Chapter-II

Origin and Evolution of the Modern Company Law.

2.1 Introduction.

Gone are the days when sole proprietorship and partnership were the most preferable form of the business where in the persons used to invest and earn profits out of the business for themselves. Though these form of businesses are still existed but are not the most common form of businesses today as now the taste of the consumers has changed, technology has been advanced manifold, etc which requires funds, huge funds and because of involvement of few persons in sole proprietorship are partnership. The need of huge investment, production at large scale, etc were not possible. So to fulfill these needs company form of business came into existence, as also with the time demand shifted from traditional goods to the capital goods and technological products which required huge amount of labour and capital supply of which were not the possible for a handful of persons. Various forms of association were known to medieval law and as regards some of them the concept of incorporation was early recognized. At first however, incorporation seems to have been used only in connection with ecclesiastical and public bodies such as chapter monasteries and boroughs, which had corporate personality conferred upon them by a charter from the Crown or were deemed by prescription to have received such grant.

In the commercial sphere the principal medieval associations were the guilds of merchants, organizations which had few resemblances to modern companies but corresponded roughly to our trade protection associations, with the ceremonial and mutual fellowship of which it can see relics in the modern Freemasons and Livery companies. Many of these guilds in due course obtained charter from the Crown,
mainly because that was the only effective method of obtaining for their members a monopoly of any particular commodities or branch of trade. In corporation as a convenient method of distinguishing the rights and liabilities of the association form of those of its members was hardly needed since each member traded on his own account subject only to obedience to the regulation of the guild.

It was not until second half of the seventeenth century that the differentiating between unincorporated partnerships and incorporated companies was firmly established. Many joint stock companies were originally formed as partnership by agreement under seal, providing for division of undertaking into shares which were transferable by the original partners with greater or less freedom according to the terms of the partnership agreement. At this time there was not limit to the number of partners, but in fact they were generally small in number and additional capital was raised by levitations or calls on the existing members rather than by invitations to the public.

2.2. Theories of the Legal Persons.

Professor Wolff has observed that Legal writers may be grouped into two categories: those who have written on the nature of legal persons and those who have not yet done so.¹

2.2.1 Purpose Theory.

It is laid down by Barker of England which is based upon the assumption that ‘person is applicable only to human beings.’ He said that so called “juristic” persons are not persons at all but they are treated as distinct from their human being. Corporation should regarded as ‘subject less properties’ designed for certain purpose.

¹ Wolff “on the Nature of Legal Persons”, (1938) 54 LQR 494.
This theory is not logical because it is based on the assumption that other people owe duties towards these ‘subject less properties’ without there being correlative claim.

2.2.2. **Theory of the Enterprise Entity.**

This theory is based upon the reality of the underlying enterprise. The Law approves the assets, activities and responsibilities of corporation as part of enterprises. Where there is no formal approval by law, then its existence is determined by underlying enterprises. This theory explains the attitude of law towards the unincorporated associations also.

2.2.3. **Bracket Theory.**

Bracket theory propounded by Ihering who emphasized that the members of a corporation and the beneficiaries of foundation are the only ‘persons’ Juristic Person is but a symbol to help in effectuating the purpose of group, it amounts to putting a bracket around the members in order to treat them as unit. This theory also assumes that person is confined to human being only.

2.2.4. **Hohfeld’s Theory.**

Hohfeld has made distinction between human beings and juristic person. Juristic person is creation of arbitrary rules of procedure. He focused that only human beings have claims, duties, powers and liabilities. It is human beings who are ultimately responsible. The arbitrary rules may restrict their activities. The corporate person is merely a procedural form which is used to work in more convenient way in case of mass jural relationship of large number of individuals. This theory is pure analytical and based upon the ultimate realities.

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2.2.5. **Kelsen’s Theory.**

Kelsen has rejected the difference between human being and juristic person. The law is concerned with only human beings. Kelsen has rejected definition of person as an entity which has claims and duties. As for as corporation is concerned, he pointed that conduct of human being is the subject matter of claims and duties. A corporation is distinct from one of its members when his conduct is governed not only by claims and duties, but also by special set of rules which regulates his actions in relation to the other members of the corporation. This theory is also analytical one.

2.2.6. **Fiction Theory.**

Savingy and Salmond have propounded that the juristic persons are treated as if they are natural persons. This theory presupposes that only human beings are properly called ‘persons’. The fiction theory asserts that some group of persons and institutions are regarded as if they are persons. However theory fails to explains why they are treated as human beings. This theory is very flexible.

2.2.7. **Concession Theory.**

This theory is akin to fiction theory. Juristic personality is concession given by the law of state. This theory has been used for the political purpose to strengthen the state and to suppress autonomous bodies within it. It is matter of discretion for the state. This theory further concedes that legal personality may be deprived by the state.

2.2.8. **Realist theory.**

Gierke and Maitland is exponent of this theory and assert that juristic persons enjoy a real existence as group. A group trends to become a unit and to function as such. This theory opposes the concession theory and treat group of persons as person without any concession from the state.
2.3. Meaning of company.

The word “company” is derived from Latin word *companis*. *Com* means with or together and *panis* means bread. It originally referred to an association of persons who took their meals together. In the leisurely past, merchants took the advantage of festive gatherings, to discuss business matters. Now a day, the business matters have become more complicated and cannot be discussed at length at festive gathering. Therefore, the word company has assumed greater importance. It denotes a joint stock enterprise in which a capital is contributed by large number of people. Thus, in popular parlance, a company denotes an association of likeminded persons formed for the purpose of the carrying on some business or undertaking. A company is a corporate body and legal person having status and personality distinct and separate from that of members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word “corporation” is derived from the Latin term corpus which means body accordingly corporation is legal person created by the process other than natural birth. It is, for this reason, sometimes called artificial legal person. As legal person a corporate is capable of enjoying many of the rights and incurring many of the liabilities of a natural person.

