when it has only been allotted in fully paid shares to the company's contractor. It was held that it is a misstatement in prospectus.

Liability:

The liability may be civil or criminal.

I. CIVIL LIABILITY:

1. Compensation:

The above person shall be liable to pay compensation to every person who subscribes for any shares or debentures for any loss or damage sustained by him by reason of any untrue statement included therein.

2. Damages for deceit or fraud:

Any person induced to invest in the company by fraudulent statement in a prospectus can sue the company and person responsible for damages. The shares should be first surrendered to the company before the company is sued for damages. Fraud occurs when any statement is made without belief in the truth or carelessly. A statement made with knowledge that is false, will constitute fraud or deceit.

3. Rescission of the Contract for misrepresentation:

It means avoiding the contract. Any person can apply to the court for rescission of the contract if the statement on which he has taken the shares are false or caused by misrepresentation whether innocent or fraudulent. It must be of material fact and not of law. It should be noted that a person cannot claim rescission of contract on misrepresentation, if he had the means of discovering the truth with ordinary diligence.

4. Liability under general law:

Any person responsible for the issue of prospectus may be held liable under the general law or under the Act for misstatements or fraud.

II. CRIMINAL LIABILITY:

Section 63 of the Companies Act deals with criminal liability for misstatements in prospectus.

Where a prospectus issued, circulated, or distributed includes any statement that is untrue or misleading in any form in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises such issue of the prospectus shall be liable for fraud.

“**Fraud**” under **Sec. 447** comprises of an act, omission, concealment of any fact with an intent to deceive, gain undue advantage, or to injure the interests of the company, its shareholders, its creditors or any other person. It is not necessary that such an act involve any wrongful profit or wrongful loss. If a person commits abuse of position, then that shall also be considered fraud under this section.

Punishment for mis-statement:

If a person is found to be guilty of the offence of fraud, then that person shall be punished with imprisonment for a term that shall not be less than six months and may extend to ten years. He shall also be liable to fine, which shall not be less than the amount involved in the fraud and may extend to three times the amount involved in the fraud.

If the fraud so committed involves public interest, the term of imprisonment shall not be less than three years.

4.5 LEGAL REQUIREMENTS OF PROSPECTUS

³Following are the legal requirements of prospectus:

1. A prospectus is required to be issued only after the incorporation of the company.
2. The prospectus must contain all the particulars, listed in Schedule II to the Companies' Act.
3. The prospectus must be dated.

4. A prospectus must be signed by every person, mentioned therein as a director or a proposed director, or his agent.
5. Every application form for shares, issued by the company, must be accompanied by a copy of the prospectus except (a) application form, issued for bona fide invitation to a person to enter into an underwriting agreement, and (b) application forms, issued to existing members and debenture holders.
6. A statement, relating to the affairs of the company by an expert, may be included in the prospectus.
7. Consent of the expert must be obtained in writing and this fact must be stated in the prospectus.
8. No deposit can be invited without issuing an advertisement in a daily newspaper. The said advertisement must be containing a statement, reflecting the company's financial position issued by the Company and in such a form or in such a manner, as may be prescribed.
9. Before a prospectus is issued, a copy of it must be registered with the registrar of companies.
10. Prospectus shall be issued within 90 days of its registration.

Penalty for Non-Compliance of Section 26:

If a prospectus is issued by non-observance of the provisions of Section 26 of this Act, shall be punishable with fine which shall not be less than Rs. 50,000/- which may extend to Rs. 300,000/- and every person who is knowingly a party to the issue of such prospectus, shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than Rs. 50,000/- and may extend to Rs. 3,00,000/- or both.

4.6 PRIVATE PLACEMENT

Private placement by companies means offering its securities or inviting to subscribe its securities for a select group of persons other than by way of a public issue through a private placement offer letter.

³ Vipul Publication .Business Law kalaivani venkatesh page no 78-79

Private placement of securities can be made only to select persons or identified persons (as identified by the board of the company). A company making a private placement cannot offer its securities through any public advertisements or utilise any marketing, media, or distribution agents or channels to inform the public about such an offer. If the offer is advertised or marketed, it will be considered a public offer and not a private placement by the company.

Rules for Private Placement:

1. Each Private Placement offer should be previously approved by the shareholders of the company, by a Special Resolution.
2. No fresh offer can be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.
3. All money received under private placement to be made by cheque or demand draft only. In any circumstances no cash can be accepted.
4. Qualified Institutional buyers and employees of the company being offered securities under a scheme of employees' stock option are excluded in calculating the number.
5. Company shall not expected to utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar.
6. Company should be restricted to from making any advertisement of the offer to public.
7. A company shall issue private placement offer cum application letter only after the relevant special resolution or resolution from the Board has been filed with the Registrar.
8. The value of such offer or invitation per person shall be with an investment size of less than Rs.20,000/-of face value of the securities.
9. The company shall maintain a complete record of private placement offers in Form PAS-5. A copy shall be filed with the Registrar along with the requisite fee within 30 days of circulation of private placement offer letter.
10. Allotment of securities shall be done within 60 days of receipt of the application failing which the application money shall be refunded within 15 days of the expiry of 60 days otherwise interest at the rate of 12% per annum shall be required to be aid from the 60th day.

Procedure for Private Placement:

A private placement shall be made only to a selected group of persons who have been identified by the Board, whose number shall not exceed fifty or such higher number i.e., not more than 200, excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees' stock option, in a financial year.

1. A resolution must be passed by the Board of Directors for private placement of securities.
2. Preparation of notice of board meeting along with draft resolution to be passed in the board meeting.

3. A General Body meeting must be convened, where in the proposed offer of securities has been previously approved by the shareholders of the company, by a special resolution, for each of the offers or Invitation.
4. Opening of separate bank account for maintaining subscription money and ensure that money received from only those persons whose name is addressed in form.
5. Open separate bank account for keeping subscription money and ensure that money received from only those persons whose name is addressed in form.

Penalty for Non-Compliance of Private Placement:

A company, its directors and promoters will be liable for a penalty if the company accepts monies or makes an offer in contravention of the Act and Rules. The penalty may extend to the amount involved in the invitation or offer or Rs.2 crore, whichever is lower. The company should also refund all monies to the subscribers within thirty days of the order imposing the penalty.

4.7 SUMMARY

Types of Prospectus: Abridged Prospectus: Deemed Prospectus Red Herring Prospectus: Shelf prospectus

Legal Requirements of the Prospects:

Misstatement in the prospectus: Untrue statements, Statements which produce wrong impression, Statement which are misleading, Concealment of material fact. Omission of facts

Civil Liability for Misstatement in the prospectus Compensation: Damages for deceit or fraud: Rescission of the Contract for misrepresentation:

Rules for Private Placement:

Each Private Placement offer should be previously approved by the shareholders of the company, by a Special Resolution. No fresh offer can be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.

Procedure for Private Placement:

Open separate bank account for keeping subscription money and ensure that money received from only those persons whose name is addressed in form.

Penalty for Non-Compliance of Private Placement

4.10 QUESTIONS

Prospectus and Private
Placement (Sections. 2.23, 26
To 32 and S. 42)

1. What is prospectus? Must every company issue it.
2. What are the contents of a prospectus?
3. What are the remedies available to a shareholder for misrepresentation or omissions in a prospectus?
4. What are the provisions of the companies act relating to registration and issue of prospectus?
5. Who are liable for misstatement in the prospectus?
6. What are the nature of liability for misstatement?
7. What are the defences available for misstatement?
8. Write short notes on:
 - a. Minimum Subscription
 - b. Statement of lieu of prospectus
 - c. Liability of an expert for his statement in the prospectus
 - d. Civil liability for misstatement in prospectus
 - e. Criminal Liabilities of directors and other persons responsible for issue of prospectus
9. Define the following terms:
 - a. Shelf Prospectus
 - b. Penalty for non-compliance of the provisions under Private Placement.
 - c. Prospectus
 - d. Statement in lieu of prospectus
10. Explain the rules of Private Placement.

What are the Procedures under Private Placement? **(Footnotes)**

MODULE II

COMPANIES ACT

5

MEMBERSHIP OF A COMPANY (SECTIONS. 2, 88, 91, 94, 95 OF COMPANIES ACT 2013)

Unit Structure

- 5.0 Objectives
- 5.1 Introduction
- 5.2 Meaning and Definition of Member.
- 5.3 Acquisition of Membership
- 5.4 Cessation of Membership
- 5.5 Rights and Liabilities of Members
- 5.6 Register of Members
- 5.7 Closure of Register of Members or Debenture Holders or Other Security Holders
- 5.8 Summary
- 5.9 Questions

5.0 OBJECTIVES

After studying the unit students will be able to:

- Understand the meaning of member of company.
- How the membership can be acquired and terminated.
- Understand what is Register of members and its types.
- Understand the rights and liabilities of members.

5.1 INTRODUCTION

The terms “members” and “shareholders” are usually used interchangeably. In general, every shareholder is a member and every member is a shareholder. However, there may be exceptions to this statement, e.g., a person may be a holder of share(s) by transfer but will not become its member until the transfer is registered in the books of the company in his favor and his name is entered in the register of members. Similarly, a member who has transferred his shares, though he does not hold any shares yet he continues to be member of the company until the transfer is registered and his name is removed from the register of members maintained by the company

5.2 MEANING AND DEFINITION

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

Section 2 (55) defines member under companies Act 2013

“member”, in relation to a company, means:

- (i) The subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
- (ii) Every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
- (iii) Every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository.

Who can be a member?:

An individual or body corporate can be a member in a company. A person who is of a sound mind and capable of contracting can be a member. Therefore, person should be competent to a contract. Following are the cases:

1. Minor:

As a minor is incapable of entering into a valid contract, he cannot become a member. However, it has been held in *Diwan Singh V. Minerva Films Ltd.* (1958 Com. Cas. 191), that there is nothing in law to prevent a minor from acquiring or holding shares in a joint stock company, if he is properly represented and acts by a lawful guardian. A guardian can therefore hold shares in a company for and on behalf of minor. Minor's name may remain on company's register of members, but during minority he incurs no liability. If the allotment is made to the minor wrongly, the company can repudiate or cancel the allotment but must repay all the money received by such minor.

The minor on attending majority can rescind the contract and get his name removed from the register of members. However if he does not do so, he shall be a member of the company, and incur all the liabilities of a member. The company however cannot be compelled to admit minor as a member.

Every person who is competent to a contract may become a member. Hence a minor and a person of unsound mind cannot be members of a company. A minor can be admitted to the membership of a company limited by shares, by means of transfer of shares provided the shares are fully paid up. A minor during his minority can enjoy the benefits of membership without being liable as a contributory.

2. Company and subsidiary company:

A company can become a member of another company as a company is a legal person.

However, a subsidiary company cannot be a member of a holding. Any allotment or transfer of shares by a holding company to its subsidiary shall be void. It may become a member of another company provided it is not prohibited by its memorandum of association. However, a company cannot buy its own shares

A subsidiary company can however be a member of the holding company in following cases:

- i. Subsidiary Company is concerned as a legal representative of a deceased member of the holding company
- ii. When subsidiary company is concerned as a trustee
- iii. When subsidiary company is a member of the holding company before the commencement of Act and it continues to be so.
- iv. Where subsidiary company was a member of the holding company before becoming the subsidiary of the holding company.

3. Trust:

A trustee, who buys shares, will be treated as a member in his individual capacity. It cannot hold share in a company. A trustee can however hold shares in his name for and on behalf of the trust. Any person holding shares in a company as a trustee is required to make a declaration to the public trust within the prescribed time. A copy of such declaration is required to be sent by the trustee to the company concerned within 21 days after the declaration to the public trust. Failure to do so will lead to penalty.

4. Partnership Firm:

A firm is not a legal person or a body corporate. It cannot hold shares in the company; however, partners in their individual capacity or as nominees of the partnership firm can hold shares in a company. These shares will constitute a part of the Assets of the firm. However, a firm can be a member of any association registered under section 25 of the Act, such as Chamber of Commerce or a Social Club or a Charitable Institution

5. Society:

A registered society under the Societies Registration Act, 1860 can acquire shares in the company.

6. Other:

An insolvent may be taken as member so long as his name appears in the register of members, notwithstanding the right of official assignee or receiver to be registered as a member.

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

7. Non-resident:

A non-resident cannot become a member of a company without the permission of the Reserve Bank of India under the Foreign Exchange Regulation Act, 1973

5.3 ACQUISITION OF MEMBERSHIP OF COMPANY

The person whose name is entered into the register of members is known as a member of the company member of a company means a person:

- i. Who has subscribed his name to the memorandum.
- ii. Any other person who has agreed in writing, to become a member and whose name is entered in the register of members.
- iii. Every person, holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository (Inserted by the Depositories Act, 1976)

On the other hand, a shareholder is one who holds shares in a company. These two expressions are being used interchangeable

Therefore, membership of a company can be obtained in following ways:

- i. By subscribing to the Memorandum of Association of a company;
- ii. By agreeing in writing to become a member;
- iii. Every person holding equity share capital and whose name is entered as beneficial owner in the records of the depository.

The essential factor to constitute membership is that the name of the person in either of the above circumstances must appear in the register of members of the company or as beneficial owner in records of depository.

ACQUISITION OF MEMBERSHIP:

1. By subscribing to the memorandum:

The subscribers to the memorandum are deemed to have agreed to become members. Their names must be entered into the Register of member. Thus, if the subscribers later do not subscribe to the shares to which they have agreed, they will still be the 'members' and will be responsible for the payment in respect of the shares which they have agreed to subscribe. Hence neither application nor allotment of shares is necessary.

2. By undertaking qualification Share:

When the director agrees to take qualification shares, such director is in same position as if he has signed a memorandum of the company for those shares of that number of value. They too are deemed to have become members on registration of the company and will be liable in respect of those qualification shares.

3. By allotment:

A person can become a shareholder if he agrees to take shares in the company by allotment. Allotment means an appropriation of shares out of the previously un-appropriated capital of a company, to a particular person. Re-issue of forfeited shares does not amount to allotment.

4. By transfer:

A person who takes shares from an existing member by sale, gift or some other transaction, acquires membership, on his name appearing in the register of member. Every person who agrees in writing to become a member of the company and whose name is registered in its register of members, is a member of the company. Thus, two ingredients are necessary for membership by transfer of shares:

- i. An application in writing to become a member, and
- ii. An entry in the register

5. By Transmission:

The transmission of shares takes places on the death or insolvency of the shareholder. On the death of a member, his executor or the person who is entitle under the law to succeed to his estate gets the right to have the shares transmitted to his name in the company's register of members. In case of transmission of shares no instrument of transfer is necessary. Articles of association gives the formalities to be followed with regards to transmission. The shares of the company are freely transferable.

6. Membership by acquiescence and estoppels:

A shareholder is not a member unless his name is entered in the register of members of the company. Where a person allows his name to be put on the register of members, or knowing that his name is put on the register, does not take steps to have his name taken off, he shall be stopped from denying that he is a member. Where his name is entered by mistake and he is unaware of it then he does not become a member.

7. Joint members:

When two or more persons hold share in a company in their joint names it is called a joint membership. They are to be treated as single member for the purpose of sending notices, dividends, interest etc. and name of person appearing first is to be treated as main member.

5.4 CEASES OF MEMBERSHIP

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

Membership ceases in following event:

1. By transfer of shares. In such case even though transferor ceases to be a member, he remains liable to be placed in 'B' list for one year, if the company goes into liquidation.
2. By forfeiture of shares
3. By surrender of shares, where surrendering is permitted
4. By sales of shares by the company after it exercises its right of lien on the shares or in execution of a decree by court or other proper authority
5. By insolvency. Such shares of an insolvent vest in the Official Receiver or Assignee.
6. By death, the name of deceased member continues till the shares are registered in the name of his legal representative
7. By rescission of the contract to take shares on the ground of misrepresentation in the prospectus
8. When the company redeems its redeemable preference shares
9. On issue of share warrants by the company in place of share certificates
10. On winding up of the company. However, a member remains liable as a contributor and is also entitled to shares in the surplus assets, if any.

5.5 RIGHTS AND LIABILITIES OF MEMBERS

RIGHTS OF MEMBERS:

Following are rights of the members:

1. Right to receive notices of all general meetings
2. A member has a right of priority to have shares offered in case of increase of capital
3. Right to attend and vote at meetings
4. Right to appoint directors and auditors of the company
5. Right to receive copies of annual accounts of the company
6. Right to transfer his shares
7. Right to receive a share certificate
8. Right to inspect the minutes of proceedings of any general meeting

9. Right to inspect the register of members, register of debenture holders and copies of annual returns.
10. If his name is omitted in the register of members, he can apply to court for rectification of the register.
11. In case of statutory meeting, he is entitled to a copy of statutory report.
12. Right to receive dividends in case of preference shares
13. Right to be registered as a shareholder in Company's Book
14. Right of Privilege of immunity from personal liability of company's debts.
15. Right to participate in dividend distribution, if ordered in the discretion of directors
16. Right to rescind the contract and claim damages in case of his acquiring shares on account of mis-statement in the prospectus.
17. Right of Priority to have shares offered to him in case of increase of capital by the company.
18. Right to petition to High court for relief in cases of oppression and mismanagement.
19. Right to petition to High court for winding up of the company
20. Right to petition to the Central Government for ordering an investigation into the affairs of the company
21. Right to participate in appointments of directors and auditors in annual general meetings
22. Right to apply to the Central Government for calling an annual general meeting if the board of directors fails to call such a meeting
23. Right to apply to the Court for calling an extra ordinary meeting of the company
24. Right to participate in the distribution of assets in case of liquidation of the company.
25. Right to bring representative suits and company's cause of action, to remedy mismanagement or unauthorised acts and thereby to compel the company to enforce its rights.

LIABILITIES OF A MEMBER:

1. Liability of members depends on the nature of the company. In the case of an unlimited company, the liability of each member is unlimited. Every member of such a company is liable in full for all the

debts of the company, contracted during the period of his membership.

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

If the company is limited by guarantee, each member is bound to contribute, in the event of winding up, a sum of money specified in the liability clause of its memorandum of association.

If the company is incorporated with the liability of its members limited by shares, each member is liable to pay only the full nominal value of the shares held by him.

2. He is liable as a contributory in the case of winding up of the company.
3. A shareholder continues to be liable to the company even though he have transferred his shares to another company, until his name is deleted from the register of members and the name of transferee is put in his place.
4. He is liable to abide by the acts of the majority of members unless the majority acts oppressively or fraudulently.
5. A member is liable to accept the share if they are allotted to him within a reasonable time and in compliance with the provisions of the Act.
6. A member is liable to pay for the shares allotted to him either when allotment is made and/or when calls are validly made in accordance with the provisions of the articles. If the full nominal value of the shares has already been paid at the time of application, the liability of the shareholder to pay ceases.
7. A member is liable to have his shares forfeited in event of non-payment of any call. Shares can be forfeited only if all the conditions for a valid forfeiture exist. These conditions are:
 - a. Forfeiture must be in accordance with the provision of the company's articles.
 - b. Share can be forfeited only for non-payment of a call due in respect of the shares.
 - c. A proper notice requiring him to pay the exact amount on or before a specified day (Which must not be earlier than fourteen days from the date of service of the notice) should be given to the shareholder. The slightest defect in the notice invalidates forfeiture.
 - d. A formal resolution declaring the forfeiture of shares must be passed and a notice of the same served on the defaulting shareholder.
 - e. The power to forfeit shares should have been exercised in good faith and for the benefit of the company.

5.6 REGISTER OF MEMBERS: (S.88) COMPANIES ACT 2013 RULE 2014

Every company shall keep and maintain the following registers as mentioned in the above act and rule. :

- (a) Register of Members mentioning separately for each class of equity and preference shares held by each member residing in or outside India;
- (b) Register of Debenture-holder and
- (c) Register of any other security holders.

⁴ Provision: “Every company shall, from the date of its registration, keep and maintain a register of its members in one or more books in **Form No. MGT-1**. In the case of existing companies, registered under the Companies Act, 1956, particulars shall be compiled within six months from the date of commencement of these rules.”

CONTAINS IN THE REGISTER:

- 1. The name, address and occupation, if any of each member
- 2. It contains the details of each class of shareholders like their basic info, allotment, transfer, folio details etc.
- 3. In case of a company having a share capital, the shares held by each member, distinguishing each share by its number, except where such shares are held with a depository, and the amount paid or agreed to be considered as paid on those shares
- 4. It contains the details of debenture holders like their basic details, allotment or redemption/conversion details.
- 5. The date at which each member was entered in the register as a member.
- 6. This register is made in reference to register of members stating the details of directors or employees to whom the sweat equity shares have been given.
- 7. This register is made in reference to register of members stating the details of directors or employees to whom the sweat equity shares have been given.
- 8. The date on which any person ceases to be a member
- 9. This register is made in reference to register of members stating the details of directors or employees to whom the sweat equity shares have been given.

⁴ <https://taxguru.in/company-law/register-members-companies-act-2013-rules-2014.html>

The register of member shall be prima facie evidence of any matter directed or authorized to be inserted therein by the Companies Act.

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

Other entries in Register of Members or in respective registers are as under:

Any, cancellation reduction, sub-division, buy-back or, forfeiture of shares, transmission of shares, shares issued under any scheme of arrangements, mergers, or any of such scheme provided under this Act or by issue of duplicate or new share certificates or new debenture or other security certificates, entry shall be made within **seven** days after approval by the Board or committee, in the register of members or in the respective registers, as the case may be.

Foreign Register:

“**Foreign Register**”, means it contain the names and particulars of the members, debenture-holders, other security holders residing outside India. A company may keep a part of the its register in any country outside India, if it is, authorized by its articles, called foreign register of members, debenture holders, other security holders or beneficial owners residing outside India.

Provisions:

A company which has issued debentures or any other security may, if so, authorized by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country (hereafter in this rule referred to as the “**foreign register**”).

The company shall file **Form MGT-3** with the Registrar for notice of the situation of the office within **30 days** from the date of the opening of any foreign register along with the fee as provided in **Annexure B**.

If a foreign register is kept by a company in any country outside India, the decision of the appropriate authority in regard to the rectification of the register shall be binding.

5.7 CLOSURE OF REGISTER OF MEMBERS OR DEBENTURE HOLDERS OR OTHER SECURITY HOLDERS

At least seven days previous notice should be given as prescribed by the and under Security Exchange Board of India before closing of register of members or the debenture holder or the register of other security holders. If such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office

of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company.

(2) The Private Companies shall serve a notice for closure of register of members or debenture holders or other security holders not less than seven days prior.

Penalty:

If a company fails to maintain; a Register of Members or a Register of Debenture holders other security holders or does not maintain them in accordance with the provisions contained herein above.

5.8 SUMMARY

Who can be a member: Minor: Company and subsidiary company : Trustees in their individual capacity, Partners in the Partnership Firm individually ,Society:

ACQUISITION OF MEMBERSHIP: By subscribing to the memorandum, By undertaking to buy qualification: By allotment: By transfer: By Transmission: Membership by acquiescence and estoppels: Joint members:

CEASES OF MEMBERSHIP: By transfer of shares. forfeiture of share, By surrender of shares, By sales of shares ,By insolvency. By death,

RIGHTS OF MEMBERS: Right to receive notices of all general meetings, A member has a right of priority to have shares offered in case of increase of capital, Right to attend and vote at meetings, Right to appoint directors and auditors of the company, Right to receive copies of annual accounts of the company, Right to transfer his shares, Right to receive a share certificate

5.9 QUESTIONS

1. Who can be a member of a company? How does a member cease to be a member?
2. Enumerate and explain the various modes of membership of a company.
3. State and discuss the rights and liabilities of a member.
4. Answer in brief-
 - a. What are “Register of Members” and Foreign Register
 - b. When can a company close its register of members?
 - c. When can the register of members be rectified?
5. Write Notes on:

- a. Forfeiture of shares
- b. Member and shareholder
- c. Register of members
- d. Membership by acquiescence
- 6. Define the following terms:
 - a. Certificate of Incorporation
 - b. Foreign Registers
 - c. Member of a company

Membership of A Company
(Sections. 2,88,91,94,95 of
Companies Act 2013)

DIRECTORS OF COMPANIES APPOINTMENTS AND QUALIFICATIONS (SECTIONS.2, 149-183, 196, 203-205)

Unit Structure

- 6.0 Objectives
- 6.1 Introduction
- 6.2 Meaning and Definition
- 6.3 Directors Identification Number
- 6.4 Who can become a Director? (Qualifications and Disqualification).
- 6.5 Appointment of Directors
- 6.6 Legal Position of Directors
- 6.7 Powers and Duties of Directors
- 6.8 Key Managerial Personnel
- 6.9 Conditions and Qualifications For Appointment of Managing Director, Whole Time Director or Manager (Kmp) (Section 196):
- 6.10 Summary
- 6.11 Questions

6.0 OBJECTIVES

After studying the unit students will be able to:

- Understand the Qualification and Disqualifications of the Director
- Understand how the directors can be appointed.
- Understand the legal positions of directors.
- Understand powers and duties of directors.
- Understand the functioning of Key Managerial Personnel

6.1 INTRODUCTION

Company is a body corporate and does not have any physical existence of its own. Company is an artificial person and gets the work done from the human agency. The factors of such agencies like directors and other members of the company work on behalf of an artificial person that is company.

