

DE JURE NEXUS LAW JOURNAL

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INCORPORATION OF COMPANY IN INDIA

In order to form a Company or any Corporate entity incorporation is the very step to make a company legal and form its Separate legal identity. Incorporation can be defined as giving birth to a Company as it separates the assets of the company from its investors and the owners. The Companies Act, 2013 lays down the rule and regulation for the incorporation of Public and Private Company which are governed under the Companies Incorporation Rules, 2014 Chapter II of the Act. As the Ministry of Corporate Affairs has mandated the procedure for Incorporation of Company in India under Companies Act, 2013. The Act also give rise to one person Company.

According to Section 3¹ of the Companies Act, the minimum requirement of member to incorporate a private company is 2 and of public company is 7.

The very first step of Registration of a Company is to file an application to the Registrar of Company (Known as ROC) along with the following documents:

1. Appropriate Name

Company is to choose an appropriate name to make it distinct from other entity and of which the company will operate and get it registered by the Registrar of office (ROC). If the name is not approved by the Registrar office, the applicant has to reapply in the same application.

2. Preparation of Memorandum of Association

One of the most important documents for company incorporation as it basically states of what the company is going to do what would be objective for formation of the company and in what area of business the company is going to deal with. It is divided under five major clauses.

¹ Section 3 of the Companies Act 2013

Name clause

Registered office clause

Object clause

Liability clause, Capital clause

3. Preparation of Article of Association

A document which covers the internal part of the part of the Company which defines the rights, duties, liabilities and task of members which lays down the accomplishment of day-to-day activities of the Company and its members and is legally binding the members of the company. In other words, a Contract is created between the Company and its members.

4. Application for Incorporation of Company.

The very first step is to file an application with the Registrar of Company under whose jurisdiction the registered office of Company is proposed to be situated According to section 7² of the Companies Act, 2013 along with the following documents.

The memorandum and Article of the Company duly signed by all subscribers.

A declaration form by practicing professionals that all the requirements related to incorporation has been complied with.

The address till the registered office is established.

The particulars of every subscriber along with identity proof.

The particulars of first directors along with the proof of identity and his interest in other firms or bodies corporate along with his consent to act as a director.

The particulars of interest of first directors in other firms or bodies corporate along with her consent to act as a director of the Company.

5. Payment of Registration fees

6. Certificate of Incorporation from Registrar of Company.

² Section 2 of the Companies Act 2013

A private Company can commence a business after this step but an additional step is added in public company a Certificate for Commencement of Business is required according to section 149³ of the Act.

Landmark Judgements

Salomon V. Salomon & Co. Ltd⁴

The principle of Corporate Veil was laid down in this case which upheld the Doctrine of Corporate personality as a Separate legal entity from its shareholders. In this case Mr. Salomon incorporated a Company with his Wife, his daughter and four sons of £39,0000 the issue arose that whether Mr Salomon should be personally held liable. It was held that “A company once legally incorporated becomes a separate entity and is an independent person and has its rights and liabilities of its own and has no relation with the people involved in its promotion The company conducts its own business and has its own separate entity.

Lewis Holdings Limited V. Steel & Tube Holdings Limited [2016] NZCA 366⁵

Steel & Tube Holdings was the holding company of stube Industrial limited and has to pay out Lewis Holdings claim in stube's liquidation. The court decision reflects an exception to the general principle that a Company is its own separate legal entity. The court held that a balance must be struck between recognition of separate corporate entity of the liquidated company on the one hand, and prevention of mischief that might result from too strict an application of that concept on the other hand it took the fact that directors of the company were never distinguished between their duties of steel & Tube and those who owned stube.

The case reflects that a wholly owned subsidiary's interests must be kept separate from those of the Holding company. An order made against the Holding Company of which whose directors who do not preserve a subsidiary's, rendering it liable for debts of the Subsidiary. Another case lifting the principle of Corporate Veil.