In the legal sense, a company is association of both natural and artificial person’s incorporated under the existing law of a country. In terms of the Companies Act 2013\(^3\) herein after referred as Act a company means a company incorporated under this Act or under any previous company law. The Act has deviated from the traditional meaning of company because in case of private company, so far it is

\(^3\) Act No 18 of 2013.
thought that company could be formed with minimum two members, but a new Act has provided that single person could form a company.\textsuperscript{4} It means sole proprietor business can be converted into company according to the Act. In common law, company is “legal person” or “legal entity” separate from, and capable of surviving beyond the lives of its members. However, an association formed not for profit acquires a corporate life and falls within the meaning of company. But, company is not merely a legal institution. It is rather legal devices for the attainment of any social or economical end. It is, therefore, a combined political, social, economic and legal institution. Thus, the term company has been described in many ways. “It is a means of co-operation and organization in the conduct of an enterprise.” It is “an intricate, centralized economic and administrative structures run by professional managers who higher capital form the investors.” Lord Justice James has defined a company as “associations of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business and who shares the profit and loss arising there form. The common stock so contributed is denoted in money and is the capital of the company. The persons who form it, or to whom it belongs, are members and the proportion of capital to which each member is entitled his share.”


Since a corporate body is the creation of law, it is not human being, it is an artificial person (created by law), it is clothed with many rights, obligations, powers and duties prescribed by law, and it is called a “person”. Being the creation of law, it possesses only the properties conferred upon it by its memorandum of association.

\textsuperscript{4} Section 2 of sub clause (62) of Companies Act 2013 says that “One Person Company” means a company which has only one person as member.
Within the limits of powers conferred by the Charter, it can do all acts as natural
person may do. The most striking characteristics of a company are as follows,

2.4.1. Corporate Personality.

By incorporation under the Act, the company is vested with a corporate
personality quite distinct from individuals who are its members. Being a separate
legal entity it bears its own name and acts under a corporate name. It has seal of its
own. Its assets are separate and distinct from those of its members. It is also a
different “persons” from the members who compose it. As such it is capable of
owning property, incurring debts, and borrowing money having a bank account,
employing people, entering into contracts and suing or being sued in the same manner
as an individual. Its members are its owners but they can be its creditor’s
simultaneously as it has separate legal entity. Share holder cannot be held liable for
the acts of the company even if he holds virtually the entire share capital. The share
holders are not the agents of the company and so they cannot bind it by their acts. The
company does not hold its property as an agent or trustee for its members and they
cannot sue to enforce its rights, nor can they be sued in respect of its liabilities. Thus,
“incorporation” is the act of forming a legal corporation as juristic person. A juristic
person is in law also conferred with rights and obligation and is dealt with in
accordance with law. In other words, the entity acts like a natural person but only
through a designated person, whose acts are processed within ambit of law.\(^5\) The
Salomon v. Solomon\(^6\) case has clearly established the principle that once a company
has been validly constituted under the Companies Act, it becomes a legal person
distinct from its members and for this purpose it is immaterial whether any member

\(^5\) Shiromoni Gurdwara Prabandhak Committee v. Shri Sam Nath Dass, AIR 2000 SCW 139,
has a large or small proportion of the shares, and whether he holds those shares beneficially or as a mere trustee. Their Lordship of the House of Lords observed,\textsuperscript{7}

“\textit{when the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate capable forthwith of exercising all the functions of an incorporated company. It is difficult to understand how body corporate thus created by statute can lose its individuality by issuing the bulk of its capital to one person. The company is at law different person altogether from the subscribers of the memorandum and though it may be that after incorporation the business is precisely the same as before, the same persons are managers, and same hands receive the profits, the company is not their trustee.”}

In \textit{Lee v. Lee’s Air Framing Ltd},\textsuperscript{8} a company was formed for the purpose of aerial top-dressing. Lee, a qualified pilot, held all but one of the shares in the company. He voted himself the managing director and got himself appointed by article as chief pilot at a salary. He was killed in an air crash while working for the company. His widow claimed compensation for the death of her husband in the course of employment. The company opposed the claim on the ground that Lee was not a worker as the same person could not be the employer and the employee. The Privy Council held that that Lee and his company were distinct legal persons which had entered into contractual relationship under which he became the chief pilot, a servant of the company. In his capacity of managing director he could, on behalf of the company, gave himself, orders in his other capacity of pilot, and the relationship between himself, as pilot and the company, was that of servant and master. Lee was a separate person form the company he formed and his widow was held entitled to get

\textsuperscript{7} \textit{Id} at 28.
\textsuperscript{8} \textit{Lee v. Lee’s Air Framing Ltd}, (1961) A.C. 12 (P.C.).
the compensation. In effect the magic of corporate personality enabled him (Lee) to be the master and servant at the same time and enjoy the advantages of both.

### 2.4.2. Limited Liability.

The privilege of limited liability for business debts is one the principal advantages of doing business under the corporate form of organization. The company, company being separate person, is the owner of its assets and bound by its liabilities. The liability of members as share holder extends to contribution to the assets of the company up to the nominal value of the shares held and not paid by him. Members, even as whole, are neither the owners of the company’s undertakings nor liable for its debts. In other words, a share holder is liable to pay the balance if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceeds its assets. This means that the liability of the member is limited. Buckley J, in *Re London and Globe Finance Corporation*,¹ has observed “the statues relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. There have, to the advantage of the investor as well as of the public, allowed and encouraged aggregation of small sums into large capitals which have been employed in undertakings of great public utility largely increasing the wealth of the country.”

### 2.4.3. Perpetual Succession.

An incorporated company never dies except when it is wind up as per law. A company, being a separate legal person is unaffected by death or departure of any member.

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¹ *In Re London and Globe Finance Corporation*, (1903) 1 Ch.D. 728 at 731.
member and remains the same entity, despite total change in the membership. A company’s life is determined by the terms of its Memorandum of Association. It may be perpetual or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association. Perpetual succession, therefore, mans that the membership of a company may keep changing from time to time, but that does not affect its continuity. The membership of an incorporated company may change either because one shareholder has transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be member under some other provisions of the Companies Act. Thus, perpetual succession denotes the ability of a company to maintain its existence by the constant succession of new individual who step into the shoes of those who ceases to be members of the company. Professor L.C.B. Gower rightly mentions, “Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived—not even a hydrogen bomb could have destroyed it.”