Section 2 (34) of the Act prescribed that “director” means a director appointed to the Board of a company. A director is a person appointed to perform the duties and functions of director of a company in accordance

with the provisions of the Companies Act, 2013. company are termed as 'directors.

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

6.2 MEANING AND DEFINITION

Section 2 (34) of the Act prescribed that “**director**” means “a director appointed to the Board of a company”. A director is a person appointed to perform the duties and functions of director of a company in accordance with the provisions of the Companies Act, 2013. company are termed as directors.

Section 2(10) further defines the Board of Directors as “Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company.”

Provisions as to Companies Act 2013 Rules (2014) prescribes the Appointment, Qualifications, Disqualifications of the Directors. It further prescribes the minimum and maximum numbers of directors are as under.

Every company is required to have a Board of directors and it should be consisting of individuals as directors. Section 149 prescribes the minimum number of directors required in a company as follows:

Public Company– At least 3 directors

Private company- At least 2 directors

One person company– Minimum 1 director

There can be a maximum of 15 directors. A company may appoint more than 15 directors after passing a special resolution.

6.3 DIRECTOR IDENTIFICATION NUMBER (SECTION 153- 159 AND RULES 2, 4)

“Rule 2(d) of the Companies (Appointment and Qualification of Directors) Rules, 2014 defines DIN as an identification number allotted by the Central Government to any individual, intending to be appointed as Director or to any existing director of a company for the purposes of identifying as a director of a company”.

DIN is a unique Director identification number allotted by the Central Government to any person intending to be a Director or an existing director of any company. It is an 8-digit unique identification number that has lifetime validity. Any person intending to become a director in an already existing company shall have to make an application for allotment of DIN through **e-Form DIR-3**.

- The Central Government may cancel the DIN due to the following reasons
- If a duplicate DIN has been found which had issued to the director.

- If DIN was obtained by fraudulent means or by submitting the fake documents
- On the death of the concerned person the DIN can be withdrawn
- If the holder of DIN or person has been declared unsound mind by the competent court the Central Government may cancel the DIN and if the person has been adjudicated as insolvent

If any person or director contravenes any provisions laid down in respect of DIN shall be punishable with an imprisonment for a term which may be extended to Rs. 50,000/- and on continuation of the contravention a further fine which may extend to Rs. 500/- per day after the first during which the contravention continues.

6.4 WHO CAN BECOME A DIRECTOR? (QUALIFICATIONS AND DISQUALIFICATIONS). (SECTION 164)

There are no qualifications laid down or prescribed under Companies Act, 2013 for an appointment of a position as 'Director' the only condition to be fulfilled being he must be competent to contract. Section 164 has made in regards with certain disqualifications for appointment of directors. When a person is disqualified under Section 164 he shall not be eligible to be appointed as a Director in a company.

1. A person shall not be eligible for appointment as a director of a company, if—

- (a) He is of unsound mind and stands so declared by a competent court;
- (b) He is an undischarged insolvent;
- (c) He has applied to be adjudicated as an insolvent and his application is pending;
- (d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence;
- (e) An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- (f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
- (g) He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

2. No person who is or has been a director of a company which—

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

- (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

6.5 APPOINTMENT OF DIRECTORS

A director is a person duly appointed to the Board of a Company, collectively called as Board or Board of Directors. The Board is responsible for the management of affairs of a company. They have the responsibility to act in the best interest of the company. Although, directors act on behalf of the company but the individual acts done by a director cannot bind the company, unless the director is authorized by a Board Resolution. Act further states that no person should be appointed as director who has not allotted a Director Identification Number along with a declaration that he has not been disqualified to become a director under the said Act.

A person shall be eligible for reappointment as a director provided, he is not a retiring director and further provides that his name should be intimated to the Registered Office of the company with in at least 14 days before the meeting.

The freedom for private company for an administration of the appointment procedure of directors under old act that is under Companies Act 1956 has been removed.

A company which contravenes any provisions under this chapter/section, the company and every officer of the company who shall be punishable with fine which shall not be less than Rs. 50,000/- and may be extended up to Rs. 5,00,000/-

Following are the modes of appointment of directors:

Appointment of First Director:

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

Nominee Director (Section 149 (7)):

This section defines “nominee director” as a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests. Further it is stated that the Nominee Director cannot be considered as an Independent Director in a company.

Section 161(3) provides an authority to Board to appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

Additional Director Section [161(1)]:

As per the provisions made under Articles of Association of the Company this Section 161(1) of the Companies Act, 2013 speaks about the appointment of the additional director. The Board of Directors may appoint an additional director to the Board only if articles provides for the same. The additional director shall hold office from the date of appointment till the date of the ensuing annual general meeting or the last date on which annual general meeting should have been held, whichever is earlier.

Independent Director Section [149(6)]:

An Independent Director is a non-executive director of a company and helps the company in improving corporate credibility and governance standards. Section 149 of the Companies Act, 2013 falls under chapter XI Appointment and Qualification of Directors. Section 149 (6) An independent director in relation to a company means a director other than a managing director or a whole-time director or a nominee director.

For example: ABC Bank grants a loan of ¹ 25 lakhs to X Ltd. ABC Bank appoints Mr. S as nominee director in A Ltd. Mr. S cannot become an Independent Director in A Ltd.

Resident Director Section [149 (3)]:

The above section provides that “Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.”

The resident Director will act as any other Director of the company. He will be responsible as any other Director of the Company; as far as operational control is concerned his insolvent is not considered. To fulfill the statutory requirement Resident director is usually appointed. He may participate in Board Meetings of the company whenever required. Like any other director the Resident Director is required to attend at least one Board Meeting in a particular year.

Alternate Director: [S.161 (2)]:

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

The board may appoint a person as an alternate director if the articles provides or a resolution passed in the General Meeting in this regard for the same. An alternate director is appointed where an original director so appointed remains outside India for a period of not less than 3 months. The term of office of an alternate director shall vacate the office when the original director returns to India or where the term of original director expires before his return to India the term of alternate director shall also expires at that time.

Appointment of Directors in Casual Vacancy [Section 161(4)]:

In case if, the office of any Director appointed by the Company in General Meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next General Meeting. Any person so appointed shall hold office only up to the date up to which the Director in whose place he is appointed would have held office if it had not been vacated. [Section 161(4)]

Casual Vacancy in the Office of Director happens under the following situations:

- Resignation by the Director
- Disqualification of the Director
- Death of the Director
- Insolvency of the Director

Woman Director: Section 149 (1) Second Provision, S. 152 (5) and Rule 3

The said rule lays down the provisions relating to appointment of Woman Director are as under:

Every listed company; Every other public company having paid-up share capital of one hundred crore rupees or more or turnover of Rs.300 crore or more. Further is provides that the Woman Director should submit the consent form No 112 along with the Director's Identification Number Provided by Central Government.

Any new company registered under this act should comply the provisions of an appointment of woman director with in a period of 06 months from the date of incorporation.

¹ <https://www.lawrbt.com/companies-act-procedures/fill-casual-vacancy-in-the-office-of-director/>

6.6 LEGAL POSITION OF DIRECTOR

In the words of Bowen, L.J.:

“Directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as exhaustive of their powers and responsibilities but as indicating useful points of view from which they may for the moment and for the particular purpose to be considered.”

In short it is difficult to express the legal position of the directors of a company. The Companies Act makes no effort to define the exact positions of the directors. Director is a multifaceted personality as at various times been described by judges as agents, trustees or managing partners.

1. Directors as trustees:

Trustee is a person whom the trust vested. He is a custodian of the funds of the company. A trustee is a person in whom is vested the legal ownership of the assets which he administers for the benefit of another or others. Directors are regarded as trustees of the company's assets, and of the powers that vest in them because they administer those assets and perform duties in the interest of the company and not for their own personal advantage. Case- *Ramaswamy Iyer v/s. Brahmayya & Co. [1966] 1 Comp. LJ 107 (Mad.)*

There is a contrast view in respect of the above discussion as a Trustee can acquire property in his own name on behalf of the trust whereas director cannot. Secondly director has to play multifaceted role while representing the company to that of trustees.

2. Directors as Managing Partner:

In a company the management is in the hands of plural executives. So, the directors are managing partners (the term partner used in the sense of the Partnership Act). Even though substantial powers may be entrusted upon directors or to an outsider, such a person has to act under the superintendence, control and direction of the board of Directors.

Therefore, unlike in a partnership firm, no power can be delegated on a single director as a managing partner. The principle of delegates non-protest delegate, i.e., power once delegated cannot be further delegated, is applicable to company management.

3. Directors as Agent:

That directors are agents is their first feature. As company is an artificial person and it gets the work done through human agency. However, directors being agents are not personally liable for their acts unless they contravene the provisions of the Act as specifically mentioned in it. Further a notice given to the agent is the notice to the principal, similarly any notice given to the director is the notice given to the company.

It is quite distinct from the principle of agency. The acts and intention of its agents are the acts and intention of the body corporate. Even a company can be held liable for the animus contended by its directors. Directors are not agents of the members of the company.

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

4. Directors as Employee:

A director is elected by the shareholders in general meeting, and once so elected, he enjoys well-defined rights and powers under the Act or the articles. Even the shareholders who elect them cannot interfere with their rights or powers except under certain circumstances. An employee appointed by the company under a contract of service is a servant of the company. He does not enjoy any powers other than those vested in him by the employer, who can always direct his actions and interfere in his work.

As such directors are agents of the company but they are not employees or servants of the company. However, there is nothing in law to prevent a director from accepting employment under the company under a special contract which he may enter into with the company *Case Law- R.R. Kothandaraman v. CIT (1957)*.

Accordingly, where a director accepts employment under the company under a separate contract of service, in addition to the directorship, he is also treated as an employee or servant of the company. He shall, in such a case, be entitled to remuneration and other benefits admissible to employees, in addition to his remuneration as Director under the Act.

5. Directors as organs of corporate body:

In the case of *Bath v. Standard Land Co. Ltd.*, Neville J. stated that the board of directors are the brain of the company and a company does act only through them.

Company is a body corporate and does not have its own mind or body to act. In the case of *Bath v. Standard Land Co. Ltd.*, Neville J. stated that the board of directors are brain of the company and company does act through them. If we consider a company as a human body, the directors are the mind and the will of the company and they control the actions of the company. On the other hand, organ of the body does not suffer from any illness without its immediate effect on the whole body. The conclusion of this is director actually works in different capacities at different level to ensure that the company is being managed as per the procedures laid down under law.

6.7 POWERS AND DUTIES OF DIRECTORS

Section 166 of the Companies Act 2013 stipulates the following duties of the directors of a Company:

1. A director must function in accordance provisions made in the company's Articles of Association.

² <https://www.taxmann.com/post/blog/meaning-of-a-director-appointment-qualifications-legal-position-etc?amp>

2. A director must act in the best interests of the company's stakeholders, in good faith and promote the company's aims and objectives.
3. It is expected that a director shall use his independent judgment in carrying out his responsibilities with due care, skill and diligence.
4. A director should constantly be aware of potential conflicts of interest and endeavor to avoid them in the best interests of the firm.
5. A director must verify that appropriate considerations have taken place and that the transactions are in the company's best interests.
6. Director has to assure that the company's vigilance mechanism and users are not prejudicially affected on such use.
7. Confidentiality of sensitive proprietary information, trade secrets, technology, and undisclosed prices must be protected and should not be released unless the board has approved it or the law requires it.
8. It is expected that the company's director must not assign his or her office, and any such assignment shall be invalid.
9. If a corporate director violates the terms of this section, he or she will be fined not less than one lakh rupees but not more than Rs. 5,00,000/-

FIDUCIARY DUTIES OF DIRECTORS:

Fiduciary duties are basically relating with the concept of good faith, and are owed to the company as a result of the management control that directors exercise over the Company. It is the duty of directors to act in the best interest of the Company. Fiduciary duties are a Legal obligation and cannot be waived in any manner.

- a. **Duty of Loyalty.** The most important fiduciary duty is the duty of loyalty: The decision that taken place within the company should act in the interests of the company, and not in the own interests of directors.
- b. **Duty of Care:** Directors, in circumstances where they do not have a clash of interest, is the duty of care , the duty to pay attention and to try to make good decisions in the interest of the company.
- c. **Duty of Disclosure of the facts:** Director is bound to disclose all the facts to the members, in the interest of the company.
- d. **Must act in accordance with the provisions of Articles of Association:** It is expected that the director must act in accordance and the provisions laid down in the Articles of Association of the company.
- e. **No Secret Profit:** Director of the company shall not achieve or attempt to achieve any undue gain or secret profit or any benefit at the

sacrifice of the company. If any director is found guilty of making any undue gain, he shall be liable to compensate the amount to the company which is equivalent to the gain or benefit earned.

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

If a corporate director violates the terms of this section, he or she will be fined not less than one lakh rupees but not more than Rs. 5,00,000/-

POWERS OF BOARD OF DIRECTORS:

There are also certain powers of the board that those resolutions can only be passed by calling a board meeting. The said provisions are applicable under Section 175, Companies Act 2013.

- i. To make calls on shareholders for unpaid money in respect of their shares.
- ii. To Issue securities and shares
- iii. To borrow monies
- iv. To approve the financial statement
- v. To approve amalgamation merger and reconstruction arrangement of the companies.
- vi. To Invest the funds of the company
- vii. To grant loans or to provide securities in respect of loans.
- viii. To diversify the business of the company
- ix. To take over a company.
- x. To authorise the buyback of securities and shares

6.8 KEY MANAGERIAL PERSONNEL (SECTION 2, 196, 203-205)

Key Managerial Personnel means to a group of people who are in charge of maintaining the operations of the company. Key Managerial Personnel are persons who have authority and responsibility for planning, directing and controlling the activities of enterprise. These group includes Chief Executive Office, Chief Financial Officer, Company Secretary, Whole Time.

According to Section 2 (51) “key managerial personnel”, in relation to a company, means:

- “(i) The Chief Executive Officer or the managing director or the manager;
(ii) The company secretary;
(iii) The whole-time director;
(iv) The Chief Financial Officer; and

- (v) Such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) Such other officer as may be prescribed;”

Companies are required to appoint Key Managerial Personnel

- a) Any listed companies
- b) Any public limited company which have paid-up capital of Rs. 10 Crores or above. Those companies are required to appoint full-time managerial person as Managing director of the company or CEO or full-time director; and Chief Financial Officer (CFO); and Company Secretary

Key Role & Responsibilities of Managing Director /Whole time Director/ Manager in a Company:

- a) Managing Director is assigned with considerable powers to manage the affairs of the company as per the provisions under memorandum and articles of association of the company.
- b) To supervise the company's operations, financial performance, investments, and business and to give systematic guidance and direction to the board to see that the company achieves aims and objectives.
- c) Developing and implementing business plans to improve cost-effectiveness.
- d) Maintaining positive relations with business partners, shareholders, and authorities.
- e) Delegating executives in their duties.
- f) Assessing, managing, and resolving ambiguous developments and circumstances.
- g) Authenticating documents and other financial-statements proceedings contract on behalf of company.
- h) Every Key managerial personnel is required to disclose its interest in any company before the board within 30 days from date of its appointment

6.9 CONDITIONS AND QUALIFICATIONS FOR APPOINTMENT OF MANAGING DIRECTOR, WHOLE TIME DIRECTOR OR MANAGER (KMP) (SECTION 196):

Directors of Companies
Appointments and
Qualifications (Sections.2, 149-
183, 196, 203-205)

The tenure of appointments of KMP shall be for a term not exceeding 5 years at a time. Company must not appoint any person KMP who is below the age of twenty-one years or has attained the age of seventy years.

Following person or group of persons are not qualified to get appointed as KMP

The person who has been undischarged insolvent declared by the competent court.

The person at any time suspended payment to his creditors;

The person at any time has been convicted by a court in any offence and sentenced for a period of more than six months

The person had been sentenced to imprisonment for any period, for any acts as specified under Schedule V of the Companies Act, 2013

The person had been detained for any period under the “Conservation of Foreign Exchange and Prevention of Smuggling Activities Act”

³Penalty amount in case of contravention with provisions of law:

Any company or its officer who contravenes the provisions under the Act Key managerial personnel shall be held liable for penalty.

Every defaulting company shall be liable to pay penalty amount of Rs. 100000 which may extend to amount of Rs. 500000.

In case of director or any officer in default penalty amount may extend to Rupees Fifty thousand. In case of continuing default, the penalty may extend to Rupees One thousand per day till default continues

6.10 SUMMARY

Director Identification Number (Section 153- 159 and Rules 2, 4)

Who can become a director? (Qualifications and Disqualifications)

- 1. A person shall not be eligible for appointment as a director of a company, if—** (a) he is of unsound mind and stands so declared by a competent court; etc
- 2. No person who is or has been a director of a company which—** (a) has not filed financial statements or annual returns for any continuous period of three financial years;etc

³<https://corpbiz.io/learning/appointment-of-key-managerial-personnel/#:~:text=Any%20company%20o>

Modes of appointment of directors: Appointment of First Director: Nominee Director Additional Director ,Independent Director, Resident Director ,Alternate Director, Appointment of Directors in Casual Vacancy , Woman Director

LEGAL POSITION OF DIRECTOR: Directors as trustees, Directors as Managing Partner: Directors as Agent ,Directors as Employee: Directors as organs of corporate body.

POWERS AND DUTIES OF DIRECTORS: 1. A director must function in accordance provisions made in the company's Articles of Association. . director must act in the best interests of the company's

Register of Companies: Foreign Register, Closure of register of members or debenture holders or other security holders.

Key Managerial Personal Includes:

- (i) The Chief Executive Officer or the managing director or the manager;
- (ii) The company secretary;
- (iii) The whole-time director;
- (iv) The Chief Financial Officer; and
- (v) Such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) Such other officer as may be prescribed;”

6.11 QUESTIONS

1. What are the types of directors?
2. How directors are appointed- Explain in detail the appointment process and qualification and disqualifications of directors.
3. Who can be a “director” of a company?
4. Explain fully the provision of the companies act, 2013 about DIN
5. Explain the Legal Positions of the Director of a Company
6. Explain the key role and responsibilities of Managing Director or Whole Time Director of the company
7. Explain the Criteria for an appointment of Key Managerial Personnel in the company.

² <https://www.taxmann.com/post/blog/meaning-of-a-director-appointment-qualifications-legal-position-etc?amp>

MEETINGS

(SECTIONS.96-122, 173-176)

Unit Structure

- 7.0 Objectives
- 7.1 Introduction
- 7.2 Meaning and Definition
- 7.3 Annual General Meeting (AGM)
- 7.4 Extra Ordinary General Meeting
- 7.5 Meetings by Tribunal
- 7.6 Class Meeting
- 7.7 Summary
- 7.8 Questions

7.0 OBJECTIVES

After studying the unit students will be able to:

- Understand the Meaning and Definition of Meeting
- Understand the procedures to be followed to conduct meetings of the company.
- Understand the legal positions of directors.
- Understand powers and duties of directors.
- Understand the functioning of Key Managerial Personnel

7.1 INTRODUCTION

Meeting is not defined under any provisions of Companies Act of 2013, but taking references from common business and market parlance meeting generally defined as a gathering or getting together of a number of persons for transacting any lawful business and to arrive at proper fruitful conclusion. There must be at least two persons to form a meeting.

7.2 MEANING AND DEFINITION

Meetings:

Board of Directors Meeting:

Board meetings are meetings at the top level, i.e. a meeting where board members or their representatives are present. A company is not a living person but it is a non-living person which acts through the human agency, and such agencies are taking the decisions as per time required. All Companies shall hold Board at a regular interval. The board of directors'

act as agents through which the company takes actions as well as makes decisions.

The Board of Directors is the highest authority in a company and they have the powers to take all major decisions for the company. The board is also liable for managing the affairs of the entire company.

The first board meeting as far as **Public Limited Company** is concerned should be held within 30 days of the incorporation or registration. In the case of a Public Limited Company, the first board meeting has to be held within the first 30 days. The Board should keep in mind that there should not be a gap of more than 120 days between two meetings.

In the case of **Small Companies** or **one person company**, at least two meetings must be held, one in each half of the financial year. Additionally, the gap between the two meetings must be at least 90 days. In a circumstance where the meeting is held at a short notice, at least one independent director must be attending the meeting.

Quorum for the Board Meeting:

The quorum for the Board Meeting refers to the minimum number of members of the board that are required to conduct lawful meeting. Section 174 of Companies Act, 2013, provides that the minimum number of members of the board required for a valid meeting is 1/3rd of a total number of directors. However, a minimum of two directors must be present. Such rules do not apply to One Person Company,

Notice of Board Meeting:

It contains a document that are sent to all the directors of the company for conveying the Board Meeting. This document tells about the details of the meeting scheduled viz, the venue, date, time, and agenda of the meeting. A notice of at least **Seven days** before the actual day of conduction of meeting, required to be sent to every director of companies. Of all type of companies.

7.3 ANNUAL GENERAL MEETING (AGM)

Annual General Meeting Under the Companies Act, 2013:

An interaction An Annual General Meeting (AGM) is held to have communication and interaction between the management and the shareholders of the company. The Companies Act, 2013 makes it mandatory to hold an annual general meeting to discuss the important matters pertaining to appointment of auditors, yearly results of the company, etc. A company should observe the procedures under the Companies Act, 2013 to conduct the Annual General Meeting.

All companies except one person company (OPC) should hold an Annual General Meeting after the end of each financial year. A company must hold its AGM within a period of six months from the end of the financial year. However, in the case of a first annual general meeting, the company

can hold the AGM in less than nine months from the end of the first financial year. In such cases where the first AGM is already held, there is no need to hold any AGM in the year of incorporation. Do note that the time gap between two annual general meetings should not exceed 15 months.

An annual general meeting (AGM) under Companies Act, 2013 is a yearly meeting of company's shareholders to receive, confirm, accept the Annual Financial Statements ending on 31st March every year along with the Board of Directors Report and Report of the Auditors thereon. Matters that are discuss in AGM are:-

- Dividend declaration to shareholders.
- Appointment of directors to replace the retiring directors.
- Appointment of auditors and deciding the auditor's remuneration.
- Apart from the above ordinary business, any other business may be conducted as a special business of the company.

Provisions has made under Section 96 of the Companies Act, 2013, in respect of conduct of Annual General Meeting of the Company.

Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between two annual general meeting of a company. The first annual general meeting of the Company should be held within a period of nine months from the date of closing of the first financial year of the company and in any other case, within a period of six months, from the date of closing of the financial year. Provided that if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.

NOTICE OF AGM:

The company must serve a notice not less than before 21 days' to its members in writing /by post or in electronic mode. The notice should include the place, the date and day of the meeting, the hour at which the meeting is planned to conduct. The notice should also contain the business to be conducted at the Annual General Meeting.

