

Chapter 1.

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- 1.2 Essential Features of a Company.
- 1.3 Difference between Company and Partnership Firms
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1.1 General Concept of Company:

The word ‘Company’ has no strictly technical or legal meaning Stanley, Re¹. It may be described to imply an association of persons for some common object or objects. The purposes for which people may associate themselves are multifarious and include economic as well as non-economic objectives. But, in common parlance, the word ‘company’ is normally reserved for those associated for economic purposes i.e. to carry on a business for gain.

The word ‘company’, in simple terms, may be described to mean a voluntary associations of persons who have come together for carrying on some business and sharing the profits there from.

Indian Law provides two main types of organisations for such associations: ‘partnership’ and ‘company’. Although the word ‘company’ is colloquially applied to both, the Statute regards companies and company law as distinct from partnerships and partnership law. Partnership law in India is codified in the Partnership Act, 1932 and is based on the law of agency, each partner becoming an agent of the others and it, therefore, affords a suitable framework for an association of a small body of persons having trust and confidence in each other. A more complicated form of association, with a large and fluctuating membership, requires a more elaborate organisation which ideally should confer corporate personality on the association, that is, should recognise that it constitutes a distinct legal person, subject to legal duties and entitled to legal rights separate from those of its members. This can be obtained easily and cheaply by registering an association as a company under the Companies Act, 2013.

Lord Justice Lindley — “A company is an association of many persons who contribute money or monies worth to a common stock and employed in some trade or business and who share the profit and loss arising there from. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute to it or to whom it pertains are members. The proportion of capital to which each member is entitled is his share. The shares are always transferable although the right to transfer is often more or less restricted.”

¹ [1906] 1Ch. 131

Chief Justice Marshall — “a corporation is an artificial being, invisible, intangible, existing only in contemplation of the law. Being a mere creation of law, it possesses only the properties which the Charter of its creation confers upon it, either expressly or as incidental to its very existence.”

Prof. Haney — “a company is an artificial person created by law, having separate entity, with a perpetual succession and common seal.”

Under Companies Act, 2013 – **Section 2(20) – ‘Company’** means a company incorporated under this Act or under any previous company law;

The above definitions clearly bring out the meaning of a company in terms of its features. A company to which the Companies Act applies comes into existence only when it is registered under the Act. On registration, a company becomes a body corporate i.e. it acquires a legal personality of its own, separate and distinct from its members. A registered company is there created by law and law alone can regulate, modify or dissolve it.

1.2 Essential Features of a Company

The essential characteristics of a company are following:

- Separate Legal Entity;
- Limited Liability;
- Perpetual Succession;
- Separate Property;
- Transferability of Shares;
- Common Seal;
- Capacity to sue and being sued;
- Separate Management;
- Association of plurality of persons
- Registration or Incorporation
- Artificial Person;
- Capital;
- Registered Office
- Statutory Obligation;
- Contractual Capacity
- Lifting the Corporate Veil.

Separate Legal Entity

A separate legal entity is a person recognised by law - a "legal person". The entity has its own legal rights and obligations, separate to those running and/or owning the entity. A company has a distinct entity and is independent of its members or people controlling it. It is regarded as a single juristic person distinct from its members who constitute the company. The separate legal entity enables a company to own property and to deal with it in the way it likes. No member, either individually or jointly, can claim the right of ownership in the assets of the company during its existence or in its winding up process. Again, a separate legal entity means that only the company is responsible to repay creditors and to get sued for its

deeds. The individual members cannot be sued for actions performed by the company. Similarly, the company is not liable to pay personal debts of the members.

Limited liability

A limited liability company (LLC) is a corporate structure in the United States whereby the owners are not personally liable for the company's debts or liabilities. Limited liability companies are hybrid entities that combine the characteristics of a corporation with those of a partnership or sole proprietorship.

A company may be limited by guarantee or limited by shares. In a company limited by shares, the liability of the shareholders is limited to the unpaid value of their shares. In a company limited by guarantee, the liability of the members is limited to the amount they had agreed upon to contribute to the assets of the company in the event of it being wound up.

Perpetual Succession

A company does not cease to exist unless it is specifically wound up or the task for which it was formed has been completed. Membership of a company may keep on changing from time to time but that does not affect life of the company. Insolvency or Death of member does not affect the existence of the company.

The existence of a Company is not affected by the retirement, death, lunacy or insolvency of its members. Shareholders may come and Shareholders may go but the Company goes on forever, unless wound up according to Companies Act.

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.

