

8. Company Incorporation and Management

8.1 Background

A company plays very important role to develop the industry, trade and commerce in the world because it is an organization having separate identity from its promoters and it has covered almost all areas of the business. Today, big type of corporations or institutions or organizations of insurance, bank, industry etc. are operative as companies with the participation of private or public or government or non-government, indigenous or foreign faces. Company is an artificial person that is created, run and ended by the law. The scope of a company is wider than of a partnership firm of business. Partnership firm is a suitable device for a small group of partners who take personal interest and there is mutual trust and confidence among them.

The concept of the formation of a company is the outcome of the experiences of partnership business and incorporation by registration. In partnership, on the other hand the liability of the partners for the debts of the business is unlimited. They are bound to meet without any limit, all the business obligations of the firm. The company being a separate person, the liability of its shareholders is limited in the context of company. The shareholders are not liable personally.

8.2 Meaning and Definition of Company

The term 'company' is derived from the Latin word 'companies'. Literally, the term company means a group of persons associated to achieve some common objective such as business, charity, and research, etc.

The company is a voluntary association of persons formed to run business activities for fulfilling the objective of earning profits by collecting capital and selling shares. So, the company is an association incorporated by a person or some person interested to carry on any business of industrial or mercantile activity or other lawful trade with the motivation of earning profit by contributing money or money's worth to the company.

The company Act, 2063, section 2(a) states that "A company shall denote the company which is incorporated in accordance with this Act."

According to eminent writer, L.C.B. Gower "A company as an association of a number of persons for a common object that object normally being the economic gain of its member."

According to Justice James "A company is an association of persons united for common object."

Chief Justice Marshal defines company as "A person artificial, invisible, intangible and existing only in the eyes of law. Being a mere creation of law, it possess only those properties which the charter of its creation upon it, either expressly or identical to its very existence."

Thus, the term 'company' means an association of a number of persons formed for some common purpose and registered according to the law relating to company.

8.3 Characteristics of Company

1.1.1 a. Perpetual succession:

A company is a corporate body with a perpetual succession system. Death or insolvency of a shareholder does not affect the existence of the company. It may come to an end only when it is liquidated in accordance with the company law.

1.1.2 b. Separate existence:

A company is separate and distinct from its members. Company is capable of acquiring, possessing, selling, disposing of or dealing with in any other manner of its movable or immovable property in its own name. The company becoming own of its capital and assets enjoys all the rights as an individual. The capital and assets of the company is generated from the money invested by its own members. The member of the company does not become owner of company's property because the company itself is the owner of the whole property belongs to it.

1.1.3 c. Limited liability:

A company's shareholders have to bear the liability to the extent of their share amount. The creditor of a company is not the creditor of its shareholder. So any decisions against the company shall not apply to its shareholder.

1.1.4 d. Transferable shares:

Capital of the company divided into different parts is called shares which are transferable. In case of a public company the shareholders can transfer their shares or debentures like movable property ever they like. But the shareholders of a private company cannot freely transfer shares or debentures ownership whenever they like. The ownership of a private company can be transferred by giving priority to the existing shareholders only.

1.1.5 e. Registered office:

A company has its own registered office from where the company operates its business and can establish branch office.

1.1.6 f. Common Seal:

A company has a seal which is an evidence of authenticity of it.

1.1.7 g. Voluntary association:

A company is an association of one or more than one person voluntarily agrees upon the establishment of it.

1.1.8 h. Contractual capacity:

As a legal person, a company can enter into a number of contracts for the achievement of its purpose and for the performance of its duties.

1.1.9 i. Legal person:

A company is not a citizen of a nation but it can enjoy the property right as a legal person.

1.1.10 j. Management by representatives:

All the shareholders are the true owners of a company. Some of the representatives are selected by the true owners to enjoy the power of the company and to perform the daily administrative functions. The committee of the representatives is called a Board of Directors. They are selected from among the shareholders.

