

**Topic:- Incorporation of a Company under the Companies Act 2013.**

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## **Abstract**

Incorporation of a Company is a process by which a person " Company becomes a legal entity, It can be compared to the birth of a company. It is a legal process and is governed by the companies Act 2013.

The companies Act 2013 is less bulky as compared to its predecessor of 1956, it also changes provisions of minimum subscription, Interest call in advance as well as areas etc..

The advantage of incorporating a company is that the company can sue and be sued in its name, it can own property. Moreover incorporating saves the shareholders from having their personal assets liable to shareholders, it creates a limited liability for members.

The minimum requirement of members in a public is 7 and private company is 2.

As per section-2(20) of the Companies Act 2013, " Company " means a company is incorporated under this Act. On the basis of Incorporation of a Company there are two company:- (a) Statutory Company (b) Registered Company

### **• Statutory Companies:-**

These companies are constituted by a special Act of parliament or state Legislature. These companies are formed mainly with an intention to provide the public services. Through primarily they are governed under that special Act, still the companies Act, 2013 will be applicable to them except where the said provisions are inconsistent with the provisions of the Act creating them ( as special Act prevails over general act). Example:- Reserve Bank of India, Life insurance corporation of India etc..

### **• Registered Companies:-**

Companies registered under the Companies Act,2013 or under any previous company law are called registered companies. Such companies comes into existence when they are registered under the Companies Act and a certificate of Incorporation is granted to it by the registrar.

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

## **Introduction**

- The formation and Incorporation of a Company are very much similar to the birth of human like it also goes through various stages of formation just like birth of human being.
- So many ground works are carried out to bring a company into existence.
- The process of an idea converting into a company includes various stages.
- The functions, duties and liabilities of a promoter need to be understood.

## **Stage of Promotion - Meaning of promoters**

- This stage of Incorporation deals with the promotions of the company which is yet to be incorporated.
- The promoter at this stage enters the market of the potential investors to collect the investment towards the idea of establishing the company.
- The promoter includes the confidence on the idea, over the investors and tries to build upon the investment so as to be able to incorporate the company.
- Promoter has been defined under Section- 2(69) of the Companies Act 2013. Technically a promoter is a person so named in the prospectus of the company.
- The company shall also name their promoter in the annual return made under section-96 of the Companies Act 2013.
- A promoter to a company is like what a parent is to a child. The promoter along with convincing investors towards the idea of the company also brings together the physical capital of the labour, raw materials, managerial ability, machinery etc..

## **The idea of promoter has three different perspectives:-**

1. Promoter is someone who is identified in the prospectus of the company or is mentioned as a promoter in the annual returns of the company and/ or.
2. Promoter is a person who has the power to appoint majority of members of board of directors or persons having authority over making policies or making decisions of the company and/or.
3. Promoter is a person on whose advice board of directors are accustomed to act.<sup>1</sup>

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<sup>1</sup> Section-2(69) and Section-96 of Companies act 2013.  
Promoter to a company is like parents is to a child.

## **Definition of promoter (By Author)**

**According to L.J. Brown.** “The term promoter is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence.”

**According to Justice C. Cockburn.** “Promoter is one who undertakes to form a company with reference to a given object and to set it going, and who takes the necessary steps to accomplish that purpose.”

**According to Palmer,** “Company promoter is a person who originates a scheme for the formation of the company, has the memorandum and the articles prepared, executed and registered and finds the first directors, settles the terms of preliminary contracts and prospectus (if any) and makes arrangement for advertising and circulating the prospectus and placing the capital.”

**According to Guthmann and Dougall.** “Promoter is the person who assembles the men, the money and the materials into a going concern.”

Legal Position of a Promoter is that he is not an agent or trustee of the company. Promoter has a fiduciary relationship with the company which is based on trust and confidence. Therefore, a promoter is obliged to disclose all the relevant facts and any secret profit which is made by him in relation to the formation of the Company.

The promoter of the company has a fiduciary position. They can create and mold the company as well. The promoter has full authority to define how and when and in what shape and under what supervision, it will start into existence and begin to act as a trading corporation.<sup>2</sup>

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<sup>2</sup> Promoter plays a vital role in Incorporation of company under Companies Act 2013. Section- 2(69) talks about the role of promoter towards the company .