A company should send the notice of the AGM to the following: -

- All members of the company including their legal representative of a deceased member
- Assignee of an insolvent member.
- The statutory auditor(s) of the company.
- All director(s) of the company.

QUORUM OF AGM:

In the case of a private company, the quorum for Annual General Meeting in case of Public Company are as under:- .

- If the number of members is **within thousand. Five members should be present** at the meeting.
- If the number of members are more than one thousand but within five thousand then minimum Fifteen **members** present at the meeting.
- **Thirty members present** at the meeting if the number of members is **more than five thousand**.
- In case the quorum for the meeting is not present **within half an hour** from the time scheduled, the meeting will be postpone to the same day in the next week for the same time and at the same venue or place.

Minutes of Annual General Meeting:

A formal written record of or proceedings of meetings are known as 'Minutes'. The said record may be in physical or electronic form in the minutes book. Every company has to be prepared a Minutes of Annual General Meeting mandatorily. The minutes should be signed and entered in the minute book within **thirty** days from the AGM. The Minutes book will be kept at the Registered Office of the company or at such other place permitted by the Board.

PROXIES:

Meaning:

Member of the company is Member of the company entitled to attend the meeting and vote at the meeting has a right to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Proxy shall have not a right to speak at the meeting and shall have right to vote except on a poll. A Person appointed as a proxy shall act on behalf or favour of such number of member(s) not more than fifty. The proxy form (MGT-11) must be deposited with the company shall not be a longer than a period of 48 hours. Section 8 company for "promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object", no member of this company shall have right to appoint proxy unless shall other person is also member of such company. Company, at its own expense cannot invite to its member for appointing proxy.

If there is any default made in fulfilling with this provision, penalty of Rs.5000 will be imposed as per the above provision.

Voting through Electronic Mode:

Relevant Rules / Procedure prescribed in the Companies (Management and Administration) Rules, 2014 as under:

As per the relevant provisions of Companies Act 2013 Rules 14 every listed company or Company having not less than one thousand shareholders may pass any resolution by electronic voting system in accordance with the provisions of this rule.

Such companies shall provide to its members the facility to exercise their right to vote at general meetings by way of electronic modes. A member may exercise his right to vote at any general meeting by electronic method and company

- i. The notice of the meeting shall be sent to all the members, auditors of the company, or directors either: -
 - by speed post or registered post OR
 - through courier service
 - through electronic modes like registered e-mail id
- ii. The notice shall also be placed on the website of the company
- iii. The notice of the meeting shall distinctly mention that the business which may be transacted via electronic voting system and the company is providing facility for voting by electronic means and distinctly indicate the process and training for voting by electronic means and the time schedule including the time period during which the votes may be cast and shall also provide the login ID and create a facility for generating password and for maintaining security and casting of vote in a secure manner.

Voting through Postal Ballot: Relevant Rules / Procedure prescribed in the Companies (Management and Administration) Rules, 2014 as under:

(Section 110 of the Companies Act, 2013)

Postal ballot includes **voting by post or through electronic modes** within a period of thirty days from the date of dispatch of the notice meeting.

Where a company is required or decides to come up with any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution containing the reasons there for and requesting them to send their consent or discord in writing on a postal ballot.

The notice shall be sent either:

- By Registered Post or speed post OR

- Through courier service for ease of the communication of the consent or discord of the shareholder to the resolution within the said period of **thirty days**.
- Through electronic means like registered e-mail id OR
 - i. Scrutinizer shall be appointed who is not in employment of the company so that the voting process shall be in a fair and transparent.
 - ii. If a resolution is consented to by the required majority of the shareholders by means of postal ballot including voting by electronic means, it shall be like to have been duly passed at a general meeting called for the purpose.
 - iii. Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer and after the receipt of consent or discord of the shareholder in writing on a postal ballot, the ballot paper should not be discarded or the identity of shareholder should not be disclosed.
 - iv. A report shall be submitted by the scrutinizer at the earliest after the last date of receipt of postal ballots but not later than seven days thereof.
 - v. All other papers and the postal ballot relating to the voting should be kept in the custody of the Scrutinizer until the chairman's approval is received. On the signing the minutes by the chairman, the same and other papers should be returned to the registrar safely.
 - vi. The consent or discord received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.
 - vii. The results shall be declared by declaring it, along with the scrutinizer's report, on the website of the company.

The resolution shall be likely to be passed on the date of at a meeting convened in that behalf.

7.4 EXTRA ORDINARY GENERAL MEETING: (Section 100-117)

Special General Meeting can be known as an 'Extra Ordinary General Meeting' Matters requiring immediate consideration by members, which cannot be postponed till next Annual General Meeting, to overcome such emergencies, the companies can facilitate for holding of emergency meetings of the members which are termed as Extra Ordinary General Meeting.

- Section 100 of the Companies Act, 2013 with rule 17 of The Companies Rules, 2014 associated with matters related to holding of Extra-ordinary General Meeting.

- Like Annual General Meeting there is no fixed time for holding an Extra-ordinary General meeting. However, there are some transactions which are urgent which cannot made wait or postpone till next Annual General Meeting, then an Extra-ordinary General meeting can be called which gives a company freedom to transact business in whom the consent of shareholders/ members are required.
- As per the Provisions under Companies Act, 2013 there is no specific reasons or purpose of business for which the EGM is called. However, an EGM might be called to deal with any of the following:
 - Matter on whom approval of members is/are required
 - Removal of Auditor
 - Related party transactions
 - Removal of Director
 - Any matter that can not wait until the next shareholders meeting.
- The notice for Extra-ordinary General meeting has to be served at least twenty-one days before the conduction of actual day of meeting.
- ¹An Extra-ordinary General meeting (EGM) can be called by:-
 - Company or
 - Requisition made by,
 - a) In the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;
 - b) In the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote
 - c) A meeting by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.
 - d) Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under the Companies Act, 2013 payable to such of the directors who were in default in calling the meeting.

¹ <https://www.cagmc.com/extraordinary-general-meeting->

7.5 MEETING BY TRIBUNAL (SECTION 97- 99)

Tribunal means National Company Law Under Section 2(90) of Companies Act. Tribunal can call a meeting under following circumstances.

¹ <https://www.cagmc.com/extraordinary-general-meeting->

- An application under section 97 for calling or obtaining a direction to call the annual general meeting of the company shall be made by any member of the company.
- A Company whether private or public, limited or unlimited, having a share capital or not, fails to hold its AGM within the prescribed time then the Tribunal under Section 97 of the Act of 2013 is empowered to call or direct the calling of AGM of such company on the application of any member of the company and further order for any measures or directions as it deems fit awarded by the Tribunal . Such meeting held under the directions of the tribunal shall be deemed to be an AGM of such company.

7.6 CLASS MEETING

Class meeting is a meeting of a group of shareholders, debenture holders, creditors etc having identical interests. Such meetings is convened by a particular class of shareholders only and only if they think that their rights are being altered or if they want to vary their attached rights.

7.7 SUMMARY

MEETINGS: Board of Directors Meeting, Quorum for the Board Meeting, Annual General Meeting Under the Companies Act, Notice of Annual General Meeting and its Contents, Quorum required for Annual General Meeting. Minutes Of Annual General Meeting: Provisions for Proxies: Extra Ordinary General Meeting, Class Meeting, Meetings by Tribunal. Class Meeting.

Voting through Electronic Mode:

Relevant Rules / Procedure prescribed in the Companies (Management and Administration) Rules, 2014.

Voting through Postal Ballot: Relevant Rules / Procedure prescribed in the Companies (Management and Administration) Rules, 2014

7.8 QUESTIONS

1. Define the term 'Meeting' What are the various types of provisions of meetings have been made under Companies Act 2013.
2. Explain the procedure for conducting an Annual General Meetings

3. What are the legal formalities to conduct the voting on different modes?
4. What is extra-ordinary general meeting (EOGM). What are the procedure and requirements to hold Extra Ordinary General Meeting?
5. Write a Short Note:-
 - a) Postal Ballot
 - b) Tribunal meeting
 - c) Quorum
 - d) Proxies

MODULE III

THE INDIAN PARTNERSHIP ACT 1932

8

FORMATION OF PARTNERSHIP AND TYPES OF PARTNERSHIP

Unit Structure

- 8.0 Objectives
- 8.1 Introduction
- 8.2 Meaning and Definition
- 8.3 Who May Be a Partner
- 8.4 Essential Elements of Partnership
- 8.5 Partnership Deed or Articles of Partnership
- 8.6 Test of Partnership
- 8.7 Types of Partners
- 8.8 Types of Partnership
- 8.9 Distinguish Between. Partnership Firm With Joint Family Business, Company And Hindu Undivided Family Business
- 8.10 Summary
- 8.11 Questions

8.0 OBJECTIVES

After studying the unit students will be able to:

- Understand the meaning of Partnership and Partnership deed.
- Explain the features of Partnership
- Distinguish between Partnership and co-partnership, HUF and Company.
- Discuss about Dissolution of Partnership Firm

8.1 INTRODUCTION

Partnership form of business organisation have come into existence due to some of the limitations of sole trading concern such as limited capital, managerial ability etc.

Formerly partnership business was regulated by Indian contract act 1872 but subsequently authorities found it necessary to have a separate law for this purpose, as a result of which Indian partnership Act 1932 came into effect. The act was established to define and modify as and when required.

Partnership derived from the word ‘part’ and implies sharing. Persons come together to share profits and properties of the business. The relationship of partnership arises from contract and not status.

8.2 MEANING AND DEFINITION

Definition:

Section 4 of the Act defines Partnership as “the relation between the persons who have agreed to share the profits of business carried on by all or any of them acting for all”. Person who has entered into partnership with one another are called individually partners and collectively a firm. The name under which their business is carried on is called firm name.

8.3 WHO MAY BE A PARTNER

1. **INDIVIDUAL** – An individual who satisfies all conditions required for a valid contract can become a partner.
2. **MINOR** – A minor cannot become a partner. He may be entered into partnership business with consent of all other partners.
3. **LUNATIC** – A person of unsound mind is not competent to contract and therefore cannot become a partner.
4. **CORPERATE BODY** – A corporate body being an artificial person can become a partner and can enter into partnership agreement.
5. **A FIRM**-A firm cannot be a partner of another firm, though its partner can be in their individual capacity.

WHO ARE NOT PARTNERS:

- The members of Hindu undivided family carrying in family business. However partnership contract inter se between members of family is permissible.
- Lender of the money receiving a rate of interest from any person engaged in business or about to engage in business.
- An agent engaged in business receiving commission from principal.
- Widow or a child of deceased partner receiving a portion of profit as annuity.
- A previous owner or part owner of the business selling his business along with the good will and receiving a portion of the profit in consideration of sale.
- Joint or co-owners of property sharing profits arising from the business.

8.4 ESSENTIAL ELEMENTS OF PARTNERSHIP

Following are the elements of Partnership:

1. Two or More Persons:

Minimum two persons are required to form a partnership. In case of banking business maximum number of partners allowed is ten, while in any other business the numbers cannot exceed 20.

2. Competency:

All partners must have attained an age of majority and must be of sound mind to enable him to enter into contracts.

3. Agreement:

There has got to be an agreement to form partnership. This agreement may be expressed or implied. Express agreement arises out of words spoken or written. Similarly implied agreement arises out of the conduct and custom of business. Section 5 of the act states “The relation of the partnership arises from contract and not from status.

4. Lawful business:

Term business refers any lawful activity, which if successful would result in profits. It include every trade, occupation and profession. It is not necessary that a business be permanent undertaking. A Partnership may exist even for a single venture example: X and Y are partners for producing a film.

5. Profit Sharing:

An agreement entered into by all the partners concerned must be for sharing the profit of the business. Profit means net profit arrived at after providing for all expenses. It must be remembered that profit sharing is must irrespective of profit-sharing ratio. However, it must be noted that near sharing of profits between persons would not necessarily determine the existence of partnership. **For Example:** Joint owner of a shop who shared the rent of the shop will not be called partners.

6. Mutual Agency between Partners: Another important aspect of the definition of a partnership is that the business must be carried on by all the partners or by any (one or more) acting on their behalf of them, i.e., joint agency

8.5 PARTNERSHIP DEED OR ARTICLES OF PARTNERSHIP

Partnership may be expressed or implied. Express Partnership arises by words spoken or written. Implied Partnership may arise from conduct of the parties. Partnership agreement must satisfy all conditions of valid contract such as offer, acceptance, competency, lawful business etc.

Sometimes minor may be admitted to the benefits of the partnership with the consent of all the partners. As relationship of partners to one another is that of agency, no consideration is required to create partnership. The documents which contain the terms of partnership as agreed among the partner is called partnership deed.

Following are the contents or provisions of the deed:

- a) Name of the firm
- b) Name and address of all partners
- c) Nature and place of business
- d) Duration of the partnership.
- e) Amount of capital of each partner with profit sharing ratio.
- f) Interest on drawings and Interest on capital.
- g) Interest on loan advanced by partner.
- h) Salary or commission payable to any partner.
- i) Method of valuation of goodwill in case of admission, retirement or death of a partner.
- j) Settlement of account in case of retirement or death of a partner or dissolution of a firm.

8.6 TEST OF PARTNERSHIP

The true test of a partnership is the existence of a Mutual Agency. There are other circumstances where the sharing of profit exists but there is no partnership. But if an agency exists between the parties who run a business together and share profits it will be deemed that a partnership exists.

Following three tests must be undertaken to determine whether or not a group of persons doing lawful activity constitute partnership or not.

1. Agreement to share profits:

Sharing of profit is prima facie evidence of existence of partnership. The term profits mean net profit i.e surplus left after deducting all expenses paid or payable. In what ratio profit is to be shared is immaterial.

2. Mutual agency:

U/S 18 of the Indian partnership act a partner is both agent and principal. It means each partner is both agent and a principal. A partner is an agent of the other partner in the sense that by his act he can bind other partners. He is principal in the sense that he can be held liable for the acts of the other partners.

3. Intention of parties:

The intention of the partners may be gathered from their conduct, course of dealings, circumstances of their entering into business.

8.7 TYPES OF PARTNERS

A partnership is when two or more people join together to engage in a particular venture and share the profits carried on from such venture or business. However, one must not always assume that all partners participate in the work or profits or even liabilities of the firm equally. In fact, there are various types of partners based on the degree of their liability, or their involvement in the firm.

1. Active Partner:

An Ostensible Partner or an active partner is the first type of partner. As the name suggests he takes an active part in the firm and carrying of the business activity. He performs on the daily business on behalf of all the partners. This means he acts as an agent of all the other partners on a day-to-day basis and with regards to all routine business of the firm.

2. Sleeping Partner:

This is a partner that does not take actual part in the daily functioning, i.e. he does not take an active part in the daily activities of the firm. He is bound by the action of all the other partners.

He will continue to share the profits and losses of the firm and even bring in his share of capital like any other partner. If such a dormant partner retires, he need not give a public notice of the same.

3. Nominal Partner

This is a partner that does not have any significant interest in the partnership. So, in essence, he is only lending his name to the partnership. He will not make any capital contributions to the firm, and so he will not have a share in the profits. But the nominal partner will be liable to outsiders and third parties for acts done by any other partners in the partnership.

4. Partner by Estoppel:

When a person holds out to another that he or she is a partner of the firm, either by his words, actions or conduct then such a partner cannot deny that he/she is not a partner. This actually means that though such a person is not a partner he/she has represented himself /herself as such, and so he becomes partner by estoppel.

5. Partner in Profits Only:

Such types of partners will only share the profits of the firm, he will not be liable for any liabilities. Even when dealing with third parties he will be

liable for all acts of profit only, he will not share any of the liability of the firm.

6. Minor Partner:

A minor cannot be a partner of a firm according to the Contract Act. However, a partner can be admitted to the benefits of a partnership if all partner gives their consent for the same. He will share profits of the firm but his liability for the losses will be limited to his share in the firm.

Such a minor partner on attaining majority has six months to decide if he wishes to become a partner of the firm. He must then declare his decision by giving a public notice. He will have to give the public notice in the circumstances whether he continues as a partner or decides to retire.

8.8 TYPES OF PARTNERSHIP

1. Partnership for a Fixed Term:

It is a partnership where at time period is fixed. Such a partnership gets dissolved at the expiry of the time period. Before the fix period it may be dissolved by mutual consent. However, if it continues after the fix period it becomes partnership at will

2. Particular Partnership :(Section 8):

Where two or more persons agree to do business in a particular adventure or undertaking such partnership is called particular partnership.

E.g. X & Y enter into partnership for producing advertising film.

3. Partnership at Will:

It is a partnership in which duration is not fixed and can be dissolved by any partner by giving a notice. The firm may be dissolved by any partner by giving 14 days advance notice in writing to all the other partners indicating his intention to dissolve the firm.

8.9 DISTINGUISH BETWEEN PARTNERSHIP FIRM WITH JOINT FAMILY BUSINESS, COMPANY AND HINDU UNDIVIDED FAMILY BUSINESS

1. Distinguish Between Partnership and Co-ownership:

	Partnership	Co ownership
1	Business: To carry on business isan essential element of partnership.	Co ownership may exist without carrying on any business.
2.	Mutual agency: There exist mutual agency among the partners of the firm.	No mutual agency exists among co owners

3.	Creation: Partnership is created by an agreement	Co ownership is created by an agreement or by law or by virtue of status.
4.	Profit: An agreement to share profit is essential element of partnership.	Sharing
5.	Lien: A partner has a lien on the property of the firm owned in common	Co ownership has no lien on the property owned in common.
6.	Partition of property: A partner cannot demand the partition of property of the firm.	A co-owner is entitle to claim partition of property. ⁷
7.	Agreement: Partnership	arises from an agreement
8.	No of partners: Minimum 2, maximum 10 for banking, 20 for other business.	There is no maximum limit of co owners.

2. Distinguish Between Partnership and Company:

	Partnership	Company
1.	Meaning: Partnership is the relationship between the persons who have agreed to share profits of the business carried on by all or any one of them acting for all.	A company means a company formed and registered under company's act or an existing company.
2.	Legal person: A firm is not a legal entity.	A company is a legal person created in the eye of a law.
3.	Liability: liability of a partner is unlimited. Even personal property of the partner is liable to settle claim of creditor.	In case of company the liability of the member is limited to the extent of unpaid amount on calls.
4	Transfer of share: in a firm a partner cannot his share without the consent all the partners.	In a company shareholder can transfer his shares subject to the provision of A.A.
5	Agency : every partner is an agent of other partner.	Shareholder of the company is not an agent of the company.
6	Registration: registration of firm is not compulsory under partnership act 1932.	Registration of company is compulsory under companies act 1956.
7	Management: Management vests in the hands of the partners except in the case of sleeping partner	Management
8	Creditors: Creditors of the firm are also the creditor of the partners individually as well.	Creditors are only the creditors of the company and not
9	Accounts: Accounts of the partnership need not be audited	Accounts

	by the auditors	
10	Ownership of property: The property of the Firm collectively belongs to the partner.	The property of the company, belongs to the company, and not to the shareholders
11	Effect of death: In case of a death or insolvency of a partner firm gets dissolved, unless there is contract to the contrary.	In case of company, death or insolvency of a member of the company does not results in to dissolution of the company.
12	Disposal of property: A partner can dispose the property of the firm	A shareholder cannot dispose of the property of the company.
13	No of members: Minimum 2, maximum 10 in case of banking and 20 in case of general business.	In case of private company maximum 50 members and public company can have any number of shareholder.
14	Existence: Partnership has no perpetual or continuous life.	Company has long and stale life

3. Distinguish Between Partnership and HUF:

	Partnership	Hindu undivided Family
1	Meaning: partnership is the relationship between the persons who have agreed to share profits of the business carried on by all or any of the acting for all.	A joint Hindu family which carries on business handed down from its ancestors.
2	Agreement: It can arise only by an agreement of the partner	It arises by the operation of the law.
3	Admission of new member: A new partner can be admitted in the partnership, only with the consent of all the partners.	A person becomes member only by birth in the family.
4	Numbers:	maximum
5	Mutual agency: There exist mutual agency among the partners i.e. all is acting for one and one is acting for all.	There is no such agency relationship between members of the family. The karta i.e. head or manager of the family is the only representative of the family.
6	Implied authority: Every partner has an implied authority to bind the firm by his acts done in the ordinary course of the business.	Only karta has an implied authority to bind the family by his acts.
7	Liability: A partner is personally liable for the business obligation of the firm. The share of each partner in the property and profits along with his private	A member is not personally liable for the business obligation of the family. Only his share of profits and property in the family is liable for discharge the debts

	property is liable for the discharge of the debts of the firm.	of the family.
8	Dissolution/partition: A partner has right to demand for dissolution of firm.	A partner has right to demand for dissolution of firm.
9	Death/insolvency: Firm gets dissolved on death or insolvency of any one partner.	It is not dissolved on the death or insolvency of any of the members.

8.10 SUMMARY

Partnership: Section 4 of the Act defines Partnership as “the relation between the persons who have agreed to share the profits of business carried on by all or any of them acting for all.

Who can become a Partner: Individual, Body Corporate,

Who can not become a Partner in Partnership: The members of Hindu undivided family carrying in family business. Lender of the money receiving a rate of interest from any person engaged in business or about to engage in business. An agent engaged in business receiving commission from principal. etc

Essentials of Partnership: Two Or More Persons: Competency: Agreement: Profit Sharing: Mutual Agency between Partners:

PARTNERSHIP DEED OR ARTICLES OF PARTNERSHIP

Partnership Deed: Meaning: Partnership Deed is nothing but an agreement between the Partners in respect of the Partnership.

Contents:

- a) Name of the firm, Name and address of all partners, Nature and place of business, Duration of the partnership, Amount of capital of each partner with profit sharing ratio. etc

Types of Partnership: Agreement to share profits: Mutual agency: Intention of parties:

Types of Partners: Active Partner, Sleeping Partner, Nominal Partner, Partner by Estoppel, Partner in Profits Only, Minor Partner

Types of Partnership: Partnership for a Fixed Term: Particular Partnership: Partnership at Will:

8.11 QUESTIONS

1. State and Explain the concept of partnership and essential elements of partnership

2. How the Partnership Firm can be formed? State types of Partnership? Formation of Partnership and Types of Partnership
3. What are types of partners?
4. “Mutual Agency’ is an essence of the Partnership’ Explain this statement.
5. Distinguish between Partnership and Company
6. Distinguish between Partnership and Joint Hindu Family Business.

7. Write Short Note on

- a. Distinguish Partnership and co-ownership
- b. Public notice
- c. Partnership Deed
- d. Who can become a partner in partnership?

REGISTRATION OF FIRMS AND CONSEQUENCES OF NON- REGISTRATION RELATIONS AMONST THE PARTNERS AND DISSOLUTION OF FIRM

Unit Structure

- 9.0 Objectives
- 9.1 Introduction
- 9.2 Consequences of Non- Registration of Partnership.
- 9.3 Rights, Duties and Liabilities and Authority of Partners
- 9.4 Rights of a Partner
- 9.5 Duties of Partners
- 9.6 Liabilities of Partners
- 9.7 Implied Authority of Partner
- 9.8 Mutual Relationship of Partners to Each Other
- 9.9 Relationship of Partners to Third Persons
- 9.10 Minor's Position in Partnership
- 9.11 Minor Become A Full-Fledged Partner.
- 9.12 Rights of the Minor If He Elects Not to Become A Partner
- 9.13 Effects or Consequences of Dissolution
- 9.14 Public Notice
- 9.15 Summary
- 9.16 Questions

9.0 OBJECTIVES

After studying the unit students will be able to:

- Understand importance of registration of Partnership.
- Understand the consequences of non-registration of firm
- Understand rights duties and mutual rights duties of partners
- Understand the Minors position in partnership
- Understand Liability of Partners to the firm and to a third parties.
- Understand the concept of Dissolution and Effects of Dissolution.