8.4 INCORPORATION OF A COMPANY

Incorporation of a company means the combination of promoter's decision to establish and registration of the company. Registration is a process which gives legal status to the company. Company is a legal institution the formation of which is known as incorporation that result is the registration in the competent authority as prescribed by the law of land. A company is incorporated to acquire profit and objectives as stated by its memorandum of association.

A company denotes a business company which is established under the company Act, 2063 section 3(1); a company may be either private or public. Incorporation of a company means formation of company according to company law. The company Act, 2063 section 3 makes the following provisions relating to the incorporation of a business company.

- Any person who wants to undertake any enterprise with the motive of earning a profit may establish a one man company personally or joint stock company along with others. According to company Act, 2063 section 166 – A company can be established without making profit. A company can be established with a motive to serve some common purpose.
- Any foreigner who wants to establish company in Nepal must perform the provision of company Act, 2063, section 4(1) g, h, i.
- If the promoter is foreign person, company or body the license for investment, business or transaction pursuant to the prevailing law must be submitted.
- If the promoter is foreign person an authorized document to prove that the person holding particular foreign citizenship.
- If the promoter is foreign company or body a copy of establishment certificate and main document regarding establishment.
- According to company Act, 2063, there must be necessary at least seven promoters and one Core paid up capital to establish a public company, but if a company wants to establish another public company it is not necessary to fulfill the provisions.

In case of a private company any one can establish a one man company and the membership must not exceed 50 shareholders (section 9(1) but this bar does not apply with public company. Whether it is a private or a public company it must be registered in the government of Nepal Company Registrar office. In this purpose one can apply with necessary matters and formalities or according to the provisions of section 4 of Company Act, 2063. To register a company, the following documents including necessary fees, an application form should be submitted in the office of the company registrar.

- Memorandum of proposed company.
- Articles and regulation of the company.

- Contract papers, if any agreement has been reached among the incorporators before the incorporation of a public company.
- In case of a private company, agreement copy if any agreement has been reached among the parties.

After the necessary steps are taken the company registrar office registered the company and issues a certificate in a prescribed format. The registration of a company by an official procedure is called the incorporation of a company.

According to company Act, 2063 section 6(1) A, B, C, D, registration may be denied for a company by the office of the registrar in the following circumstances:

- If a company has already been registered with the same name.
- If the name of a company is not good from the point of view of the social welfare, courtesy, and good conduct.
- If the objective of a proposed company is against the existing Nepal law and contrary to the public interest.
- If any of the pre- requisites for the registration of a company are not fulfilled according to this Act.

According to section 6(2) of company Act, 2063, the registrar should send about the refusal of registration with its cause clearly within 15 days.

8.5 Legal Importance and Formalities of Meetings

The meeting of company means a meeting of its shareholders. Such a meeting selects some representatives to constitute a board of directors. The Board can get legitimacy to run the company from the meeting of the shareholders. Role of the company meeting is most important in day to day affairs and management of the company. Meeting of a company is that, where the persons relating to company gather together and pass decision by discussing the matters in respect of agenda, future plan and strategy of the company.

The company Act, 2063 provides only two types of general meetings. These are as follows:

1.1.11 a. Annual general meeting:

According to the company Act, 2063 section 76 – Annual general meeting of company is held within one year from the date of receiving certificate of commencement of business and it shall convene the annual general meeting every year within six months from the date of expiry of financial year of the company.

The agenda of the annual general meeting is submission of board's report, the boards of director's election, remuneration, submission of balance sheet, distribution of profit, appointment of an auditor, remuneration of an auditor, policy making, and rule making matters are discussed and passed the resolution of this meeting. Agenda of special general meeting

1.1.12 b. Extra- ordinary general meeting:

All general meetings other than the annual general meetings are called special general meeting. Such meeting may be called by the company at any time. Basically, It is called in a special situation when an urgent decision has to be taken.