## **Functions of a Promoter**

1. **Spotting a Business demand in the market** a promoter before promoting a company idea first identifies a potential business opportunity. The potential opportunity may be any new product or a new services or may even be the production or manufacture of already established product by new means.
2. **The practicality of the Idea** The promoter has to evaluate the idea of the new potential company and has to see if it is technically and financially feasibility of the idea can be evaluated using the below mentioned three tests:-
  - **Technical Conceivability:-** The ideas of the business may be good but sometimes they may be technically difficult in reality. Hurdles regarding raw material acquisition, difficulty of making a product with limited funds etc. can be there.
  - **Budgetary Feasibility:-** Sometimes it may not be possible to gather a large fund required for the business. Financial institutions may sometimes be hesitant to give huge loans to new ventures.
  - **Monetary Feasibility :-** A business idea may be technically and financially feasible but not monetarily appreciable. It may not be gainful or may not return enough profits. In such a case, the promoters refrain from promoting the idea of business.
3. **Name of the Company** The promoter proposes a name to the company and applies to the Registrar of Companies in the jurisdiction where the company wants to have its registered head office. Application to register contains three names " X or Y or Z" in the sequence of priority and promoter follows section- 8 of the Companies ( Incorporation) Rules,2014.
4. **Finalizing signatories of MOA** The promoters decide who all will be the members signing the Memorandum of Association of the company which is to be formed. Generally, the signatories of the MOA are the first Directors of the company. The written consent of the signatories of the Memorandum is essential to become Directors of the company.
5. **Hiring professionals and preparation of necessary documents** promoters appoint professionals such as mercantile bankers,auditors,lawyers etc. For the presentation of necessary documents that are to be filled with the registrar of Companies during the registration of the company like the Memorandum of Association, articles of Association etc.<sup>3</sup>

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<sup>3</sup> The promoter empowers new power in the company/market. Under Companies Act 2013.

## **Duties of the promoter**

Various judicial interpretation have decided that the relation between the promoter and the company is fiduciary in nature. Hence the duties of promoter are:-

1. **Duty to disclose, secret profit** The promoter stand in a fiduciary relationship with the company which will be incorporated. The promoter must disclose the secret profit made by him to the company. However the promoter has right to claim expenses, if any, made during the Incorporation stage from the company.
2. **Duty to keep the company informed about the transaction** A promoter may intend to sell, lease or rent any property of the company. But if such transaction is made without informing the company, the company may repudiate ( refuse to accept) such contract of sale ,lease or rent ,the company may even claim the profit made by the promoter from the transaction by allowing such a contract made by the promoter.
3. **Fiduciary duty towards the future shareholders** The promoter is bound by a fiduciary relationship with the company. Relation of trust between promoter and future shareholders goes to show that the promoter shall uphold app the values expected to him by the company.
4. **Duty to disclose profits gained during promotion** The promoter during the promotion of the company may encounter certain private arrangements which may cause him his personal profit. Since the promoter stands in fiduciary relationship with the company he must disclose the profits and gain during promotion of the company.
5. **Duty to pay the Company Whatever received as trustee** The promoter stands in fiduciary relationship with the company, and it is the duty of the promoter to pay back to the company Whatever he has obtained as the trustee of the company.

## **Liabilities of the Promoter**

A promoter is subjected to liabilities under the various provisions of the Companies Act 2013. The liabilities of the promoter are:-

1. **Liability to justified the transactions to the company** The promoter stands in a fiduciary relationship with the company, therefore the company has all rights to enquire into the transaction made by the promoter without the consent of the company. The company while dealing with such a transaction may either repudiate such an agreement made by the promoter with the third party or may even sue the promoter to recover the money alone with profits s made by him behind the back of the company.

2. Liability against the misstatement made in the prospectus (Section- 26) of the companies act 2013 provides the matters that are to be stated in the prospectus . The may be held liable for not having complied with the provision. Under **section- 34 &35** of the companies act 2013, promoter may be held liable for any untrue statement made in the prospectus because of which a person subscribed for shares and debentures believing the prospectus statement to be true.