9.1 INTRODUCTION

Registration of a partnership firm is not compulsory under law. The provisions under Partnership Act, 1932 made specifically that if the partners so wish to register, may register the firm with the Registrar of Firms of the state in which the firm's main office is situated. A partnership firm may be registered at the time when it is formed or at any time thereafter. Procedure for partnership Registration so that to get a partnership firm registered, an application in a prescribed form must be submitted with the Registrar of Firms. The application must include the following information:

- The name of the firm
- The principal place of business of the firm
- Names of other places where the firm's business is carried on.
- Names in full and permanent addresses of the partners.
- The date on which each partner joined the firm
- Duration of partnership, if specified

The filled and prescribed application should be signed and verified by each partner, after that it is to be submitted to the Registrar of Firms of the place in which the main office of the firm's business is located or proposed to be located. The registration fee is also deposited along with the application. On submission of the application, the registrar will scrutinize the application. If he is satisfied that everything that required to fulfill has fulfilled and all the legal formalities have been taken care, he will make an entry in the register of firms. He will also issue a certificate of registration. Any change in the information submitted at the time of registration should be communicated to the Registrar.

9.2 CONSEQUENCES OF NON- REGISTRATION OF PARTNERSHIP.

The consequences of a partnership firm which is not registered are as follows:

- It cannot enforce its claims against the third party in a court of law.
- It cannot file a legal suit against any of its partners
- Partners of an unregistered firm cannot file any suit to enforce a right against the firm.
- A partner of an unregistered firm cannot file suit against other partners. It cannot claim adjustment for any sum exceeding Rs. One hundred.

Example: Suppose an unregistered firm owes Rs. 2000 to Sahil and Sahil owes Rs.1000 to the firm. The firm cannot enforce an adjustment of Rs.1000 in a court of law.

Partnership Property (Section 14):

Partnership Property is also known as property of a firm, partnership assets, joint stock, common stock, or joint estate. A partnership property includes all property and rights, and interest in property that the purchases by partnership firm.

These properties are collectively owned by all the members of the in the course of partnership business which includes Goodwill.

Therefore, a partnership property includes of the following items if there is no agreement between the partners showing any contrary intention. All property and rights and interest in property that the partners purchase in the common stock as their contribution to the common business purpose.

Goodwill of the business:

To arrive at the conclusion or to decide whether a particular property is partnership property or not it depends on the fair and true objective or agreement between the partners.

Therefore, if a firm uses the property of a partner for its purposes, it does not make it a partnership property unless that was the real intention. At any time, the partners may agree to convert the property of a partner or partners into partnership property.

9.3 RIGHTS, DUTIES AND LIABILITIES AND AUTHORITY OF PARTNERS

The Partnership Deed includes the mutual rights, duties and obligations of the partners, in certain cases, the Partnership Act also makes a compulsory provision in respect of the rights and obligations of partners. When Partnership Deed is silent.

9.4 RIGHTS OF A PARTNER

The rights of a partner are as follows:

1. Right of the partner to take active part in the day-to-day affairs of the firm.
2. Right to be consulted and heard when taking any decision regarding the business.
3. Right as agent of the firm and implied authority to bind the firm for any act done in carrying the business.
4. Right to share the profits equally or as agreed upon by the partners as per the provisions under partnership deed.

5. Right to get interest on capital contributed by the partners to the firm.
6. Right of access to books of accounts and call for the copy of the same for inspection.
7. Right to prevent admission of new partners/expulsion of existing partners.
8. Right to enjoy interest on advances paid by the partners for business purpose.
9. Right to the use of partnership property exclusively for partnership business only not for his personal use or benefit.
10. Right to retire with the consent of other partners and according to the terms-and conditions of deed.

9.5 DUTIES OF PARTNERS

The duties of a partner are as under:

a. To carry on the business to the greatest common advantage:

Every partner is bound to carry on the business of the firm to the greatest common advantage. In other words, the partner must use his knowledge and skill in the conduct of business to provide maximum benefits for the firm.

b. To be just and faithful to each other:

Every partner must be faithful to other partners of the firm. Every partner must observe utmost good faith and fairness towards other partners in partnership activity.

c. To render true accounts:

Every partner must render true and proper accounts to his co-partners, as they are mutually related.

d. To provide full information:

Every partner must provide full information and details of activities affecting the firm to the other co-partners. No information should be hidden.

e. To attend diligently to his duties:

Every partner is bound to attend diligently and faithfully to duties in the conduct of the business of the firm.

f. To indemnify for loss caused by fraud or willful neglect:

It is the duty of the partners to indemnify the firm for loss if any caused to the firm because of a partner's willful neglect in the conduct of the business or fraud committed by him against a third party.

g. Should not hold and use partnership property exclusively for the firm:

The partners must hold and use the partnership property exclusively for the purpose of partnership activity of the firm not for their personal advantage.

h. No Secret Profit and to account for personal profits:

If a partner secured any personal benefit or profit from partnership transactions or from the use of the property of the firm or business connection the firm or the firm's name, he must account for such profit and reimbursed it to the firm.

i. Not to carry on any competing business:

A partner must not engage in competing activities to that of the firm. If he carries on and earns any profit then he must account for the profit made and pay it to the firm.

j. To share losses:

When there is no agreement as to partnership, partners have to share the losses of the firm equally as per profit sharing ratio

9.6 LIABILITIES OF PARTNERS

- a. Joint & Several:** Every partner is liable jointly and severally for all the acts of the firm done while he was a partner. The liability of a partner is unlimited.
- b. Liability for Secret Profits:** A partner is liable to account for and pay to the firm any personal profits earned from the business of the firm or property .
- c. Liability for Profits from Business of a same nature:** If a partner carries on any business of the same nature and competing with that of the firm, he would be liable to account for and pay to the firm all profits made by him in that business.
- d. Liability to Render True Accounts:** A partner is liable to render true statements of accounts to other partners. He is liable to disclose all the accounts which fall within the scope of business of the firm.
- e. Liability for Losses of the firm:** As a partner has a right to share the profits of the firm likewise is he liable to share the losses equally unless otherwise agreed upon.

9.7 IMPLIED AUTHORITY OF PARTNER

The authority of a partner to bind the firm is called his "implied authority". Partners in the partnership firm are playing dual role that is as an agent and at the same time Principle. An authority which is in the

form of express or by words spoken and the Indian Partnership Act has not specifically mentioned any authority by expression. In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not confer any rights to him to—

- a. submit a dispute relating to the business of the firm to arbitration,
- b. open a banking account on behalf of the firm in his own name,
- c. acquire immovable property on behalf of the firm,
- d. admit any liability in a suit or proceeding against the firm.
- e. suspend any claim or portion of a claim by the firm,
- f. depart a suit or proceeding filed on behalf of the firm,
- g. transfer immovable property belonging to the firm into partnership on behalf of the firm.

9.8 MUTUAL RELATIONSHIP OF PARTNERS TO EACH OTHER

Each partner has a right to share in the profits of the partnership. Unless the provisions made in the partnership deed otherwise, partners share profits equally. Moreover, partners must contribute equally to partnership losses unless a provision made in the partnership deed for another arrangement.

Each partner has a **right to participate equally in the working of management of the partnership**. In many partnerships a majority vote resolves disputes relating to management of the partnership. Except, some decisions, like as admitting a new partner or expelling a partner, require the consent from all the partners.

Each partner owes a **Fiduciary duty** to the partnership and to copartners. This duty requires that a partner deal with copartners in Good Faith, and it also requires a partner to account to copartners for any benefit that he or she receives while engaged in partnership business. If a partner generates profits for the partnership, for example, that partner must hold the profits as a trustee for the partnership.

9.9 RELATIONSHIP OF PARTNERS TO THIRD PERSONS

A partner is an agent of the partnership. When a partner has the actual authority and acts on behalf of the firm, the partner binds the partnership and every partner for the obligations.

Similarly, a partner's admission concerning the partnership's affairs is considered an admission of the partnership. A partner may only bind the partnership, however, if the partner has the authority to do so and undertakes transactions while conducting the usual partnership business. **If**

a third person, however, knows that the partner is not authorized to act on behalf of the partnership, the partnership is generally not liable for the partner's unauthorized acts. Moreover, a partnership is not responsible for a partner's wrongful acts or omissions committed after the dissolution of the partnership or after the dissociation of the partner. A partner who is new to the partnership is not liable for the obligations of the partnership that occurred prior to the partner's admission.

9.10 MINOR'S POSITION IN PARTNERSHIP

A person who has not attained the age of 18 years of his or her age is known as minor as provided to Section 3 of the Indian Majority Act.

Section 4 of the Indian Partnership Act, 1932, defines partnership and partner as follows:

“Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all”.

Persons who have entered into a partnership business with one another are called “partners” individually and collectively it is called as “firm”, and the name by which their partnership business is carried on is called the “firm name”.

As per Indian Contract Act, 1872, minors can neither take an active part in any partnership business nor to enter into any agreement. An agreement involving a minor is void-ab-initio. However, the Indian Partnership Act has its own sets of legal rules in respect of minors.

Minor admitted to benefits of partnership

A partnership firm cannot be formed with a minor as the only other member. The relation of partnership arises from a contract

“Section 30 of the Indian Partnership Act, provides that a minor cannot become a partner, however with the consent of the adult partners, he may be admitted to the benefits of partnership.

A minor can only be admitted to the benefits of a partnership, and that partnership has to exist independently. Also, there cannot be a contract between two minors.

Rights of Minor:

A minor admitted to the benefits of a partnership in consultation and unanimous consent of all the other major partners.

- Such minor is entitled to his agreed shares of the property and of the profits of the firm.
- Such minor has the right to access and taking copies of the book of accounts of the firm. But has no right of access to those other books of the firm which do not contain matters of account.

- Such minor is not personally liable to the third parties for the debts of the firm, but his liability is limited only up to his shares in the partnership assets and profits.
- Such minor is not entitled to take part in the conducting of the actual business activities as he has no capacity to contract

9.11 MINOR BECOME A FULL-FLEDGED PARTNER

- On attaining the age of majority, the minor has his own choice whether to continue with the same partnership or not and accordingly he should specify his interest within a time specified that is within six months on attaining the majority. If he fails to do the same, he becomes personally liable to the third parties for all the debts of the firm with retrospective effect from the date of he gets admitted to the benefits of partnership.

9.12 RIGHTS OF THE MINOR IF HE ELECTS NOT TO BECOME A PARTNER

- His rights and liabilities shall continue to be those of a minor up to the date of giving public notice;
- His share shall not be liable for any acts of the firm done after the date of the notice;
- He shall be entitled to sue the partners for his share of the property and profits.
- If after attaining the age of majority but before choosing to become a partner the minor represents and knowingly permits himself to be represented as a partner in the firm, he will be personally liable to anyone who on the faith of such representation granted credit to the firm on the ground of 'holding out'.

From the above discussion, we can say that a partnership firm cannot be formed with a minor as the only other member. The relation of partners in partnership business come into existence from a contract. Section 11 of Indian Contract Act states that a minor is not competent to contract and hence not entitled to have the contractual relations amongst the other partners as he is not able to form the sensible judgment and such contracts are void ab initio as mentioned in the landmark judgement in the case of *Mohoribibi V/s Dharmodash Ghosh*.

DISSOLUTION OF FIRM:

MEANING OF DISSOLUTION:

Partnership, as we are aware is a result of an agreement. All agreements can be discharged or terminated. This termination of the contractual relationship in case of partnership is called as dissolution. Dissolution under the partnership law can be mean "Dissolution of the firm" as well as

“Dissolution of partnership”. Commonly both are taken to mean the same and are used interchangeably. However, legally there is a difference in the two. Dissolution of the firm means complete breakdown of the relations among all partners. Whereas dissolution of the partnership means, the relationship between same partners came to be an end while the firm continues. It would be right for us to say dissolution of the firm necessarily implies dissolution of partnership whereas dissolution of partnership does not necessarily involve dissolution of firm.

Example:

1. A, B, C, D. are partners in a firm. A, dies B, C, D decides to close down the firm. This amounts to dissolution of the firm.
2. A, B, C, D, and E are partners in a firm. There is an agreement that the firm shall not be dissolved on the death, retirement or expulsion of any partner. C dies, this amounts to dissolution of partnership as the firm continues. Only relationship with C. comes to an end.

MODES OF DISSOLUTION:

There are modes of dissolution of a firm

- 1) Voluntary dissolution.
- 2) Dissolution by operation of law.
- 3) Dissolution by intervention of court.

1. Voluntary dissolution:

It includes dissolution by any of the following manner.

- a) **By consent:** All partners may consent for the dissolution of the firm. This can happen whether the firm is for a fixed duration or not.
- b) **By agreement:** A firm may be dissolved in accordance with a contract. For example partnership formed for a specific period or for a particular venture.
- c) **By Notice:** Whenever a partnership is at will any partner can give 14 days' clear notice in advance indicating his intention to disassociate from the firm.

2. Dissolution by operation of law:

It includes dissolution in any of the following manner.

- a) **Compulsory dissolution:** In this case firm is compulsorily dissolved due to insolvency or some new law makes the business of the firm unlawful
- b) Some event making the business unlawful, if carried on in partnership, due to change in its number, example a firm carrying in banking business by more than 10 person

- c) On happening of certain contingencies such as expiry of fixed period or particular venture for which it was formed, on death of a partner and on insolvency of a partner.

3. Dissolution by intervention of court:

It arises on the following ground:

a) Insanity of a partner:

When a partner becomes of unsound mind. The other partner can institute case against such partner to dissolve the firm.

b) Permanent incapacity:

In case a partner becomes permanently incapable in discharging his duties, the court may order dissolution of the firm.

c) Misconduct of a partner:

When a partner is guilty of misconduct which adversely affects the business of the firm then court may order dissolution of the firm provided other partner take legal action.

d) Willful or persistent breaches of agreement:

Sometimes, a partner willfully or persistently commits a breach of agreement relating to the management of the affairs of the firm or conducts the business in such a way that the other partners find it difficult to carry on business with him. In such a cases any partner other than the guilty partner may approach the court for dissolution.

e) Transfer of interest:

Sometimes a partner may transfer the whole of his interest or share to a third party or the share may be charged or the share has been sold for the recovery of arrears of land revenue in which cases the other partner or partners may seek for dissolution of the firm

f) Losses in Business:

Where the business of the firm cannot be carried on except at a loss the court can order for dissolution.

g) Any other just an equitable ground:

Where the court is satisfied that is just an equitable to dissolve the firm.

9.13 EFFECTS OR CONSEQUENCES OF DISSOLUTION

Dissolution of firms:

Section 39 of the Indian Partnership Act, 1932 defines the dissolution of partnership firms. *“The dissolution of the firm means to stop all the*

business activities with the firm” There is a difference between the dissolution of the firm and the dissolution of the partnership.

When all the activities in respect of partnership business comes to an end and all the profit and loss is settled among the partners is called dissolution of the firm and when the partner retires or dies even though the firm continues to perform its partnership business with existing partners is called dissolution of a partnership.

RIGHTS OF A PARTNER ON DISSOLUTION OF A FIRM:

1. Rights to have the business wound up.
2. Right to repayment of premium on premature dissolution.
3. Where the firm was dissolved on account of fraud or misrepresentation by a partner, the innocent partner can rescind the contract and also have right to retain surplus if any for the capital and sum paid to be indemnified for all debts paid with regard to the firm.
4. Right to restrain partners from the use of the firm name or firm property.

Liabilities of Partners on dissolution

Liabilities for an act of the partners on dissolution specified under Section 45 of the Indian Partnership Act, 1932

1. According to this section, the partners of the firm are liable to the third party for any act done by any of them unless they give public notice of the dissolution of the firm.
2. It also states that the partner who dies, retires, becomes insolvent or that of a person who the third party is not aware of being the partner of the firm, is not liable under this section.

Return of premium after dissolution

Section 51 of the Indian Partnership Act specifically tells about the return of premium after dissolution. At the time of entering into a partnership firm, the partner has to pay an amount as premium. However, when the firm gets dissolved before the maturity due to any reason, then such partners are entitled to the repayment of premium at the time of admission.

9.14 PUBLIC NOTICE

Section 72 of Indian Partnership Act describes the manner and the in which the public notice of certain matters relating to partnership firm is to be given. According to this section, public notice must be given in the following circumstances:

- a) On retirement or expulsion of a partner from a registered firm.

- b) On the dissolution of a registered firm.
- c) On the election of a minor to become or not to become a partner on attaining majority.

Following are the modes by which the public notice pertaining to the above matter is to be given are as under:

- a) By notice to the Registrar of firm under Section 63.
- b) By, publication in the Official Gazette.
- c) By publication in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

Following are the repercussions or Consequences when public notice is not given:

- When a minor admitted to benefits of partnership fails to give public notice within six months of his attaining majority, he becomes a partner in the firm on the expiry of the said period and would be liable as a partner.
- If a partner does not give a public notice of the retirement, he and the other partners shall continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before retirement.
- If in case of expulsion of a partner, a public notice is not given, the expelled partner and other partners shall continue to be liable to third parties dealing with the firm as in the case of a retired partner.
- If on dissolution of a registered firm a public notice is not given, the partners shall continue to be liable to third persons for any act done by any of them which would have been an act of the firm done before dissolution.

9.15 SUMMARY

Registration of Partnership:

Registration of a partnership firm is not compulsory under law

Consequences of Non- Registration of Partnership:

It cannot enforce its claims against the third party in a court of law. It cannot file a legal suit against any of its partners, Partners of an unregistered firm cannot file any suit to enforce a right against the firm.

Rights of a Partner:

Right of the partner to take active part in the day-to-day affairs of the firm.
Right to be consulted and heard when taking any decision regarding the business.

Duties of Partners:

To carry on the business to the greatest common advantage: To be just and faithful to each other: To render true accounts:

To provide full information. To attend diligently to his duties: No Secret Profit and to account for personal profits: Not to carry on any competing business:

LIABILITIES OF PARTNERS:

Joint & Several: Liability for Secret **Profits: Liability for Profits from Business of a same nature: Liability for Losses of the firm:**

Implied authority of Partner:

Submit a dispute relating to the business of the firm to arbitration, open a banking account on behalf of the firm in his own name, acquire immovable property on behalf of the firm,

Mutual Relationship of Partners to Each Other: Each partner has a right to share in the profits of the partnership. Each Partner has right to participate equally in the working of management of the partnership. Fiduciary Duty.

Relationship of Partners to Third Persons:

A partner is an agent of the partnership. If a third person, however, knows that the partner is not authorized to act on behalf of the partnership, the partnership is generally not liable for the partner's unauthorized acts.

Minor's Position in Partnership:

Minor admitted to benefits of partnership, Rights of Minor, Minor become a full-fledged Partner.

Dissolution of Firm: MODES OF DISSOLUTION:

Voluntary dissolution. Dissolution by operation of law. Dissolution by intervention of court.

RIGHTS OF A PARTNER ON DISSOLUTION OF A FIRM:

Rights to have the business wound up. Right to repayment of premium on premature dissolution. Where the firm was dissolved on account of fraud or misrepresentation by a partner, the innocent partner can rescind the contract and Voluntary dissolution: Dissolution by operation of law; Dissolution by operation of law.

9.16 QUESTIONS

Registration of Firms and
Consequences of Non-Registration
Relations Amongst the Partners
and Dissolution of Firm

1. Define partnership. Explain its features
2. What are the effects of non-registration of Partnership Firm?
3. Explain Test of partnership
4. What do you mean by the property of the firm ?
5. Explain kinds of partnership
6. What do you mean by dissolution of the partnership firms? How dissolution takes place by operation of law?
7. Explain dissolution by intervention of court.
8. What are the modes of dissolution of Partnership?
9. Distinguish between partnership & co-ownership
10. Distinguish between partnership & company
11. Distinguish between partnership & Hindu undivided family.
12. Write a Short Note:-
 - a. Partnership
 - b. Partnership Deed
 - c. Particular Partnership
 - d. Dissolution of Partnership

LIMITED LIABILITY PARTNERSHIP FUNCTIONING AND NATURE OF LIMITED LIABILITY PARTNERSHIP [SECTION: 2, 11-12, 55-58]

Unit Structure

- 10.0 Objectives
- 10.1 Introduction
- 10.2 Definition and Meaning
- 10.3 Procedure for Incorporation of LLP
- 10.4 Features of LLP
- 10.5 Designated Partners in Limited Liability Partnership Firm (LLP)
- 10.6 Essential Clauses of the Limited Liability Agreement (LLP)
- 10.7 Advantages and Disadvantages of LLP
- 10.8 Distinguish Between Limited Liability Partnership and Partnership
- 10.9 Distinguish Between Limited Liability Partnership and Company
- 10.10 Summary
- 10.11 Questions

10.0 OBJECTIVES

After studying the unit students will be able to:

- Understand the concept of LLP Act 2008.
- Understand the procedures of incorporation of LLP
- Understand the Advantages and Disadvantages of the same.
- Understand the difference between LLP with Partnership and Company.
- Understand the procedures to be observed to convert the Firms, Private Companies into LLP.

10.1 INTRODUCTION

An approach or an idea of the Limited Liability Partnership (LLP) came to India in the year 2008. An LLP has the features of both the partnership firm and company. LLP is a body corporate and separates from partners like wise members are separate from the company. It is the well accepted and favoured form of organization among entrepreneurs as it incorporates the benefits of both partnership firm and company into a single form of organization that is on a single platform. Thus LLP is a good mixture of

good features. LLPs in India are regulated by the Limited liability Partnership Act, 2008.

10.2 DEFINITION AND MEANING

“A limited liability partnership or LLP is a form of partnership where an individual partner is not liable for the malpractice of another partner in the company. This form of company is most often found in medical practices, law offices, or accounting firms where liability is a big issue. This protects innocent partners from other partners performing services negligently.”

LLP stands for Limited Liability Partnership. It is an alternative corporate vehicle that provides the benefits of limited liability of a company along with the flexibility of a partnership. LLP is a legal entity and is liable to the full extent of its assets but the liability of a partner is limited to their contribution in the LLP.

In LLP, one partner will not be liable for the wrongdoing of another partner. The partner will be held responsible only for his own actions. LLP is called a hybrid form between company and partnership as it incorporates properties of both the organisation structures.

10.3 PROCEDURE FOR INCORPORATION OF LLP

Identification of Designated Partners: Two designated partners should identify who will work on behalf of LLP. At least one of the designated partners must be resident in India (i.e., person who has stayed in India for not less than 182 days in the immediately preceding one year).

Acquire Digital Signature: The proposed designated partners are required to obtain digital signature. It is required to file an on-line application for Every form or application is filed online with the Ministry of Corporate Affairs (MCA), which requires to be signed digitally by the applicants and partners of the LLP.

Reservation of Name of LLP: It is required to check availability of name using name search facility on MCA Portal and should apply for name reservation in **Form 1**. Rule 18 of LLP Rules provides cases in which name will not be reserved further the name should not be one prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950

Submission of Incorporation Document: Incorporation documents includes the following.

1. Proof of office address and Registered Office Address of LLP.
2. Copy of approval in case the proposed name contains any word(s) or expression(s) which requires approval from Central Government.
3. Proof of identity and residential address of the subscribers
4. The incorporated document contains the proposed name of the LLP.

5. In case, a designated partner does not have a DIN, is required to attach.
6. Statement in a prescribed form signed either by professionals like an Advocate, Chartered Accountant, Cost Accountants, stating that all the requirements for formation or incorporation are complied with.
7. All the Designated Partners must have digital signatures.
8. Detail of LLP(s) and/or Company(s) in which partner or designated partner is a director/partner
9. Apply for incorporation of LLP in **Form 2**

10.4 FEATURES OF LLP

1. **Body Corporate:** LLP is a body corporate and has a separate legal entity and it resembles with companies.
2. **Cost of Formation:** The cost of formation is less and compliances and regulations are applicable less as compared with companies.
3. **Liability:** The liability of each partner is limited up to the contribution made by the partner.
4. **Maintenance of Books of Accounts:** LLP must maintain proper books of account mandatorily. The accounts may be on cash basis or accrual basis.
5. **Agreement:** As this is a hybrid type of incorporation. Agreement is needed in respect of partners in the LLP. Hence agreement is an essence of the LLP.
6. **Change in LLP Agreement:** LLP is required to file information to the Registrar of Companies about the LLP Agreement, any changes that is substitution, deletion.
7. **Designated Partners:** At least 02 designated partners should be appointed in LLP. Designated Partners will play a role of an active partner in the LLP.