Extra-ordinary general meeting may be called by the following personalities:-

- **By the Board of Directors:** In case of a necessity, the board can call a special general meeting.
- **By the auditor:** In case of any defects in the account of a company, the auditor has to ask the board of directors. If the board does not call the meeting, the Registrar's office can call the special general meeting on the request of the auditor.
- **By the shareholders:** 10% of paid up capital shareholders or 25% of the total number of shareholders can call a special general meeting by disclosing the special cause.

According to Company Act, 2068 the following matters shall be presented in the form of special resolution of general meeting or the agenda of special general meeting of the company.

- (a) Matters relating to the increase of authorized capital
- (b) Matters relating to the reduction of share capital or alteration of share capital
- (c) Matters relating to the change of name or main objective of the company
- (d) Matter relating to merger of one company with another company
- (e) Matters relating to issue of share at discount
- (f) Matters relating to issue of bonus share
- (g) Matters relating to conversion of a private company into a public company and public company into a private company
- (h) Any other matters requiring special resolution under this Act or article of association.

8.6 Importance and Formalities of Meetings

General meeting is the legislature body of the company. It has to elect and appoint the board of directors and the auditor, and to pass resolutions regarding the policy of the company. That is why, the meeting of the company is so much important in the each and every aspect to run the company.

Prior to initiating any legal proceedings on any matter relating to meeting, some legal formalities must be satisfied .If conducted without satisfying such formalities activity as regards meeting may be invalid. Therefore, the meeting of a company to be valid, following formalities must be satisfied, according to the Company Act, 2063.

- (a) To inform all the shareholders of the company before 15 days in the case of a special general meeting and 21 days in the case of an annual general meeting.
- (b) To mention the topics in the agenda to be discussed in the meeting, in the notice (information letter) and to publish. This notice must publish two times in national newspapers.
- (c) To declare the legality of a meeting is the duty of the shareholders. If legal procedures are not followed by the board of directors of the meeting cannot be valid.
- (d) The Quorum of the meeting means minimum number of the shareholders to be present in the meeting of the company. The quorum for the general meeting of a private company shall be as provided for the article of association. If otherwise, high number is prescribed in the memorandum of association, the meeting shall not be held unless at least 3 shareholders is not presented to meet the 50% share among the whole number of share representation of a share distributed public limited company. If the meeting is postponed due to the not meeting the quorum, another meeting shall be called by providing 7 days notice and 25% shareholder's presents is sufficient for such recalled meeting.
- (e) Voting rights are used by all the shareholders members. There is the provision of enjoying voting rights by proxy also.

In Cousins v. international Brick co. Court held that a proxy is a person representative of a shareholder at a meeting of a company who may be described as his agent to carry out a course which the shareholder has himself decided upon.¹
- (f) Every public company shall have to submit the details of Annual General Meeting within 30 days regarding the numbers of shareholder presented, annual financial statement, report of director and auditor and the decisions made by the meeting (section 80(1)).

Unless otherwise provided in the company Act, 2063, the private company shall have to submit a auditor's verified copy of its annual financial report within 6 months from the date of completing fiscal year.

8.7 Minutes and Resolutions of a Company

The term "minute" literally means a note to preserve the memory of an event or transaction. Minute is a record of a meeting. The minute of a meeting is the official record of the matters considered and decision taken at a meeting. Every company is bound to record the proceedings in a minute book.

A minute means the point written summary of the points discussed at a meeting, a book of record of the decision. Such a book is of two kinds which is important for official purpose.

- Minutes of the general meeting.
- Minutes of the board of directors meeting.

¹ Cousins v. international Brick co.

When discussion held on the agenda come to end, they are passed in accordance with the law, by a simple majority, or a special majority. They are recorded in a book that is called a minute.

The following matters must be included in the minutes of a general meeting:

- How the notice of the general meeting was published?
- How many shareholders were presented?
- What percentage shareholders were presented out of total numbers?
- What were the decisions made?
- If the poll has been made, what was result?

Such minutes of the company shall have to either sent to the shareholders within 30 days or publish in national newspaper.