2.4.4. Separate Property.

A company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed off. Their Lordship of the Madras High Court in *R.F. Perumal v. H. Johan Deavin*,<sup>10</sup> held that “no member can claim himself to be the owner of the company's property during its existence or in its winding up.” A member does not even have an insurable interest in the property of the company. The Supreme Court in

Mrs Bacha F. Guzdar v. The Commissioner of Income Tax\textsuperscript{11} held that, though the income of a tea company is entitled to be exempted from income tax up to 60\% being partly agricultural, the same income when received by a share holder in the form of dividend cannot be regarded as agricultural income for the assessment of income tax. It was also observed by the Supreme Court that a share does not, as is erroneously believed by some people, become the part owner of the company or its property; he is only given certain rights by law, e.g., to receive or to attend or vote at the meetings of the shareholders. The Court refused to identify the shareholder with the company and reiterated the distinct personality of the company.

\textbf{2.4.5. Transfer of Shares.}

The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subjected to certain conditions, freely transferrable, so that no shareholder is permanently or necessarily wedded to a company. When the joint stock companies were established, the object was that their shares should be capable of being easily transferred.\textsuperscript{12}

The \textit{Companies Act} 1956\textsuperscript{13} enunciates the principle by providing that the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles.\textsuperscript{14} If the articles do not provide anything for the transfer of the shares and the Regulations contained in Table “A” in schedule one in the \textit{Companies Act} 1956, are also expressly excluded, the transfer of the share will be governed by the general law relating to transfer of movable property. A member may sell his shares in the open market and realize the

\textsuperscript{11} Mrs Bacha F. Guzdar v. The Commissioner of Income Tax, AIR 1955 SC 74.
\textsuperscript{12} Re, Balia and San Francisco Rly., (1968) L.R. 3 Q.B. 588.
\textsuperscript{13} Act No. 1 OF 1956.
\textsuperscript{14} Section 82 of the \textit{Companies Act} 1956. Further see section 56 of the \textit{Companies Act} 2013.
money invested by him. This provides liquidity to member and ensures stability to the company. The stock exchange provides adequate facilities for the sale and purchase of shares. Further as of now, in most of the listed companies, the shares are also transferable through electronic mode i.e. through Depositary Participants instead of physical transfers.

2.4.6. Common Seal

On incorporation, a company acquires legal entity with perpetual succession and common seal. Since the company has no physical existence, it must act through its agent and all such contract entered into by its agents must be under the seal of the company. The common seal acts as the official signature of company. The name of the company must be engraved on its common seal. A rubber stamp does not serve the purpose. A document not bearing common seal of the company not authentic and has no legal force behind it. The person authorizes to use seal should ensures that it is kept under his personal custody and is used very carefully because any deed, instrument or document to which seal is improperly or fraudulently affixed will involve the company in legal action and litigation.

2.4.7. Capacity to Sue and Be Sued.

A company being a body corporate can sue and be sued in its own name. To sue, means institute legal proceedings against a person or to bring suit in court of law. All the legal proceedings against the company are to be instituted in its own name. Similarly, the company may bring an action against any one in its own name a company's right to sue arises when some loss is caused to the company, i.e. to the
property of the personality of the company. Hence the company is entitled to sue for damages in libel or slander as the case may be.\textsuperscript{15}

A company, as the person separate from its members, may even sue one of its own members for libel. A company has a right to seek damages where a defamatory material published about it, affects its business. Where video cassettes were prepared by the workman of company showing, their struggle against the company’s management, it was held to be not actionable unless shown that the cassette would be defamatory. The court did not restrain the exhibition of the cassette.\textsuperscript{16} The company is not held liable for the contempt committed by its officers.\textsuperscript{17}

\textbf{2.4.8. Contractual Rights.}

A company, being separate legal entity different from its members, can enter into contracts for the conduct of the business in its own name. Shareholder cannot enforce contract made by his company, is neither a party to the contract nor entitled to the benefit of it, as the company is not trustee for its shareholders. Likewise, shareholder cannot be sued on contracts made by his company.

The distinction between company and its members is not confined to the rules of privity, however it permeates the whole of law of contracts. Thus, if director fails to disclose a breach of his duties to his company, and in consequence a shareholder is induced to enter into contract with director which he would not have entered into had there been disclosures, the shareholders cannot rescind the contract.

\textsuperscript{15} \textit{Floating Servicess Ltd v. MV San Fransceco Diploa}, (2004) 52 SCL 762 (Guj).
\textsuperscript{16} \textit{TVS Employees Federation v. TVS and Sons Ltd}, (1996) 87 Com Cases 37.
\textsuperscript{17} \textit{Latil Surajmal Kanodia v. Office Tiger Data Base Systems India (P) Ltd}, (2006) 129 Comp Cas, 192, Mad.
Similarly, a member of company cannot sue in respect of torts committed against the company, nor can he be sued for torts committed by the company.\(^\text{18}\) Therefore, the company as legal person can take action to enforce its legal rights or be sued for breach of its legal duties. Its rights and duties are distinct from those of its constituent members.

2.4.9. Voluntary Association for Profits

A company is voluntary association for profits. It is formed for the accomplishment of some public goals and whatsoever profit is gained is divided among its share holder or restored for the future expansion of the company.

2.4.10. Termination of Existence

A company, being an abstract and artificial person, does not die a natural death. It is created by law, carries on its affairs according to law through its life and ultimately is effaced by law. Generally, the existence of the company is terminated by means of winding up.

However, to avoid winding up some times companies change their form by means of re-organization, re-construction and amalgamation.

2.4.11. Disadvantages of Corporate Form of Enterprise

There are, however, certain disadvantages and inconveniences in incorporation. Some of these disadvantages are:

1. Formalities and Expenses: Incorporation of a company is coupled with complex, cumbersome and detailed legal formalities and procedures, involving considerable amount of time and money. Even after the company is

\(^{18}\) *British Thomson-Huston Company v. Sterling Accessories Ltd*, (1924) 2 Ch. 33.
incorporated, its affairs and working must be conducted strictly in accordance with legal provisions. Thus various returns and documents are required to be filed with the Registrar of Companies, some periodically and some on the happening of an event. Certain books and registers are compulsorily required to be maintained by a company. Approval and sanction of the Company Law Board, the Government, the court, the Registrar of Companies or other appropriate authority, as the case may be is necessarily required to be obtained for certain corporate activities.