3. Personal Liability towards the Contracts All the contracts entered upon the promoter during pre- incorporation stage of the company ,the promoter may be held personally liable for such contracts. Till its discharged according to contract terms or when the company takes up the liability from the promoter after it is incorporated.

4. Liability of the promoter during the winding – up process of the company In the process of winding up, the official liquidator under **Section- 340** of the companies act 2013 may by application request the court to make the promoter liable for the misfeasance or breach of trust towards the company. Also under **Section-300** of the Companies Act 2013 promoter may be liable to examination if it is alleged by the liquidator that there is fraud in the promoter or the Formation of the company.

**Case laws:- Prabir kumar Mishra V. Ramani Ramaswamy( 2010) 104 SCL 174,**

It has held that to fix liability on a promoter, it is not necessary that he should be either a signatory to the Memorandum/ Articles of association or a shareholder or a director of the company. Promoter civil liability to the company and also to the third parties remain in respect of his conduct and contract entered into by him during pre- Incorporation stage as agent or trustee of the company.

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<sup>4</sup> Case law:- Prabir kumar Mishra V. Ramani Ramaswamy (2010)104 SCL174 this case relates to the promoter liability under the Companies Act 2013.  
Name of company under Section-8 of company act 2013.



## **Registration/ Incorporation of the company**

Registration of the company is the legal recognition given to the body corporate under the company law. The procedure of registration is provided under **Section- 7** of the Companies Act 2013.

A company can get incorporated as various types of businesses which generally depends on the need and the capital of the business owner. These various types include one person Companies, Public limited companies, Private Limited companies, Limited liability partnerships, Foreign companies etc.

According to Section-33 of Companies act, 2013, the registration of a company is obtained by filing an application with the registrar of Companies. The following documents should be submitted. These include the **Memorandum of Associations (MOA) and the Articles of Association (AOA).**<sup>5</sup>

### **• Memorandum of Association (MOA):-**

The preparation of a document known as Memorandum of Association is the first step in the formation of a company. This document contains the constitution of the company. According to **Section- 12 & 13** of the Companies Act 2013, the document is divided into five clauses:-

- i) **Name clause:-** The first clause of the Memorandum states that the name of the proposed company. According to Section-20, companies Act, 2013, the name should not be undesirable. Generally, a name is said to be undesirable when it is too close to the name of another company. The name should not mislead as to the nature of the business carried on by the company. If the company is with “limited liability “ the last word of the name should be “ limited “ and in case of a private company “ private limited “.

- ii) **Registered office Clause:-**The second clause of the Memorandum states the state in which the registered office of the company shall be situated. After Incorporation, the exact address of the registered office should be sent to the Registrar.

- iii) **Objects Clause:-** The third clause of the Memorandum states the objects of the proposed company. The company carries on business with other people’s money and therefore the investors must be informed of the objects in which their money is going to be used. The objects clause has to be divided into two sub- clauses, the first sub- clause states the main objects to be pushed by the company on its Incorporation and the object incidental or ancillary to the main objects are covered under the sub-clause called other objects.

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<sup>5</sup> Registration is done under **Section-7** of Companies act 2013.  
**Section-33** of Companies act under (MOA & AOA)

**iv) Liability Clause :-** The fourth clause has to state the nature of the liability of the members of the business. The clause will state whether the liability of the members shall be limited, and if so, whether limited by shares or by guarantee, or unlimited.

**v) Capital Clause :-** The last clause states the amount of capital with which the company is proposed to be registered and the kinds, number and value of shares into which the capital is to be divided.<sup>6</sup>

• **Articles of Association (AOA):-**

Articles of Association is the second important document, which in the case of some companies, has to be registered with the memorandum. Articles are internal regulations and bye- laws needed to define how the company will actually operate. Companies which must have the articles of association are:

- i) Unlimited Companies**
- ii) Companies limited by guarantee; and**
- iii) Private companies Limited by shares.**

Articles of Association may prescribe such regulations for the company as the subscribers to the Memorandum deem convenient. The Act gives the subscribers a free hand. Any stipulations as to the relations between the company and its members, and between the members inter it may be interested in the articles. It must also be noted that the document must not be in violation of the provisions laid out in the Act.

This provision lays down the requirements for the Incorporation of the company.