Resolution is the proposal for deciding at the meeting of a company. There are two types of resolution i.e. Ordinary resolution and special resolution.

An ordinary resolution is a resolution other than special resolution. A resolution shall be an ordinary resolution when the votes in a general meeting cast in its favour are more than votes against it. In other words, if the resolutions require only majority vote to pass it is called an ordinary resolution. If any member has a different idea or a disagreement on the subject matter, he can write a note of dissent that also should be mention in the minute book.

8.8 Legal Provisions Regarding to Board's Report

Board of directors is the supreme executive body of the company. It must manage all the affairs of the company, exercise power and perform duties within the scope of Company Act, and in accordance with the memorandum of association and articles of the company, and the decisions of the general meetings.

Being the representatives of the shareholders, the board of directors should present an actual picture of the company (regarding profit and loss and the economic condition) to the shareholders. According to the company Act, 2063, section 109, this kind of report should be prepared before 30 days from the date of annual general meeting.

The board of director has to prepare a financial report including:-

- Balance sheet of end of the year.
- Yearly profit and loss account.
- Yearly cash flow report.
- Section 109(4) (a) evaluation of the last year's transactions.
- Board's opinion about the running year and future plan.
- Business relation with other organizations.
- The focusing points affecting the company's transaction.
- Profit report and percentage to be distributed to the shareholders.
- The total management expenses in the previous financial year.

Every company has to prepare and submit a report to the office of the Registrar in accordance with the company act 2063, section, 78. The report must approve board of directors and company auditor must certify.

8.9 Appointment of Auditor, Removal of an Auditor

Every company, whether private or public, has to audit accounts of its affairs. All the actual information can be obtained from the audit of the accounts about income, achievement, objectives fulfillment and financial status of the company.

So auditor is in the most important position in a company. The company Act, 2063 Section 110-119 provides the provisions, regarding the appointment, removal and duties of an auditor every company must have an audit report by a registered auditor. He must have a certificate issued by the Department of Auditor General and renewal of every year. According to the company Act, 2063 section 110 (1) each company shall have to appoint an auditor in accordance with this Act to audit its accounts.

8.9.1 An auditor can be appointed in the following ways:

- (a) **By annual general meeting of shareholder:** An auditor is appointed by the annual general meeting of shareholders of a public company for one year. It is possible to continue to make re-appointments in the same way.
- (b) **By the board of directors:** The board of directors can appoint an auditor before the first annual general meeting of the company, but in the case of private company it will be in accordance with the memorandum and unanimous agreement. The auditor appointed by the board of directors shall remain until next annual general meeting is held.
- (c) **By the office of the registrar of company:** According to the to the company Act, 2063 Section (113) the office of the registrar of the company may appoint an auditor in case the Annual General Meeting of the company fails to appoint an auditor, or the general meeting could not be held or the auditor appointed in accordance with this Act, is terminated for any reason the office of the registrar may appoint another auditor at the request of the Board of directors of the company.

8.9.2 Removal of an Auditor

The following modes of removal of an auditor in accordance with the Company Act and rule regarding company. According to the Company Act, 2063, Section (119) the auditor under this chapter shall not be remove before the completion of audit of any financial year for which he was appointed.

Not with standing anything contended in sub-section (1) of the section (119) the auditor may be remove to giving prior information to Nepal Chartered Accountants Institute, an obtaining approval from the regulatory authority relating to the business of the company, if the exists of such authority and in the absence of such authority with approval of the office of the registrar by adopting the same procedure with which he was appointed.

- (a) If such an auditor breaches the code of conduct of an auditor.
- (b) If he acts against the interest of the company appointing him as an auditor or commits any acts against the law.

The auditor shall be given a reasonable opportunity to defense while removing him.