Transferability of Shares:

The capital of the company is contributed by its members. It is divided into shares of predetermined value. The members of a public company are free to transfer their shares to anyone else without any restriction. The private companies, however, do impose some restrictions on the transfer of shares by their members. The shares of a joint stock company are freely transferable. It does not require any permission from the company or consent of other shareholders. The shares of listed companies can be sold or purchased on the stock exchange and ownership transferred without any difficulty. However, in case of a private limited company, the transfer of shares is subject to the restrictions given in the company's articles.

Common Seal

Being an artificial person, a company can act through natural persons only. The acts of a company are authorized by the "common seal". The "common seal" is the official signature of the company. A document not bearing the common seal is not binding on the company. While a company is an artificial person and works through the agency of human beings, it has an official signature. This is affixed by the officers and employees of the company on all its documents. This official signature is the Common Seal. However, the Companies (Amendment) Act, 2015 has made the Common Seal optional. Section 9 of the Act does not have the phrase

‘and a common seal’ in it. This provides an alternative mode of authorization for companies who do not wish to have a common seal.

According to this amendment, if a company does not have a common seal, then the authorization shall be done by:

- Two Directors or
- One Director and the Company Secretary (if the company has appointed a Company Secretary).

Capacity to sue and being sued

A company can sue or be sued in its own name as distinct from its members.

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.

Though shareholders of a company are its owners, yet every shareholder, unlike a partner, does not have a right to take an active part in the day to day management of the company. A company is managed by the elected representatives of its members. The elected representatives are individually known as directors and collectively as ‘Board of Directors’.

Association of plurality of persons

Except one person company (OPC) newly inducted by the Companies Act, 2013, a company cannot be registered with a similar member. It must have plurality of members, that is, at least two members must be associated to form a company.

Registration or Incorporation

A company comes into existence the day it is incorporated/registered. In other words, a company cannot come into being unless it is incorporated and recognised by law. This feature distinguishes a company from partnership which is also a voluntary association of persons but in whose case registration is optional.

Artificial Legal Person

Another one of the features of a company is that it is known as an Artificial Legal Person.

- Artificial – because its creation is by a process other than natural birth.
- Legal – because its creation is by law, and
- Person – because it has similar rights to a human being.

Further, a company can own property, bank accounts, and do everything that a natural person can do except go to jail, marry, take an oath, or practice a learned profession. Hence, it is a legal person in its own sense.

Since a company is an artificial person, it needs humans to function. These humans are Directors who can authenticate the company's formal acts either on their own or through the common seal of the company.

Capital

A company must have capital contributed by its members. A company cannot function without such capital.

Registered Office

The registered office of a company is a place to which all official communications pertaining to a Company is sent. In addition to a registered office, a company can have an corporate office or administrative office or branch office or factory, etc., However, only the registered office of the Company needs to be registered with the Ministry of Corporate Affairs. All other offices or additional locations can be opened by a company without any intimation to the ROC.

The registered office of the Company will also determine the domicile of the company (State of Incorporation). The state or location in which the registered office of the Company is situated will determine the Registrar of Company (ROC) to which the application for company registration must be made. Any change of address of Registered Office must be notified to the Registrar of Company (ROC) within a specified period.

Statutory Obligation

A company is required to comply with certain statutory obligations such as, maintaining proper books of accounts and registers, and filling of various returns with the Registrar of Joint Stock Companies.

Contractual Capacity

The contractual capacity of corporations depends on whether they are registered or statutory. A registered company derives its power from the objects clause of the MOA and must not engage in activities beyond the objects for which it was formed otherwise such transactions will be void. Contracts made within the objects clause are valid and described as intra vires while those made outside the objects clause are invalid and described as ultra vires –**Ashbury Rail Co Ltd v Riche, 1875**. For such cases, neither of the parties can sue nor be sued under an ultra-vires contract. Statutory corporations derive their powers from the Parent Act and every activity done by it must be justifiable by reference to the Parent Act.

Lifting the Corporate Veil

The Corporate Veil Theory is a legal concept which separates the identity of the company from its members. Hence, the members are shielded from the liabilities arising out of the company's actions.

Therefore, if the company incurs debts or contravenes any laws, then the members are not liable for those errors and enjoy corporate insulation. In simpler words, the shareholders are protected from the acts of the company.

This brings us to some important questions:

- a. If lifting or piercing the corporate veil possible?
- b. If yes, then what are the scenarios and the rules that govern piercing the corporate veil?

Piercing the Corporate Veil means looking beyond the company as a legal person. Or, disregarding the corporate identity and paying regard to humans instead.

In certain cases, the Courts ignore the company and concern themselves directly with the members or managers of the company. This is called piercing the corporate veil. Usually, Courts choose this option when the case involves a question of control rather than ownership.