• **The details of the documents required are:**

1. Memorandum of Association, which is the constitution of the company wherein the signatories in case of a public company has been fixed to a minimum number of 7 and for a private company a minimum number of 2 and the documents is duly stamped.
2. Article of Association, this is the document filled along with the MOA ( Memorandum of Association).
3. List of Directors, wherein the details regarding their names, address and occupation is mentioned.
4. Written consent of the directors, the consent of the directors is to be submitted to the registrar of the Companies.
5. Verification document- such document is to be signed by recognized chartered accountant, company secretary or Advocate.<sup>7</sup>

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<sup>6</sup> Memorandum of Association is defined under Section-12 &13 of Companies act 2013. The documents is divided into five clauses.

<sup>7</sup> Article of association is the second document .which is registered with MOA. For Public Company-7 , Private Company-2.

## **Process of Company Registration**

1. In the website of ministry of corporate affairs, one can register the company online by completing various legal steps of the Incorporation.
2. The process of Incorporation or registration firstly requires an application for the unique name which shall be reserved for the proposed company against the payment of Rs.1000.
3. The process then involves filling up the form online, the form is named, simplified Performa for Incorporation. The Performa gives the option to incorporate a company online, which starts by filling up the details regarding the information of the promoter of the company.
4. Secondly, the electronic Performa in the form number INC-33 and INC-34 provides the option of filling up the e- MOA ( Memorandum of Association) and e- AOA ( Articles of Association) respectively. MOA is the constitution of the company and describes the object of the company and also describes the directors involved during the Incorporation of the company.
5. After the MOA, the e- AOA option is provided so as to ease the process of Incorporation even future, an e- AOA lays down rules and regulations of company affairs. e- AOA also lays down the powers, duties and rights of managers, officers and board of directors.
6. The article of Association (AOA) may be made by the company according to its own requirements, or may be selected by such company from the various options available in the Schedule of companies Act and it must be signed by all the directors and also attested by two witnesses.
7. The articles of Association of a company is also known as by- laws of the company or also named as the doctrine of indoor management.

## **Case law:- Ewing Vs. Butter Cut Margarine Company Ltd. (1917)**

**Facts-** The plaintiff was an incorporated firm carrying on substantial business under the trade name of Butter Cap Dairy Company. The defendant company was registered to trade in similar commodities and selected the name bonafide believing that there was no other company in existence with a similar name. The plaintiff alleged that the name of the company would lead to confusion and was detrimental to the plaintiffs business.

**Judgment-**Plaintiff was entitled to restrain the registered company from carrying on business on the ground that the public might reasonably think that the registered company was connected with his business.<sup>8</sup>

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<sup>8</sup> Case law:- Ewing V. Butter cut Margarine Company Ltd. (1917) which talks about the incorporated firm carrying a business under the trade name butter cap diary company.

## **AOA ( Articles of Association) deals with various issues such as:-**

- a) Amount of share capital and kinds of share.
- b) Rights of each kind of shareholders.
- c) Procedure for making allotment of shares.
- d) Procedure for insurance of share certificate.
- e) Transfer of shares.
- f) Procedure for conducting meetings.
- g) Procedure for appointing or removing directors of the company etc.

- All the documents declared to be necessary under **Section-7** of the Companies Act are supposed to be attached along with the digital signature of the directors.
- The Ministry of Corporate Affairs simplified the process of getting the directors identity number (DIN) for the directors of the newly incorporated company by including such request from along with the PAN & TAN card of the proposed entity which is being incorporated.
- The single- window clearance regarding the Incorporation of a Company was initiated by the Central government of Indian to increase the Feasibility and scope of the Incorporation even further.

### **Certificate of Incorporation**

- The Memorandum of Association, the Articles of Association and other documents are filled with the registrar of Companies. After getting satisfied with the application and the documents submitted. The Registrar will consider issuing the certificate of Incorporation.
- Certificate of Incorporation is the ultimate proof of the existence of a company.