2. Corporate disclosures: Notwithstanding the elaborate legal framework designed to ensure maximum disclosure of corporate information, the members of a company comparatively have restricted accessibility to its internal management and day to day administration of corporate working.

3. Separation of control from ownership: Members of a company do not have an effective and intimate control over its working as one can have in other forms of business organization, say, a partnership firm. This is particularly so in big companies in which the number of members is too large to exercise any effective control over its day to day affairs.

4. Greater social responsibility: Having regard to the enormous powers wielded by the companies and the impact they have on the society, the companies are called upon to show greater social responsibility in their working and, for that purpose, are subject to greater control and regulation than that by which other forms of business organization are governed and regulated.

19 Section 135 of the Companies Act 2013.
5. Greater tax burden in certain cases: In certain circumstances, the tax burden on a company is more than that on other forms of business organization including partnership firms.

6. Detailed winding-up procedure: The Act provides elaborate and detailed procedure for winding-up of companies which is more expensive and time consuming than that which is applicable to other forms of business organization.

2.4.11.1. Lifting of the corporate veil

By the provision of law, a corporation is clothed with a distinct personality, yet in reality it is an association of persons who are in fact, in a way the beneficial owners of the property of the body corporate. A company, being an artificial person, cannot act on its own; it can only act through natural persons. It means the company has a separate legal entity from the persons constituting its members. Indeed, the theory of corporate entity is still the basic principle on which the whole law of corporations is based. But as the separate personality of the company is a statutory privilege, it must be used for legitimate business purposes only. 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. The Court will break through the corporate shell and apply the principle of what is known as “lifting of or piercing through the corporate veil”. The Court will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company. The corporate veil is lifted when in defense proceedings, such as for the evasion of tax, an
entity relies on its corporate personality as a shield to cover its wrong doings.\textsuperscript{20} However, the shareholders cannot ask for lifting veil for their purposes.\textsuperscript{21}

\textbf{2.4.11.2. Statutory Recognition of Lifting of Corporate veil.}

The \textit{Companies Act 1956} contains some provisions which lift the corporate veil to reach the real forces of action.\textsuperscript{22} Taxation Laws have also made deep inroads to crack the corporate shell for efficient administration of tax laws. For the purpose of Wealth Tax and Estate Duty Legislation, new statutory formulae have been enacted for shares of private companies which substantially disregard the separate corporate entity and proceed on the basis that the ownership of such corporate entity and proceed on the basis that the ownership of such corporate property belongs to the shareholders. In terms of income–tax Law, directors of private companies have been made personally liable for the tax liabilities of such companies. The face of the corporation is examined in order to pay regard to the economic realities behind the legal façade.

\textbf{2.5. Distinction between Company and Other Institutions.}

\textbf{2.5.1. Distinction between Partnership and a Company.}

Unlike a partnership firm, company registered under the Act from the date of incorporation has legal personality different from the members who composite it. It is capable enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. It is the beneficial owner of its own property and it does not hold it as trustee for its members. The share holders are not the proprietor of the company but merely as suppliers of capital entitled to no more than reasonable

\textsuperscript{20} BSN (UK) Ltd. V. Janardan Mohandas Rajan Pillai, (1996) 86 Comp. Cas. 371 (Bom).


\textsuperscript{22} See, Sections 45, 147, 212, 247 and 542 of the \textit{Companies Act 1956}. 

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return. It can own and dispose of its property. It can sue or be sued in its own name. Unlike a partnership firm, the death of partner does not affect the existence of a company. An incorporated company is an entity with perpetual succession. The corporate existence is never affected by the death or insolvency of member thereof. In the case of partnership if all or all but one partner is adjudicated insolvent or all but one partner dies the firm is compulsorily dissolved. Besides, on death of partner the firm is dissolved unless there is contract to contrary among the partner. But company is not dissolved on the death on the insolvency of a member. In the case of the company the members can transfer their shares without the consent of the other members but in case of partnership a partner cannot transfer his interest in the firm without the consent of other partners.

Company is one of the most important business organizations. Trading or business may be carried on by a single person or business association like partnership firm or company. Usually the company is formed to carry on the business at the large scale, i.e., to carry on business larger than that of a partnership firm. Larger business requires the larger amount of capital and therefore a company is considered better than a partnership firm. Unlike a partnership firm, company registered under the Companies Act, from the date of incorporation has a legal personality different from the members who compose it. It is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. It is the beneficial owner of its own property and it does not hold it as a trustee for its members. The shareholders are not the proprietors of the company but merely as suppliers of capital entitled to no more than reasonable return. It can own and dispose of its property. It can sue or be sued in its own name.
Unlike a partnership firm, the death of a partner does not affect the existence of a company. An incorporated company is an entity with perpetual succession. The corporate existence is never affected by the death or insolvency of a member thereof. In the case of partnership if all or all but one partner is adjudicated insolvent or all but one partner dies, the firm is compulsorily dissolved. Besides, on the death of a partner the firm is dissolved unless there is contract to contrary among the partners. But a company is not dissolved on the death or insolvency of a member. In the case of company the members can transfer their shares without the consent of other members but in case of partnership a partner cannot transfer his interest in the firm without the consent of other partners. Under Indian Companies Act a company may be registered with limited or unlimited liability. In case of a company with limited liability, the liability of each of its members will be limited to certain extent. In case of company limited by shares the liability of a member is limited to the amount unpaid on the shares held by him which in case of a company limited by guarantee the liability of a member is limited to the amount undertaken to contribute to the assets of the company in the event of its winding up. The limited liability has enabled the businessmen to invest their money in a business run by the corporate form of organization with limited risk. In case of company with limited liability it is possible for member to know the exact extent of his risks.