1.3 Difference between Company and Partnership Firms

PARTNERSHIP

Indian Partnership Act, 1932 defines Partnership as " Partnership is a relationship between two or more persons who have agreed to share the profits of a business carried on by all partners or any one partner acting for all". The members of the Partnership firm are called as Partners. There are different types of partners such as Active partner, Sleeping partner, Nominal partner, Minor partner, Etc.

Partnership Firm is created by agreement between two or more people by registering the partnership firm with Registrar of Firms according to Indian Partnership Act, 1936.

Registration of a partnership firm is very simple process and Application for registration of firm must contain the following details

1. Name of the firm, 2. Names of the partners and their addresses, 3. location where the business is carried on, 4. Partnership tenure between the partners, 5. The main office of the firm, etc.

COMPANY

Indian Companies Act, 2013 defines Company as " A Company formed and registered under this Companies Act or under any previous company law". A company is defined easily as an association of two or more persons which is formed for doing business collectively and registered with Registrar of Companies according to Indian Companies Act, 2013. There are different types of companies like One Person Company, Private company and Public Company, etc.

To get registered with Registrar of Companies, the promoters are required to submit the copies of Articles of Association and Memorandum of Association which consists of various information relating to internal management and external management of the company.

The company exhibits certain special characteristics, such as

1. It have a Separate Legal Entity, 2. It contains Common Seal under its name, 3. It has limited liability, 4. It acts as an artificial person, etc.

COMPARISON TABLE

| PARTNERSHIP | COMPANY |
|---|---|
| The members of the Partnership firm are called as Partners. | The members of the company are called as shareholders of a company. |
| Enacted by | |
| Partnership Form of business is governed by "The Indian Partnership Act, 1932." | Company Form of business is governed by "The Indian Companies Act, 2013". |

| PARTNERSHIP | COMPANY |
|--|--|
| Number of Members | |
| Partnership firm must have Minimum of 2 partners and maximum of 20 partners. | A Company must have Minimum of 2 and maximum of 200 in the case of private company. Minimum 7 and maximum is unlimited number of members in case of public company |
| Created by | |
| Partnership Firm is Created by Contract between two or more people. | Company Firm is Created by Law i.e created by incorporation of a company under company law. |
| Regulation Authority | |
| It is regulated by the Registrar of Firms which comes under State Government. | It is regulated by the Registrar of Companies which comes under Central Government. |
| Registration procedure | |
| The registration of a Partnership firm is Not Mandatory. | The registration of Company with Registrar of Companies is Mandatory. |
| Documents Required | |
| Partnership Deed(Agreement Document) is the mandatory document for creation of a Partnership Firm. | Memorandum of Association(MoA) and Articles of Association(AoA) are the main documents to the incorporation of the company. |
| Separate Legal Entity | |
| Partnership firm is not a separate legal entity from partners. The Partners of the firm are collectively referred as a Partnership firm. | A company is a separate legal entity, It is a separate entity from its members, directors, promoters, etc. |
| Liability of Members | |
| The partners have Unlimited Liability in all the matters relating to Partnership Firm. | The Shareholders and promoters have Limited liability to Capital of the company. |
| Accounts and Audit | |
| Partnership Firm has to maintain accounts as per the conditions stated in partnership deed. | A Company should maintain accounts and auditing of accounts by certified Chartered Accountant are Compulsory. |
| Common Seal | |
| A Common Seal is not required for Partnership Firm. | A Common Seal in the form of a stamp is required for the company for legal and functional purposes. |

| PARTNERSHIP | COMPANY |
|---|---|
| Management | |
| Management of the activities of a Partnership Firm is usually done by the working partners. | Management of the activities of a Company is done by Board of Directors. |
| Change of Name | |
| The name of the Partnership Firm can be changed easily by having a discussion between partners. | The name of the company cannot be changed easily and a prior approval of Central Government is required to change the name. |

1.4. Is Company a Citizen?

No company is not citizen of India

Company is Juristic, artificial, legal person –

A company is also called an artificial person or a legal person because it is registered under the company laws of India and is given a distinctive identity separate from the promoters or shareholders who own it.

Artificial person means its man- made through operation of law.

As a juristic person, a company is entitled to the rights and obligations to the duties similar to that of natural persons i.e. humans, with certain exceptions to such rights and duties.

The Indian Citizenship Act, 1955 provides

Section 2(b) defines ‘Citizen’ - in relation to a country specified in the First Schedule, means a person who under the citizenship or nationality law for the time being in force in that country, is a citizen or national of that country;

And section 2(f) defines ‘Person’ does not include any company or association or body of individuals, whether incorporated or not;

The Constitution of India 1950,

As per Part II of the Constitution (Art.5 to 11), it can be clearly noticed that the constitution talks about the grant of citizenship only to the persons (i.e. natural persons).

There is no mention of grant of citizenship to any company or body of association (artificial, Juristic persons).