### **Effect of the Certificate of Incorporation**

1. Certificate of Incorporation is the conclusive evidence of the legal existence or presence of the company as per **Section-35 of Companies Act 1956** .
2. Even if there are formal deficiencies in the documents submitted for the Incorporation of the company, once the certificate of Incorporation is issued the certificate becomes conclusive evidence regarding the legal existence of a company from the date mentioned in the Incorporation certificate.
3. If the certificate of incorporation was received on 24th but the certificate reflects the date 22nd then the company shall be taken to have come into existence from 22nd as reflected by the certificate of incorporation and this will also authenticate the transactions made by such company on 22nd and 23rd in the eyes of law.<sup>9</sup>

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<sup>9</sup> Certificate of Incorporation of company under Section-35 of company act 1956.

## **Effects of pre- Incorporation Contracts**

A lot of times what happens is that contracts are made on behalf of companies which are not even incorporated. The sub- section will discuss the effects and the legality of these pre- Incorporation contracts. Firstly, the company when it comes into existence, is not bound by any contract made on its behalf before its Incorporation. A solicitor, who on the request of promoters prepared a company's documents and spent time and money in getting it registered, could not recover his charges from the company.

Secondly, the other party to the contract is also not bound. The company cannot ratify a pre- Incorporation contract and hold other party liable . Thirdly, the agents who contact for a proposed company may sometimes incur personal liability.

### **Case law:- Weavers Mills V. Balkis Ammal and others**

The case of Weavers Mills V. Balkis Ammal and others, wherein the promoter had agreed to purchase some properties on behalf of the company, after incorporation the company took possession of the properties and also constructed structures upon it. It was held that although no conveyance had taken place between the promoter and the company regarding those properties. It was held that company 's title over the properties was valid and couldn't be set aside. The madras high court had extended the scope of interpretation of the principle mentioned above. Promoters are generally held liable personally for the pre- incorporarion contract unless the company ratified the contract .<sup>10</sup>

### **Case law:- Kelner V. Baxter (1866) LR2 CPC174**

In the case where " the principle of promoters liability in pre- incorporation contract " was explained . The facts of the case is that , the promoter of a company was approached by one Mr. Kelner to purchase his wine wherein the promoter had agreed to purchase the same on behalf of the company. Later on the company was unable to pay Mr. kelner who sued the promoter. It was interpreted whether the promoter was in a principal- agent relationship with the company and if the liability can befall upon the company. The learned judge interpreted that the principal agent relationship was not in existence as the principal of the agent cannot have existed without the Incorporation, it was further added that company cannot take the liability of pre- Incorporation contract through adoption as the company is not Privy to the contract, also the company is not Privy to the contract , also the company was not even existent at the time of contract.<sup>11</sup>

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<sup>10</sup> Case law:- Weavers Mills V. Balkis Ammal and Others 1<sup>st</sup> September, 1967; Citation :AIR 1969 Mad462,(1969)2 MIL)509. Which talks about the pre- Incorporation Contracts.

<sup>11</sup> Case law:- Kelner V. Baxter (1866) LR2 CP174 which also talks about principles of promoter liability in regard to pre- Incorporation contract.

### **Case law:- Newborn V. Sensolid Ltd (1954)1 QB 45**

In the case wherein it had happened so that the Appellate court interpreted the findings of *Kelner V. Baxter*, wherein an unformed company entered into a contract wherein the other party refused to do its duty under the contract. The judge had observed that before incorporation the company couldn't have come into existence, neither could it get into a contract and hence there cannot be an action for pre-incorporation contract. Confusion was then created that if a contract was signed by an agent or a promoter then such promoter will be liable personally, but if the person representing him as representative of a non-formed company then the contract is unenforceable.<sup>12</sup>

Finally, it can be concluded regarding the pre-incorporation contracts and Principle of Promoter's liability in pre-incorporation that, common law clearly shows that the promoter shall be held personally liable for the pre-incorporation contracts of the company and the same was followed in England and India prior to the legislation of the Specific Relief Act, 1963. It basically goes on to suggest that there is no escape from the liability of the promoter. But there are recognised ways in Indian law to shift the liability of the promoter to the company in case of the pre-incorporation contract wherein the first and foremost way is novation of contract which is also accepted by the common law courts regarding the shift of liability from promoter to the company, India but uniquely legislated Specific Relief Act, 1963 providing provisions wherein if the contract was entered upon by the promoter during the pre-incorporation stage the party to such contract can make the company liable under Specific Relief Act if the company ratifies such contract and sends communication to such party of the ratification of the contract. But otherwise the promoter is held liable in case of pre-incorporation contracts.