³ Section 149 of the Companies Act 2013

⁴ Salomon v Salomon & Co Ltd [1897] AC 22

⁵ Lewis Holdings Limited V. Steel & Tube Holdings Limited [2016] NZCA 366

The State Trading Corporation of India Ltd. & Or's. V. The Commercial Tax Officer, Vishakhapatnam & Or's. [1963] AIR 1811⁶

In State Trading Corporation a writ was filed in under Article 32 for enforcement of rights. The writ was dismissed as it provides protection to rights for citizens and Company is not a Citizen. It states that “Under the Constitution all citizens are persons but all persons are not citizens”.

Lee Vs. Lee Air Farming Ltd [1961] AC 12⁷

Lee formed a company lee's air farming for the purpose of carrying on the business of aerial top dressing and was also the director of the company and exercised unrestricted powers and control of affairs of the company and made all the decision relating to the contracts of the Company. Lee was killed by piloting the aircraft during the course of aerial top-dressing. Lee's wife who is applicant claimed worker compensation under New Zealand Workers' Compensation Act, 1922 as she claimed that Lee worked as an employee of the Company. The judgement is very important with respect to UK Company law and Indian Companies Act as it again lays down the principle of Separate Legal Entity and it can enter into a Contract with its own members as both are separate legal entity.

There has been a case law in which the principle of Separate legal entity has been refused by the court as in the case of **Gilford Motor Co V Horne** where court lifted the Corporate Veil and treated the respondent and his Company as one entity to assure the validity of the contract that applicant had with respondent. And in insolvency cases the concept of Separate Legal Entity does not apply and company and its member are treated as one.

Re. Kondoi Tea Co Ltd. [1866] ILR 13⁸

⁶ The State Trading Corporation of India Ltd. & Or's. V. The Commercial Tax Officer, Vishakhapatnam & Or's. [1963] AIR 1811.

⁷ Lee Vs. Lee Air Farming Ltd [1961] A.C. 12

⁸ Re. Kondoi Tea Co Ltd. [1866] ILR 13

Calcutta High Court affirmed the principle of Separate Legal Entity years before the famous Salmon case. Few persons who owned the a tea estate transferred it to the Company and claimed exception from ad valorem (according to the value) on the ground that it simply transfer from them to themselves under a different name the court did not accept this point and observed that a company was a separate legal entity fro,m its shareholders and transfer was a much a conveyance, transfer of property, as shareholders has been a different person from the company as company has its own separate legal entity.

Abdul Haq v. Das Mai [1910] IC 595⁹

In this case the applicant i.e., Abdul Haq was not succeeded as the applicant was the employee of the company and was not been paid his salary for several months. The applicant sued Das Mai, director of the Company for recovery of the amount of salary due to him. The court held that the company once incorporated becomes a separate entity so the remedy is not against the directors or members of the Company but the remedy is against the Company. A concept of Separate Legal Entity was applied.

T. R. Pratt (Bombay) Ltd. V. E. D. Sasson & Co. Ltd. [1938] AIR 62¹⁰

In this case the Bombay High Court and Court said “Under the law, an incorporated company is a separate legal entity, and though all the shares of the company may be practically controlled by one person, in law, a company is a distinct entity” and has its separate existence from the members of the Company.

Dhulia – Amalner Motor Transport Ltd. V. R. R. Dharamsi [1952] AIR 337¹¹

In this case a private company was formed by majority of partners of the firms and sold to the company which were earlier used by the partnership firm. The other partners of the firm filed a suit for the share of profits from the buses it was held that such a suit is not maintainable as the buses being the property of the company and not its shareholders. Bombay High Court held a Company when formed becomes a Separate Legal Entity and has a separate existence of the Company and its members.

⁹ Abdul Haq v. Das Mai [1910] IC 595

¹⁰ T. R. Pratt (Bombay) Ltd. V. E. D. Sasson & Co. Ltd. [1938] AIR 62

¹¹ Dhulia – Amalner Motor Transport Ltd. V. R. R. Dharamsi [1952] AIR 337



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