2.5.2. Distinction between Ordinary Corporation and Statutory corporations.

A company incorporated under the Act should not be confused with a statutory or public corporation. Statutory Corporation is created by a specific statute and owned or controlled by the State. It has also a separate legal personality and therefore can sue and be sued in its own name. It can own posses or dispose of its property. It exercises only those powers and performs only those functions and discharges only
those duties which are entrusted to it by the statute which creates it. Ordinarily, it is independent but required to act according to the declared policy of the government for which it has been created. It is largely autonomous in its day to day administration. It can make rules, regulation etc. if it is given such power by the statute which creates it.

It is noted that a public corporation is state within the meaning of Article 12 of the Constitution of India. Since it is state within the meaning of Article 12, it is subjected to the writ jurisdiction of Supreme Court and High Court. The incorporated company owes its existence either to the special Act of Parliament or to company legislation. The public corporation like Life Insurance Corporation of India and Damodar Valley Corporation have been brought into existence through the special Acts of Parliament, whereas company like TATA Iron and Steel Company Ltd, Reliance Industries Ltd have been formed under the Companies Act 1956.

It is to be noted that a public corporation is a person but not citizen and therefore it can claim the benefit of the Fundamental Rights guaranteed to every person whether citizen or not citizen, but it cannot claim the benefit of the Fundamental Rights guaranteed only to the citizens. It is to be also noted that a public corporation is included in the State as defined under Article 12; the Fundamental Right can be enforced against it. The public corporation or statutory corporation is a body having an entity separate and independent from the Government. It is not a department or organ of the Government. Consequently, its employees are not regarded as Government servants and therefore, not entitled to the protection of Article 311. The life Insurance Corporation of India, Damodar Valley Corporation, Air Corporation, etc. are the examples of the Public or statutory corporations. LIC of

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23 See Article 311 of Indian Constitution.
India has been set up under the *Life Insurance Corporation Act*, 1956\(^{24}\). Similarly, Damodar Valley Corporation has been established by the *Damodar Valley corporation Act*, 1948\(^ {25}\). *Air Corporations Act*, 1953\(^ {26}\) has established the corporations called “Indian Airlines” and Air India International”. The Company incorporated under the Companies Act differs from a public or statutory corporation. It is incorporated in accordance with the provisions of the companies Act and no special legislation is required to be passed for its incorporation like public corporation, a company incorporated under the Companies Act has a distinct legal personality but it is not a citizen. Being a person a company can enforce those Fundamental Rights which are guaranteed to all persons whether citizen or not but a company not being a citizen cannot enforce the Fundamental Rights guaranteed only to citizens.

A public corporation or statutory corporation should not be confused with the government company. The government company is also incorporated under the Companies Act and subject to the provisions of the Companies Act 2013\(^ {27}\). For the purposes of this Act Government company means a company in which not less than 51 percent of the paid-up share capital is held by the Central Government or by any State Government or partly by the Central Government and partly by one or more State Government or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government Company as thus defined. A Government Company has also a separate legal personality and it is not an agent or department of the Government. It is to be noted

\(^{24}\) Act no.,31 of 1956  
\(^{25}\) Act No. 14 of 1948 1  
\(^{26}\) Act no 27 of 1953  
\(^{27}\) Act no 18 of 2013
that the Central Government, by notification, can declare that certain provisions of the
Companies Act will not apply or apply with certain Modifications to the Government
Companies. The Companies Act contains certain special provisions applicable only to
the Government Companies.

Companies incorporated by the registration under the Companies Act may be
of several kinds. They may be unlimited companies or limited companies. Unlimited
company may be taken to mean a company where the liability of its members is not
limited at all and each member is liable to contribute to the debts of the company to
the full extent of his property. Limited company may be understood as a company
where the liability of its members is limited. A limited company may be either limited
by shares or limited by guarantee. A company limited by shares may be understood
as a company having the liability of its members limited to the amount unpaid on the
shares respectively held by them. A company limited by guarantee means a company
having the liability of its members limited to such amount as the members may
respectively held by them. A company limited by guarantee means a company having
the liability of its members limited to such amount as the members may respectively
undertake under the Memorandum of Association to contribute to the assets of the
company in the event of its winding up. The specified amount may be different for
different member of the company. A guarantee companies may be divided into two
categories – companies limited by guarantee with share capital and companies limited
by guarantee without a share capital. In case of a guarantee company having share
capital the members are under double liability. They are liable to pay the issue price
of their shares and also to honor their guarantee in the event of the winding up of the
company.
2.5.3. Distinction between company and Limited Liability Partnership

Limited Liability Partnership (LLP) is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name. LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner’s wrongful business decisions or misconduct.

Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. The LLP, however, is not relieved of the liability for its other obligations as a separate entity. Since LLP contains elements of both ‘a corporate structure’ as well as ‘a partnership firm structure’ LLP is called a hybrid between a company and a partnership. LLP is a body corporate and a legal entity separate from its partners, having perpetual succession. LLP form is a form of business model with: (i) is organized and operates on the basis of an agreement. (ii) Provides flexibility without imposing detailed legal and procedural requirements (iii) enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner. A basic difference between an LLP and a company lies in that the internal governance structure of a company is regulated by statute\textsuperscript{28}, whereas for an LLP it would be by a contractual agreement between partners. The management –ownership divide inherent in a company is not there in a limited

\textsuperscript{28} The Companies Act, 1956
liability partnership. LLP have more flexibility as compared to a company. LLP have lesser compliance requirements as compared to a company.

2.6. Brief History of Company Law in India and England

The history and development of Company Law in India is closely lined with that of England and for that reason it becomes essential to have a brief account of the history of English Company law for proper appreciation of our law.