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<sup>12</sup> Case law:- *Newborn V. Sensolid Ltd (1954) 1 QB 45*. Which also refers to the case of *Kelner V. Baxter*. Pre-incorporation contract effect is also mentioned in the Companies Act.

## **Procedure for Incorporation of a Company under CA, 2013**

Again an attempt has been made from my side to share my experience regarding Incorporation of a Company under Companies Act, 2013 in the form of an Article. This Article contains the procedure for Incorporation of a Company under Companies Act, 2013 with detailed documentation required.

the basic **procedure for Incorporation of a Company** under Companies Act, 2013:

### **1. Obtain Digital Signatures**

Nowadays various document prescribed under the Companies Act, 2013, are required to be filed with the digital signature of the Managing Director or Director or Manager or Secretary of the Company, therefore, it is compulsorily required to Obtain a Digital Signature Certificate from authorized DSC issuing authority for at least one director to sign the E-forms related to incorporate like form and other documents.

### **2. Obtain Director Identification Number [Section 153]**

As per 153 of the Companies Act, 2013, every individual intending to be appointed as director of a company shall make an application for allotment of Director

Identification Number in form to the Central Government in such form and manner and along with such fees as may be prescribed.

Therefore, before submission of e-Form for availability of name, all the directors of the proposed company must ensure that they are having DIN and if they are not having DIN, it should be first obtained.

### **3. Name availability for proposed company**

As per section 4(4) read with **Rule-9 of Companies Incorporation rules 2014**. application for the reservation/availability of name shall be in Form along with prescribed fee of Rs. 1,000/-. In selection of Company name should be in accordance with name guidelines given in **Rule-8** of Companies (Incorporation) Rules, 2014.

### **4. Preparation of the Memorandum of Association (MOA) and Articles of Association (AOA)**

Drafting of the MOA and AOA is generally a step subsequent to the availability of name made by the Registrar. It should be noted that the main objects should match with the objects shown in e-Form . These two documents are basically the charter and internal rules and regulations of the company. Therefore, it must be drafted with utmost care and with the advice of the experts and the other object clause should be drafted in a very broader sense.

As per section 4(6) the memorandum of a company shall be in respective forms specified in **Tables A, B, C, D and E in Schedule I** as may be applicable to such company.

As per section 5(6) the articles of a company shall be in respective forms specified in **Tables F, G, H, I and J in Schedule I** as may be applicable to such company.

### **5. Application for incorporation of a private company**

As per **Rule-12** of Companies (Incorporation) Rules, 2014, application for incorporation of a private and Public company, with the Registrar, within whose jurisdiction the registered office of the company is proposed to be situated, shall be filed in Form [Rule 12 to 18] along with Form for situation of registered office of the company.<sup>13</sup>

**Note:** Where the articles contain the provisions for entrenchment, the company shall give notice to the Registrar of such provisions in Form , as the case may be, along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 at the time of incorporation of the company.

As per Rule 25 of Companies (Incorporation) Rules, 2014, verification of registered office shall be filed ,along with the fee.

Section 12(2) of the Companies Act, 2013 states that the Company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

Section 12(4) of the Companies Act, 2013 states that Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within fifteen days of the change, who shall record the same.<sup>14</sup>

### **Certain things that a promoter can decide for a Company**

The name of the Company, The location of its registered office, The form and amount of its share capital, The brokers or underwriters for the capital issue, The bankers, The auditors, The legal advisers.

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<sup>13</sup> Procedure of Incorporation of a Company: Section-153, Section-4(4) Rule-9, Rule-12 of Companies.

<sup>14</sup> Rule -25 ,of Companies Incorporation rules 2014, Section -12(2) (4) of Companies act 2013.



## **Certificate of Commencement of Business**

According to **Section- 149 of the Companies Act, 2013**, a private company can commence its business right from the date of its Incorporation but in case of public company, a further certificate for the commencement of business has to be obtained. This becomes necessary where a company has issued a prospectus inviting the public to subscribe for its shares. It will be entitled to the certificate subject to the following conditions According to **Section- 149(1):-**

1. Shares payable in cash must have been allotted up to the amount of the minimum subscription;
2. Directors must have paid in cash the application and allotment money in respect of the shares contracted to be taken by them for cash;
3. No money is liable to become refundable to the applicants by reason of failure to
4. apply for or to obtain permission for shares or debentures to be dealt in on any recognised stock exchange.