Filled an application form, documents along with requisite fees shall be submitted to the Registrar of Companies (ROC). After the scrutinization of the shall grant it a certificate of incorporation within **Fourteen Days** of submission of an application for incorporation. Certificate of incorporation of LLP is like a certificate of incorporation of the companies which stands as a conclusive proof which can not be denied at the later stage. Such certificate is an evidence that the LLP has come into an existence and has a corporate personality, and separate legal entity.

10.5 DESIGNATED PARTNERS IN LIMITED LIABILITY PARTNERSHIP FIRM (LLP)

Every LLP must have at least two individuals termed as designated partners. Apart from these two partners one of them must be resident in India (i.e., person who has stayed in India for **not less than 182 days** in the immediately preceding one year). The incorporation document may specify who will be the designated partners by denoting their names and occupations and other identity. Every designated partner must obtain DPIN that is Designated Partners Identification Number. Now instead of DPIN, every partner who will be appointed as Designated Partner, will need to apply for DIN and not DPIN. (Amended the Limited Liability Partnership Rules, 2009.) Individuals holding both DPIN and DIN, their DPIN stands cancelled. To obtain DPIN the individual has to apply in **Form DIN-1** under Companies (Director Identification Number) Rules, 2006.

A Limited Liability Partnership firm may appoint a designated partner within 30 days of vacancy arising for any reason. Each partner in the partnership is deemed to be a designated partner, if there is no designated partner, or if at any time there is only one designated partner. Designated partners are responsible for doing all acts, matters and things that are required to be done for complying with the provisions of the Limited Liability Partnership Act and they are liable to all penalties imposed on the LLP in contravention.

10.6 ESSENTIAL CLAUSES OF THE LIMITED LIABILITY AGREEMENT (LLP)

Limited Liability Partnership is governed by the agreement amongst the partners. Therefore, preparing for LLP agreement is an essential task and necessary to cover various factors governing ventures and relation amongst partners and between LLP and its partners. They are as under: -

- A. Definition/interpretation clause
- B. Names of designated partners
- C. Lawful business clause
- D. Registered Office clause
- E. Capital & contribution clause
- F. In case of conversion of partnership/Company into LLP appropriate clauses for such takeover

General terms amongst the Partners:

- a) Admission of new partner retirement of partner
- b) Provision for Cessation of partner

- c) Terms of Resignation of partner and Expulsion of partner
- d) Rights & duties of partners
- e) Sharing of profit / Sharing of loss
- f) Amount Share in goodwill
- g) Meetings of partners
- h) Voting rights and its determination
- i) Restriction authority of partners
- j) Provisions for Acts requiring consent of requisite number of percentages of the partners
- k) Provision for Appointment of auditors
- l) Provision for Removal of auditor
- m) Nomination for signatory to bank accounts, agreement, etc.
- n) Assignment monetary interest of partners
- o) Rights of legal representative
- p) Provision for Duration of the LLP and Provision for Voluntary winding up
- q) Provision for Meeting, recording in meeting, etc.
- r) Provision for Changes/amendment in agreement
- s) Arbitration clause for settlement of disputes if any
- t) Changes that may occur in future and the procedure for the same.

10.7 ADVANTAGES AND DISADVANTAGES OF LLP

The following are advantages of incorporating an LLP in India:

1. No requirement of minimum contribution:

No minimum capital is required in LLP. LLP can be formed with the minimum possible capital. The contribution of a partner can consist of tangible, movable or immovable or intangible property or other benefits to the LLP.

2. No limit on owners of the business:

LLP requires a minimum of minimum 2 partners and there is no limit on the maximum number of partners. This is in opposite to a private limited company whereby there is a restriction of not having more than 200 members.

3. Registration Cost is low:

The cost of registering LLP is low as compared to the cost of incorporating a private limited or a public limited company

4. No requirement of compulsory Audit:

All companies, whether private or public, irrespective of their share capital, are required to get their accounts audited. But in case of LLP, there is no such compulsory requirement. This is recognized to be a significant compliance benefit.

5. Partners are not liable for an act of other partners:

In partnership partners are mutual agent of each other and hence they are liable for any wrong act done by any single partner as there is a mutual agency. Whereas in LLP partners are not liable for a wrong done by another partner.

6. Easy to dissolve or wind-up:

LLP is easy to dissolve or wind up as no government formalities and regulations need to observe.

7. Flexibility:

As LLP is a hybrid concern, it includes good features of partnership and good features of company. A limited liability partnership (LLP) is a corporate entity that integrates the organizational flexibility of a partnership with the limited liability protection along the lines afforded to a limited liability company.

8. Penalty for Non-Compliance:

LLP is required to file an income tax return each year even though it does have any activity or in a dormant Even if an LLP does not have any activity, In case an LLP fails to file Form 8 or Form 11 (LLP Annual Filing), a penalty of Rs.100 per day, per form is applicable.

9. LLP cannot raise funds from the public:

LLP stands for Limited liability partnership which means a company form of business where the only the partners contribute in the capital and their liability remains limited to the extent of their capital contribution in the business. Therefore, LLP cannot raise funds from public in any form.

10. Higher Income Tax Rate:

The income tax rate for a company with a turnover of upto Rs.250 crores is 25%. However, LLPs are taxed at a 30% rate irrespective of the turnover.

Liability may extend to personal assets of partners:

In such a scenario the liability of all the partners is unlimited for all or any other debts of the LLP. But even in such an event the personal assets of the partners are not to be exhausted to fulfil such other debts, but the liability extends only to the extent of the fraudulent activity carried out.

10.8 DISTINGUISH BETWEEN LIMITED LIABILITY PARTNERSHIP AND PARTNERSHIP.

Points	Limited Liability Partnership	Partnership
Meaning and Definition	LLP is a hybrid business form that offers the combined benefits of a partnership and a company	Revenue reserve is created to meet unforeseen events in a business organization
Act	Limited Liability Partnership Act 2008	Indian Partnership Act 1932
Registration	Registration is compulsory	Registration is optional
Legal Status	LLP has a legal status	Partnership is not a separate legal entity
Perpetual Succession	Perpetual succession is present as it is registered firm like company. Secondly partners may come and go in an LLP	Feature of Perpetual succession is not present in partnership.
Maximum Partners allowed	No such limit laid down as to number of partners in LLP	Minimum. 2 partners and Maximum 10 Partners in case of banking and 20 Maximum in case of other business.

10.9 DISTINGUISH BETWEEN LIMITED LIABILITY PARTNERSHIP AND COMPANY

Points	Company	Limited Liability Partnership
Act	Indian Companies Act 2013	Limited Liability Act 2008
Meetings	A company is required to hold minimum of 4 board meetings during a	No such meetings required to conduct.

	financial year, thereby holding 120 days gap between 2 meetings wherein the general meeting of shareholders has to be conducted once a year mandatorily.	
Audit	Statutory audit is mandatory for a company	Statutory Audit is not required unless partner's contribution exceeds 25 lakhs and annual turnover exceeds 40 lakhs.
Transferability of Shares	In a Company, shares can be transferred easily. The Article of Association can only restrict it.	In an LLP, shares can be transferred by executing an agreement before a notary public
Cost of Formation	The Statutory minimum fee for incorporation of the Company is Relatively High.	The cost of the formation of LLP and its statutory filing fees is comparatively lesser than the cost of the formation of the Company.
Voting Rights	In a Company, the voting rights of the members are determined in accordance with the total number of shares held by each member.	In an LLP, the voting rights are decided as per the terms of the LLP Agreement.
Capital	No mandatory requirement for capital.	Company limited by share must have a minimum authorized and paid-up share capital. Share capital has to be divided into shares.

Conversion of Private Limited Company into LLP:

Section 56, (Schedule III and IV) LLP Act- 2008 a Private Limited Company or Unlisted Public Company may convert into a Limited Liability Partnership in accordance with the provisions of Section 56 and the Third and Fourth Schedule of LLP Act, 2008.

Limited Liability Partnerships are popular due to the multiple advantages as they are a mixture of both Company and Partnership firms. LLP offers the benefits of a Company and the flexibility of Partnerships.

The Limited Liability Partnership is a legal entity where the liability of the partners is limited. The LLPs can enter into contracts and holding properties in their own name.

This article covers the concept of conversion of Private Limited Companies into an LLP. Each shareholder of the private limited company must submit a statement and consent for the conversion of a company into LLP along with the application.

Process for Conversion of Company into LLP

- A Board Meeting shall be convened and pass Board Resolution for such intended conversion of the company into LLP.
- A written consent of all the shareholders for conversion of Company into LLP is mandatory.
- Filing of an application for name availability with the Registrar of Company by attaching the Board Resolution and proposed object clause with the name availability application.
- Once the name is approved, it is required for actual execution of all required documents like consent, subscriber sheet etc. and file form and form 18 with the Registrar of Companies (ROC).

10.10 SUMMARY

LLP is a hybrid type of concern. It is a good mixture of features of Partnership and Company. An approach or an idea of the Limited Liability Partnership (LLP) came to India in the year 2008.

PROCEDURE FOR INCORPORATION OF LLP

Identification of Designated Partners: Acquire Digital Signature: Reservation of Name of LLP, Submission of Incorporation Document:

Features of LLP: Body Corporate, Cost of Formation: Liability: Maintenance of Books of Accounts: Agreement: Change in LLP Agreement, Designated Partners:

DESIGNATED PARTNERS IN LIMITED LIABILITY PARTNERSHIP FIRM (LLP) Essential clauses of the Limited Liability Agreement (LLP): Definition/interpretation clause, Names of designated partners. Lawful business clause, Registered Office clause, Capital & contribution clause, In case of conversion of partnership/Company into LLP appropriate clauses for such takeover,

ADVANTAGES AND DISADVANTAGES OF LLP:- No requirement of minimum contribution, No limit on owners of the business, Registration Cost is low. No requirement of compulsory Audit, Partners are not liable for an act of other partners: Easy to dissolve or wind-up: Flexibility, Penalty for Non-Compliance

10.11 QUESTIONS

Limited Liability Partnership
Functioning And Nature of Limited
Liability Partnership
[Section: 2,11-12,55-58]

1. Explain the Nature of LLP
2. What are the advantages and disadvantages of LLP
3. Who is designated partner in LLP.? Explain his role for conducting a partnership business.
4. Explain the procedure for incorporation of LLP
5. Distinguish between Company and LLP
6. State the extent and limitation of liability of LLP and its partners.
7. Write a short note:
 - a. Concept of LLP
 - b. Designated partners
 - c. Whistle Blowing
 - d. Incorporation of LLP
 - e. Conversion into LLP

EXTENT AND LIMITATION OF LIABILITY OF LLP AND PARTNERS IN LLP

DISSOLUTION AND WINDING UP OF THE LIMITED LIABILITY PARTNERSHIP

Unit Structure

- 11.0 Objective
- 11.1 Introduction
- 11.2 Liability of Partners
- 11.3 Winding Up of LLP
- 11.4 Whistle Blowing [Section 31]:
- 11.5 Summary
- 11.6 Questions

11.0 OBJECTIVE

After studying the unit students will be able to:

- Understand the extent and limitation of liability of partners
- Understand the liability of Partnership.
- Understand the liability of partners under LLP
- Understand the concept of Whistle Blowing.
- Understand the winding-up process of LLP.

11.1 INTRODUCTION

A Limited Liability Partnership (LLP) is a body corporate and the liabilities of the partners are limited, the liability of the partners only enhanced to their professional roles. LLP is a hybrid of a company and a partnership; this structure has been looked upon with increasing approval by mushrooming entrepreneurs who wish to skip the burdensome regulatory compliance requirements of companies. Secondly, they do not wish to be held personally liable for the misconduct of any partner, as per the Partnership Deed.

11.2 LIABILITY OF PARTNERS

Section 26-31 of the Limited Liability Partnership Act lay down the extent and limitation of the partners' liability.

As per the provisions made under this section, every partner in an LLP is an agent for the purposes of partnership business but is not the agent of any other partner like they used to be under Indian Partnership Act 1932 .

Extent and Limitation of Liability of
Llp And Partners in LLP

Dissolution and Winding Up of The
Limited Liability Partnership

This section differentiates the liability of one partner from that of other partners. But being a body corporate, every act of partner would bind the LLP. It would not bind a particular partner in his individual capacity.

¹Indian Partnership Act, also confers the role of an agent for the purpose of partnership to its partners. They too are made agents of the partnership business and not the other partners. In case of any discrepancy, the liability arising from the act of the partner shall be discharged, firstly from the firm's assets, and if that falls short then from the erring partner's individual assets.

11.3 WINDING UP OF LLP

Section 27 – Extent of Liability of Limited Liability Partnership:

This section described the limitation of the liabilities arise by the partners or the LLP as a whole. They can be classified as below:

1. Liability of person not authorised to act.
2. Liability of LLP if partner has incurred liability due to wrongful act or omission.
3. Obligations of LLP as an entity.

1. Liability of Person not Authorised to Act:

This section provides the LLP is not bound by anything done by a partner in his dealings with a person if the partner has no authority to do so, and the person, he is dealing with aware that the particular partner has no authority to act so or does not know him to be a partner.

2. Liability of LLP if Partner has Incurred Liability due to Wrongful Act or Omission

This section subject to conditions, provides the LLP responsible if the liability arose by the partners of a third person by his wrongful act in course of the business and in exercise of his authority. The oppressed party may proceed in a suit against the partner and the LLP, holding them jointly and severally liable, but the proceeding cannot be initiated against them singly.

3. Obligation of LLP as a Whole

Provision has been made under Section 27(3) that any liability incurred by the LLP shall be its liability as a whole and cannot confer individually upon the partners. The LLP being a body corporate is eligible to enter into

¹ pleaders.in/liability-of-partners/

contracts and if such contract is diluted, the liability is confirmed on the LLP as a whole acting through its agents, partners etc.

Extent of Liability of Partners:

Section 28 of LLP lays down that a partner shall not be obligated as per Section 27(3) in his individual capacity, because he's a partner in the LLP. However, he cannot depart from their responsibility for any wrongful act done in his individual capacity, outside the limit of his lawful authority. Further can be stated that, the LLP and the partner are jointly and severally liable under section 27(2), as the wrongful act done by partner was originally accredited by the LLP, making it responsible for any damage or loss caused.

The LLP can be held responsible for any loss suffered by the other party and both LLP and the partner can be held liable for any wrongful act done by partner in the course of business.

Holding Out [Section 29]:

This section laid down the provisions for principle of holding out. Any person who holds out as a partner of an LLP shall be held liable to the person who on faith of such representation gives credit to the LLP.

This means that the partner holding out shall be bound by estoppel and prevented from denying the liability incurred on account of any financial aid received by him or the LLP. This leads to the LLP bound to the third party to the extent of the financial benefits obtained by them.

Unlimited Liability in Case of Fraud [Section 30]:

This section acts as an exception to the principle of limited liability since it imposes unlimited liability on its partners and the LLP if

- **LLP intends to defraud its creditors**
- **LLP is entered into to carry on fraudulent activities.**

In this case the liability of all the partners is unlimited for all or any other debts of the LLP. But even in such an event the personal assets of the partners are not to be drained to recover such other debts, but the liability extends only to the extent of the fraudulent activity carried out. The LLP can depart from the liability if it establishes that the fraud was carried out by the partners without the knowledge of LLP or LLP is not aware of such fraudulent acts. This would exempt the LLP of all liability and only the partner will be held liable for the fraudulent activity.

Any such activity being carried out shall be punishable with imprisonment for two years and a fine. If any damage caused due to such fraudulent activity it is the responsibility of the LLP and the partner to reimburse the third party.

11.4 WHISTLE BLOWING [SECTION 31]

Extent and Limitation of Liability of
Llp And Partners in LLP

Dissolution and Winding Up of The
Limited Liability Partnership

²In general sense whistle Blowing means exposing a wrong doing with an intention to bring this wrong act to an end. This section provides alleviate from the imposition of fine or imprisonment on the partner if such partner decides to come forward and contribute valuable information about the fraud committed against which the investigation is being conducted leading to conviction of the guilty party. No partner or employee of any LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his limited liability partnership or employment. This section, therefore tries to bring forth the fraudulent activity as expeditiously as possible.

11.5 SUMMARY

LLP is a hybrid type of concern. It is a good mixture of features of Partnership and Company. An approach or an idea of the Limited Liability Partnership (LLP) come to India in the year 2008.

Extent of Liability of Limited Liability Partnership: Liability of person not authorised to act. Liability of LLP if partner has incurred liability due to wrongful act or omission. Obligations of LLP as an entity. Liability of Person not Authorised to Act ,Liability of LLP if Partner has Incurred Liability due to Wrongful Act or Omission, Obligation of LLP as a Whole.

11.6 QUESTIONS

1. State and Explain the extent of liability of partnership in LLP
2. Write a Short Note on Following:
 - a. Whistle Blowing
 - b. Holding out
 - c. Unlimited Liability in the case of Fraud.

² ipleaders.in/liability-of-partners/

THE CONSUMER PROTECTION ACT 1986

Unit Structure

- 12.0 Objectives
- 12.1 Introduction
- 12.2 Reasons for Enactment of Act
- 12.3 Objectives and Reasons
- 12.4 Concepts and Definition
- 12.5 Summary
- 12.6 Questions

12.0 OBJECTIVES

After studying the unit the students will be able to:

- Understand rationale for enactment of specific act
- Understand the Objectives of the Act.
- Understand various concepts and definitions pertaining to the Consumer Protection Act.

12.1 INTRODUCTION

The Consumer Protection Act, 1986 seeks to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The interests of consumers were also protected even earlier under the provisions of several legislations but these legislations failed to protect the ultimate consumer from defective goods or deficient services, overcharging of prices and unscrupulous exploitation. Further, there is ignorance of the consumer of his rights. The consumers have not yet organised themselves into a powerful movement. The consumer needed better protection which led to the enactment of the Consumer Protection Act of 1986. The Act is a very important socio-economic legislation with its main thrust on giving speedy redressal and compensation to the consumer.

12.2 REASONS FOR ENACTMENT OF ACT

Rationale behind the enactment of the Consumer Protection Act:

- Sellers were engaged in many unfair practices which tend to the rise of Consumer Movement by the dissatisfied customers.

- To give the protestation to the consumers from the exploitation in the marketplace, there was no legal system was available.
- In the 1960s, the consumer movement started rising in an organised form due to the rampant adulteration of edible oil and food, black marketing, hoarding, and rampant food shortages.
- Multiple Laws were prevailing, like Indian Contract Act. Like, Indian Contract Act, Sale of Goods Act, The Essential Commodities Act etc. The common consumer used to get confused which law should apply.
- Holding exhibitions and writing articles were largely the methods used till the 1970s, by the consumer organisations.
- To look into the malpractices in ration shops and overcrowding of public road transports, consumer groups were formed.
- In the recent past, India saw a big rise in the number of consumer groups.
- Due to the above-mentioned efforts, the Government was forced to bring in legislation to protect the consumers from unfair business practices.
- Doctrine of Caveat Emptor gives the rise to Consumer Protection Movement. This doctrine used to hold buyer totally responsible though the seller knows the fault in the goods.

The Consumer Protection Act
1986

Therefore, a need felt that there should be appropriate law to provide requisite and urgent remedy to the aggrieved consumer which is compensatory in nature. Observing this Consumer Protection Act 1986 was enacted.

12.3 OBJECTIVES AND REASONS

Statement of Objects and Reasons are as under:

- The right to be protected against marketing of goods which are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;
- The right to be assured, wherever possible, access to an authority of goods at competitive prices;
- The right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers;
- Right to consumer education.

- Protection from spurious goods or fostering deceptive practices in the provision of services.
- 3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.
- 4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be setup at the district, State and Central levels. These quasi-judicial bodies will undertake the principles of natural justice and have been authorized to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the sanctions or orders given by the quasi-judicial bodies have also been provided.

12.4 CONCEPTS AND DEFINITION

1. Consumer [Sec.2(1)(d)]:

Under Sub-Clause (i) of Section 2(1)(d), a consumer for the purpose of goods means any person, who :

- (a) Buys any goods for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment.
- (b) Includes any user of such goods other than the person who buys them, when such use is made with the approval of the buyer.

The person claiming himself as 'consumer' should satisfy that

- (i) There must be a sale transaction between the seller and the buyer,
- (ii) The sale must be of goods,
- (iii) The buying of goods must be for consideration,
- (iv) The consideration has been paid or promised or partly paid and partly. Promised or under any system of deferred payment,
- (v) The user of the goods may also be a consumer when such use is made with the approval of the buyer.

Who is not a consumer?:

A person is not a consumer if he obtains goods for resale or for any commercial purpose. Commercial purpose does not include use by a consumer of goods bought by and used by him exclusively for the purpose of earning his livelihood, by means of self-employment for e.g. buying a car to run it as a taxi or a widow purchasing a sewing machine for her livelihood etc.

When the manufacturer sells the goods to the wholesaler, who in turn sells the goods to a retailer, the wholesaler will be excluded from the definition

of the word consumer as he has brought the goods for 'resale' or for 'commercial purpose'. A person buying the goods for resale or for commercial purpose, even if for consideration, is not a consumer. Commercial purpose is commerce, mercantile, having profit as the main aim. It includes all business activities. A purchase of a car by a company for use by its business, by director and employees is purchased for commercial purpose. (Case- V. M. Agarwal J. By ford Leasing Ltd. 1992 CPJ 29 Del).

2. Complainant [Sec.2(1)(b)]:

"Complainant" means

- (i) a consumer or
- (ii) any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force. or
- (iii) the Central Government or any State Government, who or which makes a complaint, or
- (iv) one or more consumers, where there are numerous consumers having the same interest.
- (v) in case of death of a consumer, his legal heir or representative who or which make a complaint.

Explanation:

A person seeking redressal of his complaint, must come within any of the above-mentioned categories, otherwise he has no **Locus Standi** to proceed with the case before the consumer Redressal Forum.

Example:

Kumar.Chotu seriously injured and died because of the ignorance on the part of the hospital in treatment as there is non-payment of deposit money. The parents could approach the Consumer Dispute Redressal Forum for claiming the relief.

3. Complaint [Sec. 2 (1)(c):]

Complaint means any allegation in writing made by a complainant in regard to one or more of the following:

- (i) An unfair trade practices or a restrictive trade practice has been adopted by any trader.
- (ii) The goods bought by him or agreed to be bought by him, eagersuffer from one or more defects.
- (iii) The service hired or availed of or agreed to be hired or availedof by him suffer from deficiency in any respect.
- (iv) A trader has charged for the goods mentioned in the complainta price

in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

- (v) Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provision of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

Explanation (I) : In the Consumer Protection Act, 1986. (c “complaint” means any allegation in writing, made by a complainant against any unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider.

Explanation (II): In order to obtain any relief under this Act the complaint must be made in writing specifying the name and address of the complainant and the opposite party. It must state the facts and also must specify the relief which the complainant is seeking.

4. Manufacturer [Sec.2(1) (j)] :

Manufacturer means a person who:

- (1) Makes or manufactures any goods or part of it or
- (2) Assembles parts of any goods which are made or manufactured by others and claims the end product to be goods manufactured by himself or
- (3) Puts his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself.

Explanation: Where a manufacturer dispatches any goods or parts thereof to any branch office maintained by him, such branch office is not the manufacturer, even though the parts dispatched are assembled at such branch office and are sold or distributed from such branch

5. Consumer Dispute [Sec. 2(1)(e)]:

“Consumer Dispute” means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

Explanation: A complaint has been made against any person who denies the allegation made against him or her. Dispute must be pertaining to the goods delivered or services provided.

6. Defects: Sec. 2(1)(f):

“Defect” means any fault, imperfection or shortcoming in the quality, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or

implied or as is claimed by the trader in relation to any goods.

The Consumer Protection Act
1986

Explanation: When the goods are sub standard or engaged with some inappropriate fault or imperfection in it is known as defects in the goods. In short when the goods are not in accordance with the standard sets by the law the goods called imperfect or defective.