8.9.3 Rights and Powers of an Auditor

According to the Company Act, 2063 the following rights and powers are give to the auditor of a company:

- Right to ask for submission of books of account for auditing with the related officers of the company.
- Right to ask the directors and officers to give him explanation for his questions.
- Right to visit all the branches of the company, to check the account, books and documents for auditing.
- Right to request the board of directors to call a extra-ordinary general meeting of the company, if the board does not called the extra-ordinary general meeting according to the company Act. He ca can all the extra-ordinary general meeting with the help of the company registrar office and makes the share holders familiar with the real financial picture of the company.
- Right to seek legal and technical counseling from the experts.
- Right to remuneration for his services provided to the company
- Right to prepare and submit an audit report to concerned party freely.

8.9.4 Dissolution of the Company

Dissolution of the company means an ending or breaking the termination of legal existence and legal personality of company by closing it's transaction. The life and death of the company depends upon the law.

The dissolution of company, the process of collecting it's assets and distributing the liabilities among the creditors and shareholders in accordance with the company Act.

The general meeting of the shareholders or the office of the registrar of the company can dissolve a company in accordance with the Company Act, 2063.

1.1.13 Modes of Winding up

Modes of winding up of a company are provided n the Company Act, 2063 (Section 126 to 137). They are as follows:

- (a) Voluntary winding up (liquidation) of company: According to the company Act, 2063 section 126 (1) except in case where a company has become or insolvent under the law relating to insolvency. The shareholders may liquidate a company either by special resolution adopted in the general meeting or as a provided for in the memorandum of association or the unanimous agreement or Article Association for this purpose the general meeting may pass a special resolution in the following circumstances:
 - If the determined time to run the company has already passed.
 - If the company is unable to pass it's liabilities.
 - If a company is at a loss or if it is not possible to run it continuously.
 - Any other causes may lead to a shut down of the company

- The company shall submit to the office of the company registrar a copy of special resolution and written declaration made directors on voluntarily (winding up) in a period of 7 days adopting such a resolution.
- (b) Winding up by the office of the registrar: According to the Company Act, 2063 (section 132 to 136) the office shall issue an order that the company has been dissolved in accordance with this Act.

In accordance with the Company Act, 2063

The office of the registrar may dissolved a company in the following circumstances:

- If the promoter of the company has applied to the office of the registrar to dissolved the company because it fails to commence the business of the company.
- If the company defaults to submit to the office of the registrar the details and defaults in paying fine under section 80, 81 or the financial years.
- If in the course of administration of the company the office of the registrar has reasonable ground to believe that the company is not carrying on business or is not operated in this situation the office of the registrar shall issue an order to dissolved the company in accordance with this Act.

1.1.14 Short Answer Questions

1. What is arbitration? What are the powers and duties of an arbitrator? [4+6]
2055
2. Define arbitration. Who can refer the disputes to arbitration? [5+5]
2056
3. What are the major provisions of 'Nepal Madhyasthata Ain'? Explain. [10]
2057
4. What is arbitration? Who can refer to arbitration? [4+6]
2059
5. What is arbitration? Who can refer disputes to arbitration? [4+6]
2061
6. Who can refer disputes to arbitration? Also explain what may be referred to arbitration. [5+5]
2062
7. What is arbitration? Explain the powers and duties of arbitrator. [3+7]
2063
8. What is bill of lading? Explain the power and duties of arbitrator. [3+7]
2063
9. What is arbitration? Describe the provisions relating to arbitration in Nepal. [3+7]
2064
10. Define arbitration. Explain the provisions relating to 'Madhyasthata Ain' in Nepal. [10]
2065
11. What is arbitration? Why is arbitration important in modern business world? [4+6]
2066
12. The process of arbitration has been an inbuilt component of business law. In the light of the statement define arbitration and discuss the part who can refer to arbitration. [10+10]
2060

13. What is arbitration? Explain its importance to business community. [3+7]
2068

1.1.15 Comprehensive Question

1. Who can appoint an arbitrator? What are the right and duties of an arbitrator? How an award given by an arbitrator can be made void? Discuss. [5+10+5]
2067