2.6.1. Background of English Company Law:

The history of modern company law in England began in 1844 when the joint Stock Companies Act was passed. The Act provided for the first time that a company could be incorporated by registration without obtaining a Royal Charter or sanction by a special Act of Parliament. The office of the Registrar of Joint Stock Companies was also created. But the Act denied to the members the facility of limited liability. The English Parliament in 1855 passed the Limited Liability Act providing for limited liability to the members of a registered company. The Act of 1844 was superseded by a comprehensive Act of 1856 which marked the beginning of a new era in company law in England. This Act introduced the modern mode of creating companies by means of Memorandum and Articles of Associations. The first enactment to bear the title “Companies Act” was the Companies Act, 1862. By these Acts some of the modern provisions of a company were clearly laid down. Firstly, two documents, namely, (a) the Memorandum of association, and (b) the Articles of association formed the integral part for the formation of a limited by guarantee. Thirdly, any alteration in the object clause of the memorandum of association was prohibited. Provisions for winding-up were also introduced. Thus, the basic structure of the
company as we know had taken shape. Sir Francis Palmer described this Act as the “Magna Carta of co-operative enterprises”.

*The Companies (Memorandum and Association) Act, 1890* made relaxation with regard to change in the object clause under the leave of the Court obtained on the basis of special resolution passed by the members in general meeting. Then the liability of the directors of a company was introduced by the *Directors’ Liability Act, 1890* and the compulsory audit of the company’s accounts was enforced under the *Companies Act, 1900*. The concept of private company was introduced for the first time in the *Companies Act, 1908*. The earlier ones were called public companies. Two subsequent Acts were passed in 1908 and in 1929 to consolidate the earlier Acts. *The Companies Act, 1948* which was the Principal Act in force in England then was based on the report of a committee under Lord Cohen. The Act introduced *inter alia* another new form of company known as exempt private company.

Another outstanding feature of the 1948 Act was the emphasis on the public accountability of the company. Generally recognized principles of accountancy were given statutory force and had to be applied in the preparation of the balance sheet and profit and loss account. Further, the 1948 legislation extended the protection of the minority and the powers of the Board of Trade to order an investigation of the company’s affairs and for the first time the shareholders in general meeting were given power to remove a director before the expiration of his period of office. The independence of auditors vis-à-vis the directors was strengthened. The 1948 Act was

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29 53 & 54 Vict c 62.
30 53 & 54 Fior. cAP. 64.
32 11 & 12 Geo.6 c.38.
33 Id.
34 Id.
amended by *the Companies (Amendment) Act*, 1967. The Amending Act was based upon the report and recommendations of the Jenkins Committee presented in 1962.

The 1967 Act adopted and considerably extended in some respects, the recommendations of the Committee as to disclosure. The Act abolished the exempt private company, and required all limited companies to file accounts. More stringent provisions were imposed in relation to director’s interests in the company and disclosed thereof. The *Companies Act*, 1976 attempted to remedy a variety of defects which had become evident in the application of the Acts of 1948 and 1967. The 1976 Act strengthened the requirements of public accountability and those relating to the disclosure of interests in the shares of the company.

*The Companies Act*, 1980\(^\text{35}\) was a major measure of company law reform in England. Insider dealing was made a criminal offence. The shareholders were given a right of pre-emption in the case of new issues of shares in specified circumstances. Dealings between the directors and their companies became greatly restricted and maximum financial limits were introduced for such dealings.

The protection to the minority shareholders was extended by enabling them to petition for relief if their position was unfairly prejudiced. *The Companies Act*, 1981 introduced other important changes for the purposes of accounting and disclosure. Companies were divided into small, medium-sized and other companies and their disclosure requirements were differentiated accordingly.

The law relating to the names of companies was simplified by the abolition, in principle, of the approval of the name by the Department of Trade. The company was authorized, subject to certain conditions, to issue redeemable equity shares and to

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purchase its own shares. The 1981 Act further abolished the register of business names which had to be kept under the *Registration of Business Names Act, 1916*.

Active steps were taken to prepare consolidating measures relating to the *Companies Acts* 1948 to 1981. In November, 1981, the Department of Trade published a consultative document entitled “Consolidation of Companies Acts”. In this document the various methods of consolidation and their relative advantages for the practice were discussed. The whole of the existing statute relating exclusively to companies was consolidated in the *Companies Act, 1985*, and Companies Acts 1948 and 1983 repealed by the *Companies Consolidation (Consequential Provisions) Act, 1985*.

At the same time two minor consolidating enactments, the *Business Names Act, 1985* and the *Company Securities (Insider Dealing) Act, 1985*, were passed to consolidate certain provisions of the *Companies Acts* 1980 and 1981, which affected sloe traders and partnerships and persons other than companies as well as companies regulated by the *Companies Act, 1985*.

The whole of the present stature, therefore, was contained in the *Companies Act, 1985* and the two minor consolidating enactments together with the temporary and transitional provisions of the *Companies consolidation (Consequential Provisions) Act, 1985*, all of which have come into force 1st July, 1985.

The U.K. company law has further been amended and has been substituted by U.K. *Companies Act, 2006*. The Act has been brought into force in stages and circumscribes enhanced duties of directors, simpler regime for private companies, increased use of e-communication, enhanced auditor liabilities etc.

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36 Received Royal Assent on 8th November, 2006.
2.6.2. Development of Indian Company Law

Company Law in India, as indicated earlier, is the cherished child of the English parents; our various Companies Acts have been modeled on the English Acts. Following the enactment of the Joint Stock Companies Act, 1844 in England, and the first companies Act was passed in India in 1850. It provided for the registration of the companies and transferability of shares. The Amending Act of 1857 conferred the right of registration with or without limited liability. Subsequently this right was granted to banking and insurance companies by an Act of 1860 following the similar principle in Britain. The Companies Act of 1856 repealed all the previous Acts. This Act provided inter alia for incorporation, regulation and winding up of companies and other associations. This Act was recast in 1882, embodying the amendments which were made in the Company Law in England up to that time. In 1913 a consolidating Act was passed, and major amendments were made to the consolidated Act in 1936. In the meantime England passed a comprehensive Companies Act in 1948. In 1951, the Indian Government promulgated the Indian Companies (Amendment) ordinance under which the Central Government and the Court assumed extensive powers to intervene directly in the affairs of the company and to take necessary action in the interest of the company- The ordinance was replaced by an Amending Act of 1951.