- Supply of contaminated agricultural products which contain pesticides and harmful soil particles, which caused to food poisoning.
- Product made for children that contains choking hazards
- Products like a helmet that cracks or breaks from small impact
- Unstable structures, such as tables or chairs that collapse
- Mechanical defects on cars and other electronic goods.
- Defects in the clothing materials. Etc.

7. Deficiency: Sec.2(1)(g):

“Deficiency means any fault, imperfection or shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service “.

Explanation: Deficiency is in services. If there is imperfection or shortcoming or inadequacy in the nature or manner of performance of any services as per the standard sets by the law, there is said to be deficiency in services.

Cases:

a) Abhoya Kumar Panda V. Bajaj Auto Ltd:

The complainant purchased a Bajaj Auto Trailer manufactured by the respondent. The vehicle suffered from a major structural manufacturing defect. The National Commission held that the manufacturer should not have sold initially a product which suffered from a major manufacturing defect.

Deficiency in telephone service:

b) Overbilling – In Union of India V. Nilesh Agarwal.:

A complaint was made averring that there were excess charges in the telephone bill. The Rajasthan State Commission held that the complainant who is a subscriber is a ‘consumer’ and the telephone service provided by the Telecom Department is a ‘service’ for which he pays rent and over billing of telephone is “deficiency in service” within the meaning of the section.

8. Person [Sec. 2 (m)] Person includes:

- (i) a firm whether registered or not
- (ii) a Hindu undivided family
- (iii) a co-operatives society
- (iv) every other association of persons whether registered under the Societies Registration Act, 1860 or not.

A person has to be a consumer within the definition of the word consumer under the Consumer Protection Act to get remedy.

9. Service [Sec.2 (1)(o)]:

“Service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, (housing construction) entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

Explanation: Contact of personal service is excluded from the definition. A service offered by an Advocate to his client or service rendered by a private tutor is therefore not included in the definition. The law excludes some of the services from the purview of above definition viz:

- Free Services: Government or Municipal Hospitals rendering Free Services
- Services rendered by Government officials
- Services provided under any contract of personal service.
- Services provided under sovereign function.

10. “Unfair trade practice” [Section 2 (1)]:

Means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely

The practice of making any statement, whether orally or in writing or by visible representation which,-

- a) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
- b) falsely represents that the services are of a particular standard, quality or grade
- c) falsely represents any re-built, second-hand, renovated, reconditioned

or old goods as new goods

- d) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
- e) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
- f) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
- g) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof
- h) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price.
- i) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods.

12. Appropriate Laboratory: Section 2 (1) (a):

"Appropriate laboratory" means a laboratory or organization

- (i) Recognised by the Central Government;
- (ii) Recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or
- (iii) any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect;

Explanation: Appropriate Laboratory is a recognised body set up or funded fully or partly by Central Government or State Government of Both. The function of such laboratory is to analyse the sample of the goods which is in query to report the findings to the Dispute Redressal Mechanism for further action at their end.

12.5 SUMMARY

Rationale behind the enactment of the Consumer Protection Act:

- Sellers were engaged in many unfair practices which tend to the rise of Consumer Movement by the dissatisfied customers.
- To give the protestation to the consumers from the exploitation in the marketplace, there was no legal system was available.
- seller knows the fault in the goods.

Objectives and Reasons: The right to be protected against marketing of goods which are hazardous to life and property; The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

Service : “Service” means service of any description which is made available to potential users. “**Unfair trade practice**” Means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices,

12.6 QUESTIONS

1. Explain the need for enactment of Consumer Protection Act.
2. Who can file a complaint under the consumer protection act and under what circumstances?
3. Who is a consumer and who is not a consumer under the consumer protection act?
4. What are an unfair trade practices?
5. Write a Short Note on :-
 - a. A trader?
 - b. Consumer Dispute
 - c. Deficiency
 - d. Defects
 - e. Contract of Personal service
 - f. Service
 - g. Manufacturer

THE CONSUMER PROTECTION COUNCILS

Unit Structure

- 13.0 Objectives
- 13.1 Introduction
- 13.2 Central Consumer Protection Council
- 13.3 State Consumer Protection Council
- 13.4 District Consumer Protection Council
- 13.5 Summary
- 13.6 Questions

13.0 OBJECTIVES

After studying the unit the students will be able to:-

- Understand the Composition and Functioning of Central Consumer Protection Council.
- Understand the composition and Functioning of State Consumer Protection Council
- Understand the composition and Functioning of District Consumer Protection Council

13.1 INTRODUCTION

Consumer Protection Act 1986 has come into existence to protect the interest of the consumers in various manners. Right to heard, Right to be protected against the against marketing of goods which are hazardous to life and property, right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices, and most importantly right to consumer education, such rights are conferred by this particular Act to the consumers. Again, to get the simple and speedy redressal of grievances, this Act has established Councils and Forums at District, State and National levels for effective protection of the consumer's interest. The resolution passed by the councils are recommendatory in nature.

13.2 CENTRAL CONSUMER PROTECTION COUNCIL

Composition:

- (1) The Central Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Consumer Protection Council.

- (2) The Central Council shall consist of the following members, namely:
- a) The Minister in charge of the consumer affairs in the Central Government, who shall be its Chairman,
 - b) The Minister of State or Deputy Minister In charge of Consumer's Affairs in the Central shall be Vice-Chairman
 - c) Representative of women not less than ten in number.
 - d) A person capable of representing Consumers Interest not mentioned here in above 15 in numbers,
 - e) Two members of parliament each one from Lok Sabha and Rajya Sabha,
 - f) Secretary In-charge of Consumer's Affairs in the State, nominated by the Central Government and the same is not exceeding 3 in numbers,
 - g) An administrator of Union Territory, to represent Union Territory, on rotational appointment as per the term of the Council and
 - h) Such number of other official or non-official members representing such interests as may be prescribed.

¹Objectives of the Central Council:

The objects of the Central Council shall be to promote and protect the rights of the consumers as laid down under section 6 of Consumer Protection Act. They are as under:

- The right to be protected against the marketing of goods and services which are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services,
- The right to be 'assured, wherever possible, access to a variety of goods and services at competitive prices;
- The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate Forum;
- The right to seek redressal against unfair trade practices or restrictive trade practices;
- The right to consumer education.

Procedures for Meeting:

1. The meeting of the Central Council shall be presided over by the Chairman.

2. Council may meet as per requirement, at least one meeting shall be conducted every year mandatorily.
3. Meeting may be called by giving a notice not less than 10 days before hand to the members who are entitled to receive the same.
4. Notice must contain the place, day and hour of the meeting enclosed with an agenda.
5. As the resolution passed in the meeting is recommendatory only hence no quorum is required,
6. In connection with the journey undertaken, non-official members are entitled to avail first class or two-tier air- conditioned class of railway accommodation.
7. The non-official members shall be entitled to have sum of Rs.1000 per day as daily allowance.

13.3 STATE CONSUMER PROTECTION COUNCIL

Composition:

The State Government shall, by notification, in the official gazette established a State Consumer Protection Council:

The State Council shall consist of the following members, namely:—

1. The Minister in charge of consumer affairs in the State Government who shall be the Chairman of the Council;
2. Such number of other official or non-official members representing such interests as may be prescribed by the State Governments;
3. Such number of other official or non-official members, not exceeding ten in number, nominated by the Central Government.

Procedures for Meeting:

- The State Council shall meet as and when required; but at least two meetings shall be held every year.
- It is provided that the State Council shall meet at such time and place as the Chairman decides.

Objects of the State Council:

The objects of the State Council is to promote and protect the Consumers Rights laid down under section 6 of the Act.

13.4 DISTRICT CONSUMER PROTECTION COUNCIL

In order to promote and protect the rights of the consumers at the district level, provisions have been made in the Consumer Protection Act, 1986.

The State Government shall establish for every district, by notification, a Council to be known as the District Consumer Protection Council

Composition:

The Collector of the district, who shall be its Chairman, and

1. Such member of other official and non-official members representing such interests as may be prescribed by the State Government.
2. The Council shall meet as and when necessary but not less than two meetings shall be held every year.
3. The Council shall meet as such time and place within the District as the Chairman may think fit.

Procedure for the meetings of the District Council:

1. Every meeting of the District Council shall be convened by the Member Secretary in accordance with the directions of the Chairman.
2. The meeting of the District Council shall be presided over by the Chairman
3. Quorum meeting of the District Council shall be seven.
4. Every meeting of the District Council shall be called only after giving not less than seven days' notice, to each member:
5. The resolutions passed by the District Council shall be recommendatory in nature.

13.5 SUMMARY

Central Consumer Protection Council. Composition: - The Central Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Consumer Protection Council.

Objectives of the Central Council: The objects of the Central Council shall be to promote and protect the rights of the consumers as laid down under section 6 of Consumer Protection Act. the right to be protected against the marketing of goods and services which are hazardous to life and property; etc

Procedures for Meeting: The meeting of the Central Council shall be presided over by the Chairman. Council may meet as per requirement, at least one meeting shall be conducted every year mandatorily.

State Consumer Protection Council: The State Government shall, by notification, in the official gazette established a State Consumer Protection Council: the Minister in charge of consumer affairs in the State Government who shall be the Chairman of the Council;

Objects of the State Council: The objects of the State Council is to promote and protect the Consumers Rights laid down under section 6 of the Act.

The Consumer Protection
Councils

District Consumer Protection Council: The State Government shall Establish for every district, by notification, a Council to be known as the District Consumer Protection Council

13.6 QUESTIONS

1. Explain in detail the Constitution of State and Central Council
2. Explain the objectives for formation of Consumer Protection Council
3. Write a Short Note on:-
 - a. Consumer Protection Central Council
 - b. Consumer Protection District Council
 - c. Procedure for meetings of State and Central Council

CONSUMER PROTECTION REDRESSAL AGENCIES (SEC. 9 TO 27 A)

Unit Structure

- 14.0 Objectives
- 14.1 Introduction
- 14.2 District Forum
- 14.3 State Commission
- 14.4 National Commission
- 14.5 Summary
- 14.6 Questions

14.0 OBJECTIVES

After studying the unit the students will be able to:

- Understand the Composition and Functioning of District Forum
- Understand the composition and Functioning of State Commission
- Understand the composition and Functioning of National Commission

14.1 INTRODUCTION

To provide simple, speedy and inexpensive redressal of consumer grievances, the Act envisages Three-tier quasi-judicial machinery at the district, state and national level. At the district level there will be “District Forum” to entertain consumer complaints where the value of goods or services and compensation does not exceed rupees twenty lakhs, and at the state level there will be ‘State Commission’ to deal with the complaints where the claim exceeds rupees twenty lakhs but does not exceed rupees One crore. At the national level there is a ‘National Commission’ has the original jurisdiction carries where the value of goods or services and compensation if any exceeds Rs. One Crore.

14.2 DISTRICT FORUM

Each district of the state shall have a Consumer Dispute Redressal Forum known as ‘District Forum’ it is to be established by the State Government by notification to be published in official Gazette. With the 1993 amendment, the constitution and setting up of the District Forum is now under the exclusive domain of the State Government. The State Government, if it deems fit, establish more than one District Forum in a district.

• **Composition of the District Forum:**

Each District Forum shall consist of:

- (a) A person who is or has been or is qualified to be a District judge, who shall be its President.
- (b) Two other members, one of whom shall be woman.

Qualifications:

The person must:

- a. Be of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.
- b. Be not less than 35 years of age.
- c. Possesses bachelor degree from recognised university.

Disqualifications:

He is not fit to get appointed if he or she:

- a. Adjudged insolvent.
- b. Is of unsound mind declared by the competent court.
- c. Has been removed from the services of State or Central Government or any body corporate owned fully or partly by State or Central Government.
- d. Has been convicted and sentenced to imprisonment for an offence involves moral turpitude.
- e. Any other disqualification prescribed by the competent authority from time to time.

Selection Committee:

Every appointment shall be made by the State Government on the recommendation of a selection committee consisting of the following:

- (i) The President of the State Commission - Chairman.
- (ii) Secretary, Law Department of the State - Member.
- (iii) Secretary in-charge of the Department dealing with consumer affairs in the State - Member.

• **Terms and Conditions:**

Every consumer of the District Forum shall hold office for a term of five years or up to the age of 65 years whichever is earlier and shall not be eligible for re-appointment.

A member may resign his office in writing under his hand addressed to the State Government. His office shall become vacant on his resignation being accepted by the State Government. Any vacancy so caused may be filled by appointment of a person possessing the required qualifications.

• **Salary or Honorarium:**

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be as may be prescribed by the State Government.

• **Jurisdiction of the District Form:**

Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any claimed does not exceed rupees five lakhs.

The provisions of Sec. 11 are intended to bring justice as near as possible to the consumers and at the same time the defendant should not be put to under inconvenience of travelling long distance.

• **Pecuniary Jurisdiction:**

The Forum can entertain the complaints where the value of goods or services and the compensation claim does not exceed Rs, Twenty Lakhs. 'The pecuniary Jurisdiction depends upon the amount of relief claimed and not upon the value of the subject matter, nor upon the relief allowed by the forum.

• **Territorial Jurisdiction:**

This section provides that a complaint shall be instituted in a District Forum within the local limits of whose jurisdiction.

- a. The opposite party or each of the opposite parties at the time of institution of the, complaint
 - (i) Actually and voluntarily resides or
 - (ii) Carries on business or
 - (iii) Has a branch office or
 - (iv) Personally works for gain.
- b. Where there are more than one opposite parties, any of the opposite parties at the time of the institution of the complaint:

- Actually, and voluntarily resides or
- Carries on business or
- Has a branch office or
- Personally, works for gain. Provided that in such case either the permission of the District Forum is given or
- The opposite party who does not reside or
- Carry-on business etc., consents in such institution.

Who can make the complaint?:

- a. The consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided.
- b. Any recognised consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not.
- c. One or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of or for the benefit of, all consumers so interested.
- d. The central or the State Government.

Thus the complaint may be filed by the affected consumer himself or by any recognised consumer association. It meant any voluntary consumer association registered under the Companies Act, 2013 or any other law for the time being in force.

• Procedure on receipt of complaint:

This section lay down the procedure which is to be followed by the District Forum on the receipt of a complaint under the Act, where a complaint does not require analysis or testing of the goods, it should be decided as far as possible within a period of 90 days from the date of the notice received by the opposite party and within 150 days if it requires analysis or testing of goods.

• Remedies available to consumers:

The Act enumerates the relief that can be granted to a complainant by the District Forum.

If, after the proceeding conducted and the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in complaint about the services are proved, it may grant relief by directing the opposite party to do one or more of the following things:

- (a) To remove the defect pointed out by the appropriate laboratory.
- (b) To replace the goods with new goods of similar description,
- (c) To return the price or charges paid by the complainant,
- (d) To pay compensation for loss or injury suffered by the consumer due to the negligence of the opposite party.
- (e) To remove the defects or deficiencies in the services in question.
- (f) To discontinue the unfair trade practice or the restrictive trade practice or not to repeat it,
- (g) Not to offer the hazardous goods for sale,
- (h) To withdraw the hazardous goods from being offered for sale,
- (i) To provide for adequate costs to parties.

The satisfaction of the District Forum must be based upon the judicial approach and after complying with the procedure laid down in appropriate section of the Act.

Cases:

1. In Patel Ramabhai Shankerlal vs. Indian Airlines Corporation:

Gujarat State Commission has held that power to re-schedule the flight is a rare power and if the Indian Airlines Corporation exceeds that power, the corporation should be considered to be negligent and hence it should be held liable to bear damages.

2. In Secretary Karnataka Electricity Board v/s. Secretary Bellary Citizen's Forum:

The complainants alleged that due to sudden high voltage surge, the electric equipment and fitting got damaged and claimed compensation for the same. The Karnataka State Commission held that mere fluctuation in the electricity voltage will not by itself give cause of action to the consumers for claiming damages. The complainants have to prove negligence of the officials of the Electricity Board.

• Appeals:

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the state commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed. State commission that he has sufficient cause for not preferring the appeal within the period of limitation.

14.3 STATE COMMISSION

A consumer dispute redressal forum at the State level established by the State Government is known as State Commission.

Composition of the State Commission:

Each state commission shall consist of:

- a. A person who is or has been a judge of a High Court, appointed by the State Government, who shall be its President provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court.
- b. Two other members, one of the member, shall be a woman.

Qualifications:

The person must:

- a. Be of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.
- b. Be not less than 35 years of age.
- c. Possesses bachelor degree from recognised university

• Removal of the President or Member (Disqualifications):

The State Government may remove from office, the President or member of the State Commission who:

- (a) Has been adjudged an insolvent or
- (b) Has been convicted of an offence which, in the opinion of the State Government, involves moral turpitude or
- (c) Has become physically or mentally incapable of acting as such president or
- (d) Has acquired such financial or other interest as is or a member, as the case may be or
- (e) Has so abused his position as to render his continuance in office prejudicial to public interest.

However the President or a member shall not be removed from his office on the ground specified in clause (d) and (e) above, except on an inquiry held by the State Government.

Selection Committee:

Every appointment made under this clause shall be made by the State Government on the recommendation of a selection committee consisting of the following namely:

- (i) President of the State Commission - Chairman.
- (ii) Secretary of the Law Department of the State - Member

- (iii) Secretary and in-charge of Department dealing with consumer affairs in the state - Member.

• **Salary and Honorarium:**

The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the state commission shall be such as may be prescribed by the State Government.

• **Terms and Conditions:**

Every member of the State Commission shall hold office for a term of five years or up to the age of sixty-seven years, whichever is earlier and shall not be eligible for re-appointment.

• **Jurisdiction of the State Commission:**

The State Commission shall have jurisdiction

a. To entertain:

- (i) Complaints where the value of the goods or services and compensation, if any claimed exceeds rupees twenty lakhs but does not exceed rupees One Crore this is known as pecuniary jurisdiction.
 - (ii) Appeals against the orders of any District Forum within the State and
- b. to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State where it appears to the state commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

• **Appeals:**

Any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed body corporate as if it is a private company, without however, any limit to the number of members thereof.

• **Circuit Benches:**

This is a new provision inserted in the Act by the Consumer Protection (Amendment) Act, 2002. Section 17 B, provides for establishment of Circuit Benches of State Commission. The State Commission shall ordinarily function in the State Capital but may perform its functions at such other place as the State Government may, in consultation with the State Commission, notify in the Official Gazette, from time to time.

• **Remedies Available:**

State Commission may provide the same remedies which are available under District Forum.

14.4 NATIONAL COMMISSION

The National Commission is known as National Consumer Dispute Redressal Commission. It is set up at New Delhi. Such body is established by Central Government.

Composition of the National Commission:

- a. a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President:
- b. not less than four, and not more than such number of members, as may be prescribed, and one of whom shall be a woman, who shall have the following qualifications, namely:

Qualifications:

The person must:

- a. Be of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.
- b. Be not less than 35 years of age.
- c. Possesses bachelor degree from recognised university

• **Disqualifications:**

This section laid down the following disqualifications for being appointment:

- (a) Has been adjudged an insolvent or
- (b) Has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude or
- (c) Has become physically or mentally incapable of acting as such president or
- (d) Has acquired such financial or other interest as is or a member, as the case may be or
- (e) Has so abused his position as to render his continuance in office prejudicial to public interest.

• **Salary and Honorarium:**

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government.

• **Terms and Conditions:**

Every member of the National Commission shall hold office for a term of five years or up to the age of seventy years, whichever is earlier and shall not be eligible for re-appointment.

• **Jurisdiction of the State Commission:**

Section 21: of Consumer Protection Act "Jurisdiction of the National Commission"

Section 21: Subject to the other provisions of this Act, the National Commission shall have jurisdiction:

(a) To entertain:

1. Complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore; and
2. Appeals against the orders of any State Commission; and
3. To call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Administrative control:

The National Commission shall have administrative control over all the State Commissions in the following matters, namely:

- Calling for periodical returns regarding the institution, disposal, pendency of cases
- Issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of English translation of judgments written in any language, speedy grant of copies of documents

• **Circuit Benches:**

This is a new provision inserted in the Act by the Consumer Protection (Amendment) Act, 2002. These benches shall function other than in Delhi and shall comprises of President and one more member.

13 Penalties:

Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both:

Functioning of Three Tire Mechanism of Consumer Protection Act:

	District Forum	State Commission	National Commission
President	A person who is, or has been, or is qualified to be a District Judge, who shall be its President	A person who is, or has been, or is qualified to be a High Court Judge, who shall be its President	A person who is, or has been, or is qualified to be a Supreme Court Judge, who shall be its President
Establishment	District Forum is setup by the State Government.	State Commission is setup by the State Government.	National Commission is setup by the Central Government.
Jurisdiction	It is jurisdiction extends to the whole of the district.	Its jurisdiction extends to the whole of the State.	
	<ul style="list-style-type: none"> • Territorial Jurisdiction • Monitory or Pecuniary Jurisdiction 	<ul style="list-style-type: none"> • Original Jurisdiction • Territorial Jurisdiction • Appellate Jurisdiction. • Revisional Jurisdiction. • Supervisory Jurisdiction 	<ul style="list-style-type: none"> • Original Jurisdiction • Territorial Jurisdiction • Appellate Jurisdiction. • Revisional Jurisdiction • Supervisory Jurisdiction.
	No Appellate Authority	Appeal can be entertained if the consumer is aggrieved against the verdict given by District Forum	Appeal can be entertained if the consumer is aggrieved against the verdict given by State Commission

President	A person who is or has been or is qualified to be District Judge may be its President.	A person who is or has been a Judge of High Court may be its President.	A person who is or has been Judge of Supreme Court may be its President.
Number	There can be more than one District Forum in a District.	There can be only one State Commission in a State.	There can be only one National Commission in the whole country.
Complaints	District forum can entertain complaints as to goods or services within the jurisdiction limits of the district.	State Commission entertains all appeals against all District Forums within the State.	National Commission entertain all appeals made of all the State Commission in the country.
Members	It consists three members one of whom shall be a woman.	It consists three members one of whom shall be a woman.	It consists five members one of whom shall be a woman.
Monitory Jurisdiction	It can entertain complaints claiming not exceeding Rs. 20 lakh.	It can entertain complaints claiming more than Rs. 20lakh but not exceeding rupees one crore.	It can entertain complaints claiming exceeding rupees one crore.
Term of office	The term of office of every member of the District Forum shall be 5 years or unto the age of 65 years, whichever is less.	The term of office of every member of the State Commission shall be 5 years or up to the age of 67 years, whichever is less.	The term of office of every member of the National Commission shall be 5 years or upto the age of 70 years whichever is less.
Control	The State Commission has administrative control over	The National Commission has administrative control over all	The National Commission is an independent institution.

	the all District Forum within the State.	State Commission in the country.	
Remedies	To remove the defects. <ul style="list-style-type: none"> • to replace the goods • To return the price • To pay compensation • To remove defect of deficiency. 	<ul style="list-style-type: none"> •To remove the defects •to replace the goods •. To return the price •To pay compensation •To remove defect of deficiency. 	<ul style="list-style-type: none"> •To remove the defects •To replace the goods •To return the price •To pay compensation • To remove defect of deficiency.

14.5 SUMMARY

Introduction: To provide simple, speedy and inexpensive redressal of consumer grievances, the Act envisages Three-tier quasi-judicial machinery at the district, state and national level.

District Forum: Each district of the state shall have a Consumer Dispute Redressal Forum known as 'District Forum' it is to be established by the State Government by notification to be published in official Gazette. District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any claimed does not exceed rupees five lakhs.

State Commission: A consumer dispute redressal forum at the State level established by the State Government is known as State Commission

National Commission: The National Commission is known as National Consumer Dispute Redressal Commission. It is set up at New Delhi. Such body is established by Central Government.

14.6 QUESTIONS

1. State composition of district forum
2. Explain the functioning of three tier system of consumer dispute redressal under the consumer protection act?
3. Write note on removal of the president or member of the national commission
4. Explain briefly the various provisions of District Forum, State Commission and National Commission.
5. Explain the Penalties for frivolous complaint.