- In case of a private company, as soon as it gets the certificate of Incorporation, it can start its business.
- In case of a public company, once the certificate of Incorporation is received, it can issue prospectus for inviting the public to subscribe to its share capital. It fixes the minimum subscription in the prospectus. Then it is required to sell the minimum number of shares mentioned in the prospectus.
- After completing the sale of the required number of shares, the certificate is sent to the register along with the letter from the bank stating that all the money is received
- The registrar then scrutinize the documents. If all the legal formalities are done then the registrar issues a certificate known as **Certificate of commencement of business** .
- This is a conclusive evidence for the commencement of business for the public company.<sup>15</sup>

### **Case law:- Lee V. Lee's Farming Co .Ltd (1960)**

**Fact:-** Lee incorporated a company of which he was the managing director. In that capacity he appointed himself as a pilot of the company. While on the business of the company he was lost in a flying accident. His widow claimed compensation for personal injuries to her

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<sup>15</sup> Certificate of Commencement of Business is defined under the Incorporation of company under the Companies Act 2013.**(Section-149)** of Companies act 2013.

husband while in the course of his employment. It was argued that no compensation was due because L & Lee's Air framing Ltd. were the same person.

**Judgment:-**

1. Lee was separated person from the company he formed and compensation was payable.
2. His widow recovered compensation under the workmen's compensation act.
3. A member of a company can contract with a company of which he is a shareholders.
4. The directors are not precluded from being an employee of the company for the purpose of workman's compensation legislation. <sup>16</sup>

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<sup>16</sup> Case law:- Lee V. Lee's Farming Co .Ltd 1960. As Lee was separated person from the company he formed and compensation was payable at that point of time.

## **Conclusion**

Incorporation of a Company thus has its own pros and cons. Incorporation greatly depends on the needs of the business, if the members perceive the business as scalable then the high incorporation costs are completely justified.

The ease of Incorporation has been increased by making it online affair, The Ministry of Corporate Affairs provides options to incorporate the company with a unique name by providing the online option of submitting the Memorandum of Association along with articles of Association online with the declaration digitally signed stating that all the procedures of Incorporation of a Company under law have been followed by the respective company.

From the above article, we understand that the company's incorporation period can be understood to be the integration of Pre incorporation period and incorporation period. Pre incorporation period may be understood as the idea phase of the company. The promoter whose name is reflected in the prospectus of the company plays a very important role in collecting the funding for the company. The promoter also conducts a SWOT analysis of the company to understand the potential of such a company in the marketplace and making it a feasible option to invest upon by the investors. The duties and liabilities of the promoter has been discussed in detail showing how the relationship between the promoter and the company is fiduciary in nature. The principle of promoter's liability relation to the pre-incorporation contract has been dealt in detail coming to a conclusion that the promoter shall be held personally liable for all the pre-incorporation contracts, unless there is novation of the contract or in case of India when the provisions of Specific Relief Act applies wherein the company ratify the contract and send communication to the other party of contract regarding their liability. The role of the government in easing the process of incorporation is very crucial as it determines the potential intention of the investors towards companies in the market.

The ease of incorporation has been increased by making it online affair, The Ministry of Corporate Affairs provides options to incorporate the company with a unique name by providing the online option of submitting the memorandum of association along with the articles of association online with the declaration digitally signed stating that all the procedures of incorporation of a company under law have been followed by the respective company. The State's duty as an enabler of business for the growth of the economy finds its presence in this legislation. Certificate of incorporation plays a crucial role to prove that the company has been duly incorporated and the same cannot be taken back unless the winding up is initiated for the registrar of company finds that the company incorporated has played fraud for its incorporation. The certificate of incorporation speaks for itself and receipt date of the same does not affect the date of incorporation i.e. if the incorporation certificate clearly specifies the date of incorporation as 14th February although certificate is received on 20th February all the transactions taken place after 14th February shall be taken to be done in compliance with law.