2.6.2.1. The Companies Act, 1956

This law was enacted with a view to consolidate and amend the earlier laws relating to companies and certain other associations. The Act came into force on 1 April, 1956. The Companies Act 1956 was based largely on the recommendations of the Company Law Committee (Bhabha Committee) which submitted its report in March, 1952. The Act was the longest piece of legislation ever passed by Indian Parliament. Amendments have been made in the Act periodically. The Companies Act
consists of 658 Sections and 15 Schedules. Full and fair disclosure of various matters in prospectus; detailed information of the financial affairs of company to be disclosed in its account; provision for intervention and investigation by the Government into the affairs of a company; restrictions on the powers of managerial personnel; enforcement of proper performance of their duties by company management; and protection of minority shareholders were some of the main features of the Companies Act, 1956.


The Companies Act was amended twice in 1966. These amendments consisted of four sections only. Two important changes were introduced by the *Companies (Amendment) Act*, 1969. The institutions of managing agents and secretaries and treasurers were abolished with effect from April 3, 1970. Secondly, Contributions by companies to any political party or for any political purpose were prohibited. The *Companies (Amendment) Act*, 1974 which came into force form February 1, 1975 had introduced some important and major changes in the Companies Act, 1956.

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37 Act No 98 of 1969.
The object of the Amendment Act was to inject an element of public interest in the working of the corporate sector. The important changes introduced by the Amendment Act of 1974 are given below;

1. Deemed to be public limited companies

2. Acceptance of deposits from the public to be in accordance with the Rules.

3. Maintenance of a separate account for unclaimed dividend by public limited companies.

4. Control over foreign-owned companies brought within the purview of the Act

5. Appointment of Company Law Board benches in metropolitan cities.

6. Power to prohibit the appointment of a sole-selling agent by Central Government.

7. Appointment of a whole-time secretary.

2.6.2.2. The Companies (Amendment) Act 1977

This legislation brought about certain changes in Sections 58A, 220, 293, 620 and 634A. The amended Section 58A empowered the Central Government to grant extension of time or to exempt any company in deserving cases from all or any of the provisions of Section 58A. Section 293 empowered a company to make donations for charitable purposes up to 5 per cent of its average net profit or up to Rs.25,000 whichever was higher. This section as amended by the Act of 1977 raised the ceiling to Rs. 50000.
The Companies (Amendment) Act, 1985\textsuperscript{38}: The Amending Act substituted Section 293A with a new section permitting Non-Government companies to make political contributions, directly or indirectly. With a view that legitimate dues of workers rank pari passu with secured creditors in event of closure of the company and above seven the dues to Government, Sections 529 and 530 of the Companies Act, 1956, were amended and a new Section 529 A was introduced.

In order to give effect to the recommendations of the Committee on Subordinate Legislations (Seventh Lok Sabha) that the Company Law Board should be empowered to reassess compensation on appeal from the order of the prescribed authority assessing the compensation payable under an order of amalgamation under Section 396, and that the order of amalgamation itself may provide for the continuation of any pending legal proceeding by or against the transferee company on the lines of the existing provisions of Section 394 of the Act under which the High Court orders amalgamation, Section 396 of the Act was amended.

\textbf{2.6.2.3. The companies (Amendment) Act, 1988}

Based on the recommendations made by the Expert Committee (Sachar Committee), the Companies (Amendment) Act, 1988 substantially amended the Companies Act, 1956 in order to streamline some of the existing provisions of the Companies Act, 1956 and to ensure better working and administration of the Act. It was for the first time that the Companies Act provided that every public company of a certain size shall have a managing or whole-time director. The companies were also given freedom to fix the managerial remuneration on the basis of certain limits.

\textsuperscript{38} Act No. 35 of 1985.
2.6.2.4. The Important Changes Introduced by the Amendment Act of 1988

Definition of Secretary brought in line with the definition of ‘Company Secretary’ in the *Company Secretaries Act, 1980* and includes individual possessing prescribed qualifications. The concept of company secretary in practice was introduced for the first time in the Companies Act. A practicing secretary has been authorized to file declaration of compliance under Sections 33 and 149. Every listed company is required to file annual return under Section 161 which must also be signed by a practicing secretary apart from other signatories. In the absence of a company secretary, the practicing secretary may also certify that the requirements of Schedule XII have been complied with.

The amended Act, among other things, also set up an independent Company Law Board to exercise such judicial and quasi-judicial functions, earlier being exercised either by the Court or the Central Government. It also dispensed with the requirement of getting Government approval for managerial appointments and remuneration subject to the fulfillment of certain statutory guidelines which were incorporated in the Act itself. It delinked the rates of depreciation from the rates specified under the Income-tax Act and laid down rates of depreciation in the Act itself to reflect the true and fair view of the state of affairs of the company.

2.6.2.5. Amendments made to the *Companies Act* by the *Depositories Act, 1996.*

1. Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.\(^40\)

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\(^{39}\) Act 56 of 1980.

\(^{40}\) See, Section 41(3) of the *Companies Act* 1956.
2. Section 83 was repealed, as requirement of distinguishing each share in a company by an appropriate number is no more mandatory. However, section 83 was reintroduced by the Depositories Related Laws (Amendment) Act, 1997.

3. Stamping of transfer instruments is not required where both the transferor and transferee are entered as beneficial owners in the records of a depository.\textsuperscript{41}

4. Power of company to refuse to register transfer of shares would apply to a private company only.\textsuperscript{42}

5. The securities of a company other than a private company have been made freely transferable. The transfer has to be effected immediately by the company/depository. However, if it is provided that the transfer is in contravention of SEBI Act/SICA the aggrieved party can move to CLB to determine if the alleged contravention has taken place.\textsuperscript{43}

6. The register of members shall indicate the shares held by a member in demat mode but such shares need not be distinguished by a distinct number.\textsuperscript{44}

7. The register of debenture holders shall indicate the debentures held by a holder in demat form but such debentures need not be distinguished by distinct numbers.

8. The company is required to indicate in the offer document that an investor has the option to subscribe for securities in the demat mode.