¹³ https://legislative.gov.in/sites/default/files/A1986-68_0.pdf

COMPETITION ACT- 2002

Unit Structure

- 15.0 Objectives
- 15.1 Introduction and Preamble of the Act
- 15.2 Preamble
- 15.3 Objectives of Competition Commission and Advantages of Competition
- 15.4 Some Important Terms in the Act
- 15.5 Salient Features of the Act
- 15.6 Summary
- 15.7 Questions

15.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the Preamble of the Competition Act
- Understand the advantages of competition
- Understand the composition and Functioning of Competition Commission of India.
- Understand the Salient Features of the Act.

15.1 INTRODUCTION AND PREAMBLE OF THE ACT

The Monopoly and Practices Act 1969 has become obstacle in certain respect mainly due to globalisation and liberalisation. There is need to shift our focus from curbing monopolies to promoting competition.

The competition Act 2002 provides for establishment of quasi-judicial body to be called as Competition Commission of India (CCI) which shall not only ensure fair competition but also undertake competition advocacy for creating awareness and imparting training on competition issues. The act also provides for investigation by the Director General for the commission. The director General would be able to act only if so directed by the commission but will not have any Suo motu power for initiating investigations. The Act confers power upon CCI to levy penalty for contravention of its orders, failure to comply with its direction, making of false statement or omission to furnish material information, etc. It can also order division of dominant enterprises and has power to demerger and amalgamations that adversely affects competition.

15.2 PREAMBLE

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”

15.3 OBJECTIVES OF COMPETITION COMMISSION OF INDIA AND ADVANTAGES OF COMPETITION

It is a mechanism to implement and enforce competition policy and to prevent and punish anti-competitive business practices by firms and undue Government interference in the market. Competition laws is equally applicable on written as well as oral agreement, it is nothing but an arrangements between the enterprises Following are the objectives of the Competition Commission of India:

1. Eliminate practices having adverse effect on competition.
2. Promote and sustain competition in markets.
3. Protect the interests of consumers.
4. Ensure freedom of trade in the markets of India.
5. Establish a robust competitive environment.

Following are the Advantages of Competition:

1. Competition promotes the efficiency
2. It leads to higher productivity in the Market
3. It punishes the laggards; It enhances choices
4. It improves quality
5. It leads to Economic Welfare
6. It helps in more innovation and techniques in the quality of services
7. It reduces costs of products
8. Competition facilitates better governance

15.4 SOME IMPORTANT TERMS IN THE ACT

Some important definition and meanings under the act:

Acquisition: Section 2 (a) “acquisition” means, directly or indirectly, acquiring or agreeing to acquire:

(i) Shares, voting rights or assets of any enterprise; or

(ii) Control over management or control over assets of any enterprise;

Agreement: Section 2 (b) “agreement” includes any arrangement or understanding or action in concert:

(i) Whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

Appellate Tribunal: Section 2 (ba) “Appellate Tribunal” means the National Company Law Appellate Tribunal referred to in sub-section (1) of section 53A;]]

Cartel: Section 2 (c) “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

Chairperson: Section 2(d) “Chairperson” means the Chairperson of the Commission appointed under sub-section (1) of section 8;

Commission: Section 2(e) “Commission” means the Competition Commission of India established under sub-section (1) of section 7;

Consumer: Section 2 (f) “consumer” means any person who;

(i) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

Enterprise: Section 2(h) “enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in

investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation - For the purposes of this clause,:

- (a) “Activity” includes profession or occupation;
- (b) “Article” includes a new article and “service” includes a new service;
- (c) “Unit” or “division”, in relation to an enterprise, includes—
 - (i) A plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 - (ii) Any branch or office established for the provision of any service;

Person: Section 2 (l) “person” includes:

- (i) An individual;
- (ii) A Hindu undivided family;
- (iii) A company;
- (iv) A firm;
- (v) An association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (vi) Any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

15.5 SALIENT FEATURES OF THE ACT

1. Competition Commission of India: (Section 7 To 48):

The Competition Commission of India acts as the competition regulator in India. The Commission was established in 2003, and became fully functional only by 2009. An objective of the Commission is at establishing a competitive environment in the Indian economy through proactive engagement with all the stakeholders, the government, and international jurisdiction. The objectives of the Commission are as under

- To prevent practices that harm the competition.
- To promote and sustain competition in markets.

- To protect the interests of consumers.
- To ensure freedom of trade

Composition:

- The Commission consist of one chairperson and a minimum of two members and a maximum of ten members. (This has further been reduced to three members and one chairperson by the Cabinet.)
- The chairperson and the members are usually full-time members.

Qualifications for an appointment:

The Chairperson and every other Member shall be a person of ability, integrity, and who, has been, or is qualified to be a judge of a High Court, or, has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, in the opinion of the Central Government, may be useful to the Commission.

Term of office of Chairperson and other Member:

The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office or Sixty-Five years and for members Sixty-Seven years whichever is earlier respectively and shall be eligible for re-appointment:

Disqualifications:

Following are the disqualifications of the Chairman and Members of the Commission.

- a. Is, or at any time has been, adjudged as an insolvent; or
- b. Has engaged at any time, during his term of office, in any paid employment; or
- c. Has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- d. Has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or
- e. Has so abused his position as to render his continuance in office prejudicial to the public interest; or
- f. Has become physically or mentally incapable of acting as a Member.

14 Functions of Competition Commission of India:

The preamble of the Competition Act focuses on the development of the economy and the country by avoiding unfair competition practices and

¹ <https://byjus.com/free-ias-prep/the-competition-commission-of-india/>

promoting constructive competition. The functions of the CCI are:

1. Considering that the welfare of the customers are maintained in the Indian Market.
2. An enhanced and inclusive economic growth through considering fair and healthy competition in the economic activities of the nation.
3. Ensuring the efficient utilization of the nation's resources through the execution of competition policies.
4. The Commission also undertakes competition advocacy.
5. It is also the antitrust ombudsman for small organizations.
6. The CCI will also scrutinize any foreign company that enters the Indian market through a merger or acquisition to ensure that it abides by India's competition laws – the Competition Act, 2002.
7. CCI also ensures interaction and cooperation with the other regulating authorities in the economy. This will ensure that the sectoral regulatory laws are agreeable with the competition laws.
8. It also acts as a business facilitator, by ensuring that a few firms do not establish dominance in the market and that there is a peaceful co-existence between the small and the large enterprises.

Duties of the Commission:

It shall be the duty of the commission to

1. Eliminate practices having adverse effect on competition,
2. Protecting the interest of the consumers and ensure freedom of trade carried on by other participants in market in India.
3. Promoting and sustaining competition in the market.
4. Commission may in order to perform its duty enter into any memorandum or arrangement with the prior approval of Central Government, with any agency or any foreign country

2. Competition Advocacy:

The Central Government and State Government may in formulating policy on competition or on any other matter, make a reference to the commission for its or its opinion on the possible effect of such policy on competition. The opinion given by the commission shall not be binding upon the Central government or State government. The commission shall take suitable measure for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

The MRTP Act, 1969 is repealed. The MRTP Commission established under MRTP ACT, stands dissolved. The MRTP may however, continue to exercise jurisdiction and power under the repealed Act for a period of

two years from the date of commencement of the Competition Act in respect of all cases or proceedings filed before the commencement of competition Act, as if MRTP Act had not been repealed.

All cases pertaining to monopolistic trade practices or restrictive practices including cases of unfair trade practiced, pending before the MRTPC shall, after the expiry of aforesaid two years period stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provision of the repealed act.

All the investigation or proceedings, other than those relating to unfair trade practices pending before the Director General of Investigation and Registration, on or before the commencement stand transferred to the Competition Commission of India (CCI) may conduct or order for conduct or order for such conduct of such investigation or proceeding in the manner as it deems fit.

3. Anti-Competitive Agreement:

No enterprise or association of enterprises or persons or association of persons shall enter into any agreements in respect of production, supply, distribution, storage, acquisition, or control of goods or provisions of services, which causes or is likely to cause an adverse effect on competition within India. Any agreement which causes an adverse effect on competition shall be void. The Act has no retrospective effect. An anti-competitive agreement entered into before the enforcement of the act will not be invalid. However, if the anti-competitive agreement continues after the enforcement of the act, the same shall rendered invalid.

Horizontal Agreements:

Horizontal agreements are arrangements between enterprises at the same stage of the production cycle and that is generally between two opposites for either fixing prices or for limiting production or for sharing markets etc. In all such agreements, there is a presumption in the Act that such agreements cause AAEC that is (**appreciable adverse effects**) Cartel is also a one kind of horizontal agreement.

Vertical agreements:

Vertical agreements are between enterprises at different stages of the production cycle or chain, an example of such agreements are between the manufacturer and a distributor. The presumptive rule does not apply to vertical agreements. The question whether the vertical agreement is causing AAEC is (**appreciable adverse effects**) is determined by rule of reason. When rule of reason is employed, both positive as well as negative impact of competition is seen.

Agreements which do not cause adverse effect on competition:

1. Any agreement entered into between enterprises or association of enterprises or persons or association of persons or between any person and enterprise or practice carried on or decision taken by any association of enterprise or associations of persons, including cartels, engaged in identical or similar trade of goods or provisions of services, which:
 - a) Directly or indirectly determines purchase or sale price.
 - b) Limits or controls the production, supply, markets, technical development, investment or provision of services.
 - c) Shares the market or source of production or provision of services, by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.
 - d) Directly or indirectly results in bid rigging or collusive bidding.
2. Any agreement amongst the enterprises or persons at different stages or level of the production chain in different markets, in respect of production, supply, distribution, storage sale or price of or trade in goods or provision of services including.
 - a) Tie in arrangements;
 - b) Exclusive supply agreement;
 - c) Exclusive distribution agreement;
 - d) Refusal to deal;
 - e) Resale price maintenance.
4. **Abuse of dominant position:** In the event, an enterprise or an associated individual, it is found to indulge in practices that are unfair or discriminatory in nature shall be considered an abuse of dominant position. If a party is found to be in abuse of its position, then they will be subjected to an investigation from the concerned authorities.
5. **Combinations:** As per the act a combination is defined as terms which lead to acquisitions or mergers. But should such combinations cross the limits as put forth by the Act, then the parties involved would be under the scrutiny of the Competition Commission of India.

Dominant Position:

Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enable it to

- 1) Operate independently of competitive forces prevailing in the relevant market; or
- 2) Effect its competitors or consumers or the relevant market in its favour.

Relevant market means the market which may be determined by the commission with reference to the relevant product market or the relevant geographical market or with reference to both the markets.

Relevant product market mandates demand sustainability as revealed by consumer preferences.

Relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighboring area.

Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the product or services, their prices and intended use.

15.6 SUMMARY

Advantages of Competition: Competition promotes the efficiency; It leads to higher productivity in the Market It punishes the laggards; It enhances choices, It improves quality, It leads to Economic Welfare, It helps in more innovation and techniques in quality of services It reduces costs of products; Competition facilitates better governance.

Salient Features of Competition: Competition Commission of India, Its Composition and Functioning, Competition Advocacy, Anti-Competitive Agreement: Horizontal Agreements, Vertical agreements, Abuse of dominant position, Combinations, Dominant Position.

15.7 QUESTIONS

1. Objective of competition act, 2002
2. State prohibition of certain agreements
3. State duties, powers and functions of the commission
4. Explain functioning of competition commission of India
5. Write Short Note:
 - a) Meetings of commission
 - b) Establishment of commission
 - c) Prevention of abuse of dominant position

MODULE V

INTELLECTUAL PROPERTY RIGHTS

16

NATURE AND CONCEPT OF IPR

Unit Structure

- 16.0 Objectives
- 16.1 Introduction
- 16.2 Concept of Intellectual Property Rights
- 16.3 Scope of Intellectual Property
- 16.4 Nature of Intellectual Property Rights
- 16.5 Summary
- 16.6 Questions

16.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the concepts of Intellectual Property Rights
- Understand the nature of Intellectual Property Rights.

16.1 INTRODUCTION

Intellectual property is the product of the human intellect including creativity concepts, inventions, industrial models, trademarks, songs, literature, symbols, names, brands, etc. Intellectual Property Rights do not differ from other property rights. They allow their owner to completely benefit from his/her product which was initially an idea that developed and crystallized. They also entitle him/her to prevent others from using, dealing or tampering with his/her product without prior permission from him/her. He/she can in fact legally sue them and force them to stop and compensate for any damages.

16.2 CONCEPT OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property, very broadly, means the legal property which results from intellectual activity in the industrial, scientific and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations. The second is to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.

- IP law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time- limited rights to control the use made of those productions.
- IP is traditionally divided into two branches: “Industrial Property and Copyright”.

Intellectual property shall include rights relating to:

- 1) Literary, artistic and scientific works;
- 2) Performances of performing artists, phonograms and broadcasts;
- 3) Inventions in all fields of human behaviour;
- 4) Scientific discoveries;
- 5) Industrial designs;
- 6) Trademarks, service marks, and commercial names and designations;
- 7) Protection against unfair competition and all other rights resulting from intellectual activity in industrial scientific, literary or artistic fields”.

Some of the important convention relating to the Intellectual Property Rights and India being a member are bound to obey to this convention, they are as under.

- Paris Convention for the Protection of Industrial Property (1967)
- Berne Convention for the Protection of Literary and Artistic Works (1971)
- TRIPS Agreement
- GATT and WTO Agreement
- Patent Cooperation Treaty 2001
- The Paris Convention for the Protection of Industrial property, 1967.
- The Berne Convention for the Protection of Literary and Artistic Works, 1971.
- The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, 1961.

16.3 SCOPE OF INTELLECTUAL PROPERTY

Intellectual property rights include copyright, patent, trademark, geographic indication of origin, industrial design, trade secrets, database protection laws, publicity rights laws, laws for the protection of plant varieties, laws for the protection of semi-conductor chips (which store information for later retrieval), etc.

Patents:

A patent is a type of intellectual property right which allows the holder of the right to exclusively make use of and sale an invention when one develops an invention. Invention is a new process, machine, manufacture, composition of matter. It is not an obvious derivation of the prior art (It should involve an inventive step). A person who has got a patent right has an exclusive right.

Copyright:

Copyright is a form of IPR concerned with protecting works of human intellect. The domain of copyright is literary and artistic works, might that be writings, musicals and works of fine arts, such as paintings and sculptures, as well as technology-based works such as computer programs and electronic databases.

Copyright lasts for a longer period of time. The practice is life of author plus 50 years after his/her life

Industrial Design Law:

It is the aesthetics and ergonomics of a product. It consists of three-dimensional elements, such as the creation of the product's shape, or two-dimensional ones, such as graphics, patterns and colors.

Trademarks Rights Law:

A trademark (also written trade mark or trade-mark) is a type of intellectual property consisting of a recognizable sign, design, or expression which identifies products or services of a particular source from those of others, although trademarks used to identify services are usually called service marks.

Geographic Indication:

Geographical Indications ("G.I.s") identify a product as originating in a certain region or country. So for a G.I. product, its reputation for quality or authenticity is intimately linked to its geographical origin.

For Example: Darjeeling tea is a tea grown in the Darjeeling district,

A Solapuri chadar (सोलापुरी चादर), also known as Solapuri Cheddar ("Solapuri bed sheet"), is a cotton bed sheet made in the Solapuri city of the Indian state of Maharashtra.[1] These chadars are popular in India where they are manufactured using hand looms and are known for their design and durability.[2] Solapuri chadars were the first product in Maharashtra to obtain Geographical Indication (GI) Ratnagiri Hapus, Belgam – Kunda, Nagpur- Oranges

It is indications on products of the geographic origin of the goods. It indicates the general source. The indication relates to the quality or reputation or other characteristics of the good.

16.4 NATURE OF INTELLECTUAL PROPERTY RIGHTS

Intellectual properties have their own peculiar features. These features of intellectual properties may serve to identify intellectual properties from other types of properties. Thus, we will discuss them in brief.

1. It has a territorial based:

Any intellectual property issued should be resolved by national laws. Because intellectual property rights have one characteristic which other national rights do not have. In ownership of intellectual property of immovable properties, issues of cross borders are not probable. But in intellectual properties, it is common. A film made in Hollywood can be seen in other countries. The market is not only the local one but also international?

2. Giving an exclusive right to the owner:

It means others, who are not owners, are restricted from using the right. Most intellectual property rights cannot be implemented in practice as soon as the owner got exclusive rights.

3. It is assignable:

Since they are rights, they can obviously be assigned or licensed. It is possible to put a. Intellectual property can be bought, sold, or licensed or hired or attached.

4. Independence:

Different intellectual property rights subsist in the same kind of object. Most intellectual property rights are likely to be embodied in objects.

5. Subject to Public Policy:

They are vulnerable to the deep embodiment of public policy. Intellectual property attempts to preserve and find adequate reconciliation between two competing interests. On the one hand, the intellectual property rights holders require adequate remuneration and on the other hand, consumers try to consume works without much inconvenience. Is limitation unique for intellectual property?

16.5 SUMMARY

Concept of Intellectual Property Rights:

Intellectual property, very broadly, means the legal property which results from intellectual activity in the industrial, scientific and artistic fields. Countries have laws to protect intellectual property for two main reasons.

Scope of Intellectual Property: Patents, Copyright, Industrial Design Law, Trademarks Rights Law, Geographic Indication.

Nature of Intellectual Property: It has a territorial based, Giving an exclusive right to the owner, It is assignable, Independence, Subject to Public Policy

16.6 QUESTIONS

1. Explain the concept and nature of Intellectual Property Rights
2. What is the Scope of IPR? Explain

COPYRIGHT

Unit Structure

- 17.0 Objective
- 17.1 Introduction
- 17.2 Meaning and Definition
- 17.3 Duration or Term of Copyright and Fair Use
- 17.4 Rights of Copyright Holder
- 17.5 Registration
- 17.6 Infringement of Copyright and Remedies
- 17.7 Summary
- 17.8 Questions

17.0 OBJECTIVE

After studying the unit, the students will be able to:

- Understand the Rights of Copyright holder
- Understand the Procedure for Registration of work done.
- Understand the infringement of copyright and remedies available
- Aware about the term of copyright and fair use.

17.1 INTRODUCTION

A new Copyright law was enacted in the year 1957 Before the Act of 1957, the Act of 1914 was functional before this act has come in to existence the same was an extension of the British Copyright Act, 1911. In May, 2012 the Parliament of India unanimously passed a bill named Copyright Amendment Bill, 2012. This Bill has an objective to bring Indian copyright laws at international level and in compliance with the World Intellectual Property Organisation treaties such as the WIPO Copyright Treaty (WCT) and the WIPO Performance and Programme Treaty (WPPT). Further, the main highlights of the 2012 Amendment bill are:

- Amendments in the right to artistic work such as cinematograph films and sound recordings.
- Amendments in the mode of grant of license and assignments
- Protection against internet piracy.
- Amendments in accordance with WCT and WPPT.

Copyright ownership provides the owner the exclusive right to take the benefit or use of the work, with some exceptions. When a person come up or create an original work, he or she will be the automatic owner of that work and owns copy right to that work.

Following are the types of works are entitle for copyright protection under this act:

- Audiovisual works, such as TV shows, movies, and online videos
- Visual works, such as paintings, posters, and advertisements
- Sound recordings and musical compositions
- Video games and computer software
- Dramatic works, such as plays and musicals
- Written works, such as lectures, articles, books, and musical compositions

17.2 MEANING AND DEFINITION

Copyright means the exclusive right to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:

A. In case of a literary, dramatic or musical work, not being computer programme

- i. To reproduce the work in any material form including the storing of it in any medium electronic means;
- ii. To issue copies of the work to the public not being copies already in circulation;
- iii. To perform the work in public, or communicate to the public ;
- iv. To make any cinematograph film or sound recording in respect of the work
- v. To make any translation of the work;
- vi. To make any adaptation of the work;

In relation to a literary work or an artistic work, adaptation shall mean the conversion of work into a dramatic work by way of performance in public or otherwise. In relation to dramatic work, adaptation shall mean any abridgement of the work or any version of the work in which the story Or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodicals. In relation to a musical work, adaptation shall mean any arrangement or transcription of work.

B. In the case of a computer programme:

- i. To do any of the acts specified in clause (a) above;
- ii. To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme.

C. In case of an artistic work:

- i. To reproduce the work in any material form including the storing of it in any electronic media.
- ii. To communicate the work to the public;
- iii. To issue copy of the work to the public not being copies already in circulation
- iv. To include the work in any cinematograph films;
- v. To make any adaptation of work.

D. In case of cinematograph films:

- i. To make copy of the film including a photograph of any image forming part there of or storing of it in any medium by electronic or other means,
- ii. To sell or give on commercial rental or offer for sale or for such rental, any copy of the film.
- iii. To sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions.
- iv. To communicate film to the public,

E. In the case of sound recording:

- i. To make any other sound recording embodying it, including storing of it in any medium by electronic or other means,
- ii. To sell or give on commercial rental or offer for sale or for such rental any copy of sound recording,
- iii. To communicate the sound recording to the public

Literary works are given a safeguard from being stolen or it is protected by copyright as they are appeared in physical form. Such literary works includes, newspapers, books, computer, magazines, journals, anthologies, novels, software and programmes, letters, e-mails, poetry, lyrics of songs, tables and compilations. Literary works are not only defined to the above-mentioned things but also includes encyclopedia entries, abstracts, dictionary meanings and individual poems are protected within the shield of copyright laws.

Copyright defined as “the legal right of the owner of intellectual property” In simpler terms, copyright is the right to copy. This means that the original creators of products and anyone they give authorization to are the only ones with the exclusive right to reproduce the work.

OWNERSHIP OF COPYRIGHT: (Sec 17)

a) In the case of literary, dramatic or artistic work:

If these work made by the author in the course of his employment by the proprietor of a newspaper, magazine, or similar periodical under a contract of service or apprenticeship for the purpose of publication in the newspaper, magazine or similar periodical, the said proprietor shall be the first owner of the copyright. This is however in the absence of any agreement to the contrary between the author and his employer.

b) In case of photograph, painting or portrait etc.:

In the case of a photograph taken, or a painting or a portrait drawn, or an engraving or a cinematograph made, for valuable consideration, at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright

c) In case of any address or speech delivered in public:

the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of another person, such other person shall be the first owner of the copyright therein even if the person who delivers or on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf such address or speech is delivered.

d) Government work:

Government shall, in the absence of any agreement to the contrary, the first owner of the copyright therein.

e) Work of international organisation:

The international organisation concerned shall be the first owner of the copyright therein.

WORK IN WHICH COPYRIGHT SUBSISTS:-

Work means any of the following works, namely;

- **Literary work:** it includes computer programmes, tables including computer databases.
- **Musical work:** this means a work consisting of music and includes any graphical notation of such work. It does not include words or action intended to be sung or performed with music.

- **Artistic work:** it means a painting, a sculpture, a drawing or a photograph, whether or not any such work which possesses artistic quality.
- **Cinematograph film:** Cinematograph film means any work of visual recording and includes a sound recording accompanying such visual recording. A ‘producer’ in relation with this means a 5) Sound recording: this means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made.
- **Broadcast:** broadcast means communication to the public by any means of wireless diffusion or in form of signs or sounds.
- person who looks after making the work.
- Literary/dramatic = Who creates
- Musical work = The composer
- Sound recording = The producer
- Photograph = The photographer
- Computer generated work = person who causes the work to be created.

17.3 DURATION OR TERM OF COPYRIGHT AND FAIR USE

- a) Work published during the life time of the author the term of a copy right is for the lifetime of the author + 60 years.
- b) Cinematographic films, records, posthumous publication, anonymous publication, works of government and International agencies, the term is 60 years from the beginning of the calendar year following the year in which the work was published.
- c) Broadcasting = 25 years

FAIR USE:

Fair use is a legal theory that says “you can reuse copyright-protected material under certain circumstances without getting the copyright owner’s permission.”

