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A Promoter of a Company

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ABSTRACT

The Companies Act 1956 gives no meaning to the word promoter & although the meaning is defined in sections 62, 69, 76, 478 and 519. Section 62 of the Companies Act 1956 defines the word for this purpose only. Section 62(6)(a) defines the term promoter as partners involved in the preparation of the prospectus or any part of it that contains false information; company. According to article 300, if the court decides that a person has made a report that he has cheated in the promotion or establishment of a company, the partners will be treated like any other director or officer of the company.

The Madras High Court in Prabir Kumar Misra v Ramani Ramaswamy [2010] 104 SCL 174 ruled that the project owner does not need to be the person signing the Memorandum of Understanding/Articles or the owner or director of the company to determine responsibility. The sponsor's liability to the company towards third parties continues depending on the acts and agreements concluded by the agency or representative of the company during the period prior to participation.

I. INTRODUCTION

A company is not formed by one person, rather an empire is built through the lots of effort of team members. For making the formation of a company, there must be a process and it involves many stages.

Promotion is the first stage of a company. At this stage, the idea of carrying on a company is convinced by a person who is known as a promoter. A promoter conceived the ideas of a business and the purpose of its formation. They are those who consistently work to develop ideas in the process. The **Indian Companies Act,1956** used it to fix the liability of promoters but didn't define it and accepted their established position under the common law. At a later date, the **Indian Companies Act,2013** define the term for the first time.

II. DEFINITION

The definition of the term '**promoter**' has been defined in the **Section 2(69)** of the **Companies Act ,2013**. A Promoter is a person whose name has been mentioned in the prospectus of the company or is identified in the annual return of the company, or any person who has direct or

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indirect control over the affairs of the company. Whether as a stakeholder, is a person who performs the all preliminary steps like making the prospectus of a company, securities etc. But if a person is doing this in a professional capacity, he would not be considered a promoter.

(A) Statutory Definition of Section 2(69) of the Companies Act

The Companies Act ,2013 contains a statutory definition of the promoter. Promoter means a person –

- who has been named as such in a prospectus or is identified by the company in the annual return referred to in **Section 92**;
- Who has the right to control all over the company through direct or indirect ways, whether as a shareholder, director or anyone else;
- in accordance with whose advice, directions or instructions the Board of directors of the company is accustomed to act. A person who is acting in a professional capacity is preclude by this provision.

III. TYPE OF PROMOTERS

A promoter is a person who established the idea of forming a company. So, there are many following types of promoters in the company –

- **Professional Promoter:** A professional promoter is the expert of a company to promoting it during the formation of creation. They transfer the ownership of the company to shareholders when it is established in the market.
- **Financial Promoter:** A financial promoter is the one who invests capital or value and also has a larger company share. They aim to assess the market's financial situation and start a company at the right moment.
- **Managing Promoter:** A managing promoter is the one who helped to establish the company. And they also have the right to manage the company after its formation.
- **Occasional Promoter:** An occasional promoter is the one whose main work is to control the company. They are not promoting a business properly because they are charged with two or three enterprises but they got involved in the most crucial circumstances in the company.

IV. FUNCTION OF THE PROMOTER

A promoter plays various important roles in the formation of the company. From conceptualizing the idea to establishing the company they are taking all the important steps to transform the ideas into reality. Some important functions of the promoter are –

- One of the most important roles of the promoter is to conceptualize the idea of the formation of the company.
- The promoter looks into the ability to work successfully and the workability of the ideas about whether the establishment of the company is profitable and practice able or not.
- After the idea has been constructed, the promoter collects and organizes the resources available to create the idea into a reality.
- The promoter has the right to select the name of the company and also decide the contents regarding the articles of the association and memorandum of the association of the company.
- The promoter has the right to select where the head office of the company will be situated. The promoter also has the right to nominate people or associations for vital posts. For the first time, the promoter may also appoint the banker, auditors and director of the company.
- The promoter has the responsibility to prepare all the other important documents which are required to form a company.

Explaining the legal status of the promoter is a very difficult job. They are not a employees, or agents or any type of trust of the company. But the role of the promoter is to exist when the company is profitable run by its board of directors and management.

V. DUTIES OF A PROMOTER

The promoters have many responsibility towards the company, which are the following –

- **Disclose Hidden Profits :-** The most important duty of the promoter is to be faithful and loyal to the company and not include fake practice. The promoter should not earn hidden profits anything at the time of promoting the company and selling or buying profits related to the company. They are not bound to take the profits but they have to be disclosed to the stakeholders. The promoter has to share all the information and profits with the stakeholders relating to the company.
- **Disclose All The Material Facts :-** A relationship between the company and the promoter is to trust and confidence i.e., a fiduciary relationship. Under this type of relationship, the duty of the promoter is to disclose all the relevant factors and information regarding the formation of the company must be acknowledged to the stakeholders.
- **Act In The Interest Of The Company :-** In all the circumstances, the promoter has the duty to give all the best profit to the company's interest and also in the business dealings.
- **Disclose All Private Arrangements :-** At the time of formation and establishment of the company, many private transfers of services or goods take place. However, such

transactions of goods and services must be disclosed to the stakeholders. It is the duty of the promoter to disclose all the earnings and transfer of goods and also the profits to the stakeholders.

VI. PRIVILEGES OF THE PROMOTER

According to the Companies Act, 2013, promoters have many rights and privileges. The privileges of the promoters are as follows –

- **Right Of Indemnity :-** If there are many promoters of any company, all have a right to claim for loss or compensation or, in any event of breach of contract. It is clearly mentioned that if any affairs happened at that time, all the promoters or individuals are responsible for those affairs.
- **Right Of The Preliminary Expenses :-** A promoter has the authority to reimbursement for any of the legal expenses which he expends during the formation and establishing the company. These expenses include registration fee, paperwork, promotion fee etc.
- **Right To Remuneration :-** A promoter has the right to take recompense from the company which he expends, otherwise it is a reverse of the contract. This is the duty of the director to pay an amount to the promoter because it's also mentioned in the article of the association. But the promoter cannot sue the company to pay for their remuneration unless or until there is contract.

VII. LIABILITY OF A PROMOTER

The company's promoter includes many strict liabilities:-

- Under section 7 of the company act, the promoter may be held liable for the information related to the first director is not true, accurate or some neglecting factors arise. For this offence, the minimum punishment is six months, but if the violation is major, then it may be increased to ten years.
- The format for filing a prospectus is defined under The Company Act of 2013 in section 26. In which all the information related to secretaries, members of the company bankers, trustees and also comments by the board of directors etc. are mentioned. If any important information related to the company is left by the promoters, then they have the right to take action and the punishment is defined under section 447 of The Company Act 2013.
- The promoter will be held liable for any type of information in the prospectus that is misleading and illusory under section 35 of this act. According to section 36 of this act, a promoter is held liable for fraud and any losses for his false promises to invest the money

for the interest of the company. A promoter is also directly responsible for the errors which are found during the company's winding up.

VIII. CONCLUSION

It can be said that a promoter can be a single person, a company or an association of a person which plans for the formation and establishes the structure of the company and takes all the necessary steps to incorporate the actual existence of the company. The promoters have the right to nominate the board of directors, bankers, legal person and auditors of the company and also decide the article of the association and memorandum of association. The promoter is the one who is known as the molding block and gives the basic structure to the company and also plays an important role for the company.

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