\textsuperscript{41} See, Section 111(3), Id.
\textsuperscript{42} See, Section 111(4), Id.
\textsuperscript{43} See, Section 111(A), Id.
\textsuperscript{44} See, Section 150 (1)(B), Id.
2.6.2.6. The Companies (Amendment) Act, 1999-Salient Features

- The infrastructure Development Finance Company Limited recognized as one of the Public Financial Institutions.
- Companies allowed buy-back their own securities.
- Companies enabled to issue Sweat Equity shares.
- Facility for nomination provided for the benefit of share/debenture/deposit holders.
- An Investor Education and protection Fund proposed to be established.
- National Advisory Committee on Accounting Standards for companies proposed to be established.
- Companies freed from obtaining prior approval of Central Government for their inter corporate investment/lending proposals.

2.6.2.7 Salient Features of the Companies Act 2013

The salient features of the Companies Act, 2013 are-

- Insurance companies, Banking Companies, and public electric companies are brought under the Companies Act.
- Definition of company is widened; even single person can constitute company which is called as “One Person Company.”
- Even the membership of Private Companies is enhanced to two hundred persons.
- Further Act has prescribed the quantum of investment for different kind of companies.

43 Act No 18 of 2013.
46 Section 1 (4) of the Companies Act 2013.
47 Section 2 (62), Id.
48 Section 2(68) (ii), Id.
• Act has enhanced the fine amount considerably to the extent of cores under different sections which will be imposed on the guilty officer and company.\textsuperscript{50}

• Act has introduced the concept of minimum mandatory punishment to deter companies from committing wrongful act.\textsuperscript{51}

• Act has introduced the concept of “Corporate Social Responsibility” to make company more responsible for the cause of the society.\textsuperscript{52}

• Act has authorized the Central Government to constitute “National Company Law Tribunal” and “National Company Law Appellate Tribunal” to adjudicate the matters in speedy manner.\textsuperscript{53}

• Act has empowered the Central Government to Constitute Special Court to try the offence committed by company and its official which ensures speedy justice.\textsuperscript{54}

2.7. Conclusion

Industrialization, development in science and technology have boosted the trade and commerce across the universe. Obviously community has looked for innovative devices which will help the people of community to carry the business and trade in very effective and smooth manner. Naturally the law invented the idea of creating artificial person in the form of company. Company is very ideal instrument to start business with more number of persons without much problem and difficulty.

\textsuperscript{49} One lakh Rupee investment is necessary to constitute private company, where as in case of public company five lakh Rupee investment is necessary, see section 2(68) and (71) (b) of the Companies Act 2013.

\textsuperscript{50} Any company with intent to defraud issues duplicate share certificate such company may be punished with ten cores Rupee fine, see section 46(5) of the Companies Act 2013.

\textsuperscript{51} Section 447 of the Companies Act 2013 empowers the special court to punish a person who is found to be guilty of fraud in payment of debt not less than six month which may be extended to ten years. Section 449 empowers the special court to punish person who gives false evidence intentionally with minimum three years imprisonment which may be extend to seven years.

\textsuperscript{52} See section 135 of the Companies Act 2013.

\textsuperscript{53} See section 408 and 410, Id.

\textsuperscript{54} See section 435, Id.
among themselves. The idea of company gained momentum across the universe and become very much popular concept. Every nation has enacted company law including India. The greatest advantages of carrying business through company are independent existence, limited liability, unlimited membership in case of public company, perpetual succession, acquiring property in its own name and company has the capacity to sue others and be sued by others. Further law has facilitated companies to attract more investment and members in company through by providing easy facility of liquidity and transferable of share in the market. Companies have become multinational and carrying their activities across the universe. Therefore it became imperative for the government of India to pass the comprehensive companies Act. Therefore India passed the comprehensive the Companies Act in 1956. After having experience of nearly sixty years of the Companies Act 1956 the Central Government felt that the time has come to have New Companies Act. Obviously the Government of India passed New Companies Act in 2013.55

Newly enacted Companies Act 2013 has provided the opportunity of forming the company with single membership.56 Further, the Act has enhanced the maximum membership of private company from fifty to two hundred.57 Act has wide application because it covers even Banking Companies, Insurance Companies, and Electric Companies.58 New Act has provided opportunity for promoters to establish company for future project which has not carried significant transactions to keep such company as dormant company.59 The New Companies Act 2013 has constituted Special Court which has been given exclusive jurisdiction to try the offences committed by

55 Act No18 of 2013.
56 Section 2 (62) of the Companies Act 2013.
57 See, Section 2(68), Id.
58 Section 1 (4), Id.
59 See, Section 455, Id.
companies under the new Act. Act has prescribed the mandatory minimum punishment in certain offence which is worthy to be noted because it works to be more deterrent. New Act has prescribed the enhanced punishment in case company commits the offence second time. Even the New Act has provided the summary proceedings for offence punishable less than three years which enables the court to provide speedy justice. Further the Act has empowered the Central Government to maintain the penal of expert to be called as the Mediation and conciliation which would help in resolving the litigation of company in more amicable manner in a short period. That would certainly create healthy environment in company. Further, the Act has enhanced the quantum of fine considerably which has to be imposed on company in case of its wrongful act. It has added new chapter of social responsibility. New Act encourages the company to spend some portion of its earned profit to the cause of society. This is welcome step in right direction. Further it has authorized the Central Government to Constitute the National Company Law Tribunal and “National Company Law Appellate Tribunal.” All these things ensure that litigation in company matters and offence committed by company would be disposed off speedily.

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60 See, Section 435, Id.
61 See, Section 447, 449, and proviso (8) of 454, Id.
62 See, Section 451, Id.
63 See, Section (2) of 435, Id.
64 Any company with intent to defraud issues duplicate share certificate such company may be punished with ten cores Rupee fine, see section 46(5) of the Companies Act 2013. Further, Section 447 empowers the special court to punish a person who is found to be guilty of fraud in payment of debt not less than six month which may be extended to ten years. Section 449 empowers the special court to punish person who gives false evidence intentionally with minimum three years imprisonment which may be extend to seven years.
65 See section 135 of the Companies Act 2013.
66 Section 408 and 410, Id.