Copyright Act, 1957, section 52 describes that certain acts or works that cannot be treated as an infringement of copyright like fair dealing with a literary, dramatic, musical or artistic work which is not a computer program for the purposes of-

- (i) “Private or personal use, including research;

- (ii) Criticism or review, irrespective of that work ;
- (iii) The reporting of current events and current affairs, lectures delivered etc.

17.4 RIGHTS OF COPYRIGHT HOLDER

The Copyright Act, 1957 provides copyright protection in India. It confers copyright protection in the following two ways:

- (A) Economic rights of the author, and
- (B) Moral Rights of the author.

1. Right of Reproduction:

This is the most important right which is attained after the copyright protection. This particular right gives the authority the person having such copyright to make copies of the same protected work in any format. For example: Copying, a song on a Compact Device or any sound and visual recording can be considered as a reproduction of the content.

2. Right to Distribute:

This right is belongs to the right of reproduction or they are in the same group. A person with whom the copyright of a particular work can distribute his work in any manner. For example: He may take a print and distribute to the general public at no cost or transfer some of right or all the rights of holding to any one of his choice.

3. Right to make Derivative Works:

The copyright has the right to use his work in number of ways, for example making translations in any form. For example a adaptation as making a Bollywood Movie Novel. Right to Publicly Perform

4. Right to Follow:

5. Right of Paternity:

The ordinary copyright law some time fails to protect the computer software and other data related information as the essential element of creation is not appeared in such databases. Therefore, there was a need for new law to protect such software and databases. A database is an arrangement of information which may not be creative; it may still require protection from unauthorized copying. Such database right are conferred for a fifteen year period.

6. Private Copying:

This right is an exception to the reproduction rights which are accomplished by the owner. According to this right, any person can make copies of the copyright protected work if it is proved that such copying is

for educational purpose and that there is no commercial intention behind such copies being made.

Copyright

17.5 REGISTRATION

Copyright Registration Process:

1. Filing of Application:

This is the first step under the procedure for the Copyright registration. The author of the original work / his agent/ or any representative on his behalf can file an application that is FORM IV along with requisite fees either through portal available on the official website of Copyright or physically at the copyright office. Separate application to be filed along for registration of each work with Registrar.

2. Examination:

Once the application is submitted is the examination of the copyright application. An examiner takes minimum 30 days to make a review of the said application. If there is no objection is carried or raised by others then the examiners shall continue to make further scrutineer of the application where no discrepancy found

3. Registration:

This is the final stage for registration. When the Registrar is satisfied with the document supplied along with an application form in support of the claim made, he shall enter the details in the register of copyright and further issues the Registration Certificate.

17.6 INFRINGEMENT OF COPYRIGHT AND REMEDIES

- When copyright is infringed?
- Copyright in a work shall be deemed to be infringed-
 - a) By a person without a license granted by the owner of the copyright or in contravention of the conditions of a license so granted-
 - i) Does anything, the exclusive right to do which is conferred upon the owner of copyright; or
 - ii) Permits for profit any place to be used for communication.

Where any person:

- i) Makes for sale or hire or by way of trade displays for sale or hire any infringing copies of the work;
- ii) By way trade exhibits in public any infringing copies of the work.
- iii) Imports into India any infringing copies of the work.

When copyright not infringed? The following acts shall not constitute an infringement of copyright:

- 1) A fair dealing with any work, not being a computer programme for private or personal use.
- 2) Making of copies or adaptation of a computer programme by lawful possessor of a copy of such programme.
- 3) The reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force
- 4) The reading or recitation in public of reasonable extracts from a published literacy or dramatic work
- 5) The reconstruction of a building or structure in accordance with the architectural drawings to which building was constructed.
- 6) The making of ephemeral recording by a broadcasting organization using its own facilities for its own broadcast.

CIVIL REMEDIES [secs . 55, 57, 58 & 62]:

- **Where copyright** in any work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction, damages, accounts and otherwise as may be conferred by law for the infringement of a right.
- **The author shall** also have a right to claim authorship of work or claim damages in respect of any distortion, mutilation, modification in relation to the said work which is prejudicial to his reputation.
- **Protection of separate rights:** - where the several rights comprising the copyright in any work owned by different persons the owner of such right shall be entitled to the remedies {sec 56}
- **Author's special rights:** - after the assignment of the said copyright, wholly or partially, the author of a work shall have the right-
 - a) **To claim** authorship of the work
 - b) **To restrain** or claim damages in respect of distortion, mutilation, if such acts would be prejudicial to his reputation {sec 57}.
 - c) **Jurisdiction:** every suit or other civil proceeding in respect of the infringement of copyright in any work shall be instituted in District court having jurisdiction. {sec 62}.

17.7 SUMMARY

INTRODUCTION: Copyright ownership provides the owner the exclusive right to take the benefit or use of the work, with some exceptions. works are entitled for copyright protection under this act: Audiovisual works, such as TV shows, movies, and online videos, Visual

works, such as paintings, posters, and advertisements, Sound recordings and musical compositions, Video games and computer software, etc

Work in which Copyright subsists: Literary work: Musical work: Artistic work: Cinematograph film: Broadcast:

Duration of Copyright and Fair use: Work published during the life time of the author the term of a copy right is for the lifetime of the author + 60 years. Broadcasting 25 years. Fair use is a legal theory that says “you can reuse copyright-protected material under certain circumstances without getting the copyright owner’s permission.”

Rights of Copyright holder: Right of Reproduction, Right to Distribute, Right to make Derivative Works, Right to Follow, Right of Paternity, Private Copying.

Copyright Registration Process: Filing of Application, Examination, Registration Copyright Infringement and remedy. Makes for sale or hire or by way of trade displays for sale or hire any infringing copies of the work; by way trade exhibits in public any infringing copies of the work. Civil Remedy

17.8 QUESTIONS

1. What is Copyright?
2. What work does copyright subsists?
3. What are the rights of copyright holder?
4. Discuss the issues of copyright infringement and the applicable remedies to it.

5. Write Short Note on:-

- a. Fair use
- b. Procedure for registration of work

PATENT

Unit Structure

- 18.0 Objectives
- 18.1 Introduction
- 18.2 Meaning and Definition
- 18.3 Term of Patent
- 18.4 Requisites for Grant of Patent
- 18.5 Procedure for Obtaining Patent
- 18.6 Patent Infringement and Remedies
- 18.7 Summary
- 18.8 Questions

18.0 OBJECTIVES

After studying the unit, the students will be able to: -

- Understand the Meaning and definition of patent
- Understand the Procedure obtaining patent
- Understand the infringement of Patent Rights and remedies available
- Aware about the term of copyright and fair use.

18.1 INTRODUCTION

A patent is a Monopoly and legal rights granted by a government or the head of the state in return for invention. A granted patent gives the proprietor the right to prevent others using the invention in the territory to which the patent relates. A patent does not, give a positive right to use an invention.

18.2 MEANING AND DEFINITION

Patent is an exclusive right granted by a government for an invention that is new, involves inventive step and is capable of industrial application. Section 2(1)(m) of the Indian Patent Act, 1970 defines patent as: “patent” means a patent for any invention granted under this Act.

Patent means a patent for any invention granted under the Act. By grant of patent, protection by way of a monopoly is extended to the inventor for a limited period for

- a. inventing a new product; or
- b. inventing a new process; and

- c. new invented product or process is capable of industrial application.

When a patent is granted and is in force in respect of either the article or the process it is called patented article and patented process respectively. The person in whose favour the patent is granted and who is entered in the register of the patent is called patentee. Patentee includes an exclusive licensee. Exclusive licensee means a licence from a patentee which confers on the licensee any right in respect of the patented invention.

18.3 TERM OF PATENT

Section 53 of the Patents Act, 1970 deals with the determination of term of patent in India. Subsection 1 of section 53 provides that the term of every patent granted shall be 20 years. The term of patent can be expired on the expiry of 20 years a fixed term. Secondly if the patentee is unable to pay or ignored to pay the annual renewal fees. Governor at any time can impose the restriction on using this monopoly rights to the patent holder.

18.4 REQUISITES FOR GRANT OF PATENT

A patent is a type of intellectual property that gives its owner the legal right to exclude others from making, using, or selling an invention for a limited period of time in exchange for publishing an enabling disclosure of the invention.

Section 2(1)(j) of the Patent Act, 2005, defines the “invention” as a new product or as process involving an inventive step and capable of industrial application.

1. The innovation must be new and not have prior use:

The invention must be new and not been used prior. It should be genuine and not known to others before. It should not published earlier anywhere.

2. The innovation is useful:

This requirement does not relate to whether the new product, process or invention is ‘useful’ in terms of whether or not someone would buy it. Instead, it relates to whether the invention is capable of being made in accordance with the claims and information in the patent.

From April 2013, there has been a requirement to disclose a specific, substantial and credible use for the invention in the patent specification

3. It should have Industrial Applicability:

Only those inventions are patentable, wherein having industrial applicability.

4. The innovation is inventive:

This requirement of an inventive step relates to the 'obviousness' of the new product, process or invention. If it is 'obvious' to a skilled person, it is not patentable. It must have a feature of inventiveness.

PATENTABLE INVENTION AND NON- PATENTABLE INVENTION:**Patentable Inventions:**

- a) New products such as toys, appliances, tools, medical devices, pharmaceutical drugs
- b) New process, such as a manufacturing process or an industrial method or process
- c) Software
- d) Business methods
- e) Some types of biological materials

Not patentable Inventions:

- a) Artistic creations
- b) Mathematical algorithms or models
- c) Abstract intellectual or mental concepts or processes
- d) Plans or schemes
- e) Principles or theories
- f) The mere discovery of a scientific principle or the formulation of an abstract theory
- g) Methods of agriculture or horticulture.
- h) Inventions relating to atomic energy are not patentable.
- i) The mere arrangement or re-arrangement or duplication of known devices
- j) An invention which is frivolous and obvious
- k) Any process for medicinal, surgical, curative, prophylactic or other treatment of human being.

18.5 PROCEDURE FOR OBTAINING PATENT

A patent, granted by the government or by the head of the State, it confers an exclusive right to an inventor to make, use, and sell his invention. This exclusive right available for 20 years from the date of filing. The conceptional idea is to safeguard the inventions that are created and

therefore, encourage more noble developments. Let us look into the steps involved in a patent filing in India. Following are the procedures for obtaining the Patent.

1. Drafting a patent application:

An application in Form-I may be filed and submitted. It can be filed by the owner or the legal representative of the inventor.

2. Filing the Patent Application:

This is where the actual process starts. After drafting the patent application, this can be filed in the government patent office as per the application form in Form 1. A receipt would be generated with the patent application number. One can also file a provisional patent application, in case; the invention is at an early stage under Form 2.

3. Publication of the Application:

After filing the complete specification, the application is published after 18 months from the date of filing. There is no need for any special requirement from the applicant for publication. In this process an objection also can be demanded.

4. Respond to the Objections:

By way of first examination report the applicant need to respond the objection received from the patent office. The applicant is expected to file a written response to the objection raised in the examination report. Such hearing of an objection can be called for by physical hearing or video conferencing.

5. Grant of Patent:

After responding all objections, the application would be placed for a grant once it is found to be meeting all patentability requirements, and finally, the patent will be granted to the applicant. The grant of a patent is notified in the patent journal which is published from time to time.

18.6 PATENT INFRINGEMENT AND REMEDIES

Patent Infringement:

Patent infringement is the commission of a prohibited act with respect to a patented invention without permission from the patent holder. It occurs when someone violates the patent rights an inventor has in his invention by making, using or selling the invention without the patent owner's permission.

Remedies Available:**RELIEFS THAT MAY BE GRANTED: S- 108**

The reliefs available to a successful plaintiff in a suit for infringement include-(i)an injunction;(ii)damages;(iii)an account of profits;(iv)an order for deliver-up or destruction(v)certificate of validity; (vi)costs. Injunction: Injunction is a preventive civil remedy.

Injunction is of two kinds:

- (i) Interlocutory /temporary injunction and
- (ii) Permanent injunction.

Temporary injunction is limited to a specific period or till the time the case is finally decided on merit. The permanent injunction is granted after hearing the parties on the merits of the case. The permanent injunction is limited to the duration of the patent.

DAMAGES OR ACCOUNT OF PROFITS: The plaintiff is entitled to the remedy of either damages or an account of profits. The plaintiff is given the option to elect one of them.

SEIZURE OR FORFEITURE OF INFRINGING GOODS AND IMPLEMENTS: Apart from the other reliefs which a court may order that the goods which are found to be infringing and materials and implements which are predominantly used in the creation of infringing goods shall be seized, forfeited or destroyed, as the court deems fit under the circumstances of the case without payment of any compensation.

The usual criminal remedies are punishment by imprisonment or by a fine or both.

18.7 SUMMARY

Introduction: Patent is an exclusive right granted by a government for an invention that is new, involves inventive step and is capable of industrial application.

Term of Patent: Term of every patent granted shall be 20 years. The term of patent can be expired on the expiry of 20 years a fixed term.

Requisites for Grant of Patent:

The innovation must be new and not have prior use, The innovation is useful: It should have Industrial Applicability, The innovation is inventive:

Procedure for obtaining Patent: Drafting a patent application: Filing the Patent Application, Publication of the Application, Respond to the Objections,

Grant of Patent:

Patent Infringement: Patent infringement is the commission of a prohibited act with respect to a patented invention without permission from the patent holder. It occurs when someone violates the patent rights an inventor has in his invention by making, using or selling the invention without the patent owner's permission. Remedies Available : Interlocutory /temporary injunction and permanent injunction.

18.8 QUESTIONS

1. Explain the Concept of Patent and its applicability
2. What is Patentable and What things are not Patentable?
3. What are the procedure for obtaining Patent?
4. Write Short Note
 - a. Infringement of Patent Rights and Remedies available
 - b. Term of Patent
 - c. Requisites for grant of patent.

TRADEMARK

Unit Structure

- 19.0 Objectives
- 19.1 Introduction
- 19.2 Meaning and Definition
- 19.3 Registration of Trademark
- 19.4 Types of Trademarks
- 19.5 Functions of Trademark
- 19.6 Trademark Which Cannot Be Registered.
- 19.7 Passing off
- 19.8 Trademark Infringement
- 19.9 Remedies Available
- 19.10 Summary
- 19.11 Questions
- 19.12 References: Webliography

19.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the Meaning and definition of Patent
- Understand the Procedure for registration of Trademark
- Understand the functions of Trademark and meaning of ‘Passing off’
- Understand the infringement of Trademark and Remedies available

19.1 INTRODUCTION

Trademark is a type of intellectual property rights. Intellectual property rights allow public to maintain ownership rights of their innovative product and creative mind. The intellectual property came to light because of the efforts of human efforts, so it is limited by a number of charges for the registration and charges for infringement. Types of intellectual property are Trademarks, Copyright Act, Patent Act, and Designs Act.

19.2 MEANING AND DEFINITION

A trademark includes a name, word, or sign that differentiates goods from the goods of other enterprises. Marketing of goods or services by the procedure becomes easier with a trademark because identification of product with the trademark is the essence of this act. The owner can prevent the use of his mark or sign by another user. A trademark can be a logo, image mark, picture mark or a slogan.

According to Section 2(1) (zb) of the Trade Marks Act, 1999, a 'trademark' “means a mark which is capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others, and may include the shape of goods or their packaging and combinations of colours.”

19.3 REGISTRATION OF TRADEMARK

1. Filing Trademark Application

The first step is to file a trademark application at the Trademark Registrar in India. Nowadays, filing is mostly done online. Once the application is filed, an official receipt is immediately issued for future correspondence.

2. Examination

On filing of trademark application, the same is examined by the examiner to find out whether any anomalies or discrepancies are there. This process may take around one year. An examiner may accept the trademark without any reservation or with condition.

If the application form is accepted the trademark is published in the Trademark Journal.

3. Publication:

The step of publication is incorporated in the trademark registration process so that anyone who objects to the registering of the trademark has the opportunity to oppose the same. If, after 3-4 months from publication there is no opposition, the trademark proceeds for registration. In case there is opposition; there is a fair hearing and decision are given by the Registrar.

4. Registration Certificate:

Once the application proceeds for trademark registration, following publication in Trademark Journal, a registration certificate under the seal of the Trademark Office is issued.

5. Renewal:

The trademark can be renewed perpetually after every 10 years. Hence, logo or brand name registration can be protected perpetually.

19.4 TYPES OF TRADEMARKS

The Trademarks Act, 1999, allows the registration of various types of trademarks such as word marks, service marks, collective marks, certification marks, series marks logos/symbols and many other.

Following are the types of Trademarks in India

1. Word Marks. Word Marks are the most common types of trademarks that are registered in India. ...
2. Service Marks. Service Marks represent the service which a company or business deals in.
3. Logos and Symbols.
4. Shape of Goods.
5. Series Marks.
6. Collective Trademarks.
7. Certification Mark.
8. Geographical Indicators.

1. Word Marks:

Word Marks are the most common types of trademarks that are registered in India. These refer to any marks that are used to identify the products and services of a trading company or service-providing company. If the name of your product or service is text- based (contains text only) it will be registered under Word Marks

For Example - The word Nestle® is a registered as a Word-Mark.

2. Service Marks:

Service Marks represent the service which a company or business deals in. They distinguish different services available in the market .

For example - FedEx is a registered courier delivery service provider.

3. Logos and Symbols:

A logo is a printed/painted figure/design/character and do not consist of any letters/words/numerals. For word marks that are also used as a logo, the trademark needs to be registered both as a word mark and a device marks. In India, the registration for both these aspects can be made in a single application.

For example - Apple has a registered logo which is used on each of their products.

4. Shape of Goods

The shape of goods are categorized in Trade Dress (appearance of a product) wherein, other than a logo or label a product can also be distinguished based on its packaging.

For example - The bottle of Coca-Cola is distinguished from other brands on the basis of its bottle's shape.

5. Series Marks:

Service marks are trademarks which have a common syllable, prefix or suffix, thus denoting as a family of marks sharing a 'common name.' They should differ only as to matters of non-distinctive characters (goods, price, quality or size).

For example - McDonald's have a series of 'Mc' registered as word mark which represents their different product range such as Mc Chicken, Mc Veggie etc.

6. Collective Trademarks

These marks are linked with a group of people and not one single product or service. These trademarks are primarily owned by an organization, institutes or any association. They can be used by members of the organization to represent them as one the part.

They are "Badges of origin" which indicates the specific source of the individual, his/her products and services.

For Example - A chartered accountant can use the "CA" device as he is a registered member of the Institute of Chartered Accountants.

7. Certification Mark

The certification mark is created to show a specific quality standard that the company has met. This means that the public will be aware that the trader's goods or services are certified as it has met a particular standard, as defined by the certifying body that owns the certification mark.

Certification marks are used to define "Standard" of goods and services.

For Example - FSSAI - Certification for the quality of packaged food products.

8. Geographical Indicators: A geographical indication is used on products to show the unique nature, reputation and quality the products possess based on the place of origin

The Geographical Indicators are awarded by the GI Registry and is granted to natural, agricultural, manufactured and handicraft products that come from a specific geographical origin.

For Example - Darjeeling Tea is a GI under the Intellectual Property Rights.

19.5 FUNCTIONS OF TRADEMARK

A trademark serves the purpose of identifying the source or the origin of goods. Trademark performs the following four functions.

1. It helps in identifying the product and its origin.

2. It proposes to give the guarantee its quality.
3. It advertises the product. The trademark represents the product.
4. It creates an image of the product in the minds of the public particularly the consumers or the prospective consumers of such goods.
5. It helps the genuine buyer to protect themselves from the spurious goods. etc.

19.6 TRADEMARK WHICH CANNOT BE REGISTERED.

- a) The use of which would be likely to deceive or defraud or cause confusion in the minds of users.
- b) A mark the use of which would be contrary to any law for the time being in force;
- c) A mark containing scandalous or obscene matter;
- d) A mark comprising any matter likely to hurt the religious susceptibilities of any class or section of the community;
- e) A mark which would be not allowed to protection in court of law
- f) A mark which is simile with a trademark already registered in respect of the same goods or goods of the same description
- g) A word which is the accepted name of any single chemical name or chemical compound in respect of chemical substances.
- h) A geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India.

19.7 PASSING OFF

‘Passing off’ which can be used to enforce unregistered trademark rights. The law of passing off prevents one person from misrepresenting his goods or services as that of another.

The concept of passing off has gone changes in the near course of time. At first it was sticked to the representation of one person's goods as those of another. Afterwards it was extended to business and services. Subsequently it was further extended to professions and non-trading activities. Today it is applied to many forms of unfair trading and unfair competition where the activities of one person cause damage or injury to the goodwill associated with the activities of another person or group of persons.

In *British Diabetic Association V Diabetic Society*, both the parties were charitable societies. Their names were deceptively similar. The words 'Association' and 'Society' were too close since they were similar in derivation and meaning and were not wholly dissimilar in form. Permanent injunction granted.

19.8 TRADEMARK INFRINGEMENT

Section 29 of the Trade Marks Act prescribes the infringement of a trademark. In simple words, when the exclusive rights of the owner of the registered Trademark are violated, it is said to be an infringement of Trademark. The trademark registration provides the exclusive rights to the brand name to the proprietor i.e. the applicant. The certificate of trademark registration provides exclusive rights to the proprietor to use the brand name for their business activity falling under the class in which it is registered. In case, a third party uses the brand name in course of trade without permission of the owner, it is the violation of owner's right and is called as the infringement of Trademark.

Most common cases of trademark infringement include using closely or deceptively similar brand names or logos for associated goods and services; and using a mark that creates false impression or confusion with the registered trademark. For proving trademark infringement, the intention of creating confusion or commercial use is ground for support.

Certain situations under the law are also prescribed which are not considered as the infringement of trademark.

19.9 REMEDIES AVAILABLE

Civil Remedies for Trademark Infringement are available in following heads:

1. In the form of Injunction:

The action of an injunction is referred as stopping one person from doing particular activity or task through the judicial process. With respect to trademark infringement, it is restraining a person from unauthorised use of the trademark. Through a temporary or permanent stay, the Court grants protection to the trademark owner.

2. In the form of Damages:

Damages refer to the recovery of loss faced by the trademark owner through the trademark infringement. The monetary value of financial loss or brand impairment is recovered under this head. The amount of damages will be granted by the court after considering the actual and anticipated loss of owner due to infringement.

The damages in Trademark law as a relief has increasingly assumed importance and the main aim of the damages is to monetarily compensate.

3.Custody of infringing materials:

This remedy suggests that the Court may ask the infringer to deliver all the goods or products that are labelled with the brand name. Here, the Court may direct the authorities to withhold the related materials accounts and destruct all such goods. Where the trademark relates to services, i.e. a Service Mark is infringed; the order may be passed to stop the provision of the services immediately by the infringer.

19.10 SUMMARY

Meaning: A trademark includes a name, word, or sign that differentiates goods from the goods of other enterprises. a 'trademark' “means a mark which is capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others, and may include the shape of goods or their packaging and combinations of colours.”

Registration of Trademark: Filing Trademark Application, Publication, Registration Certificate, Renewal

Types of Trademarks: Word Marks. Service Marks. Logos and Symbols, Shape of Goods, Series Marks. Collective Trademarks. Certification Mark. Geographical Indicators.

Functions of Trademarks: It helps in identifying the product and it's origin. It proposes to give the guarantee its quality. It advertises the product. The trademark represents the product. It creates an image of the product in the minds of the public particularly the consumers or the prospective consumers of such goods.

Passing off: ‘Passing off’ which can be used to enforce unregistered trademark rights. The law of passing off prevents one person from misrepresenting his goods or services as that of another.

Trademark Infringement: Most common cases of trademark infringement include using closely or deceptively similar brand names or logos for associated goods and services; and using a mark that creates false impression or confusion with the registered trademark.

Civil Remedies: In the form of Injunction: In the form of Damages:

Custody of infringing materials:

19.11 QUESTIONS

1. Explain the concept of Trade Mark?
2. What are the functions of trademarks?
3. Explain various types of Trademarks

4. Write Short Note:
 - a. Passing off
 - b. Trademark infringement
 - c. Remedies available for infringement of trademark

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