



PROMOTER

By *Kanchan Kalwani*

From *Bharati Vidyapeeth, New Law College, Pune*

ABSTRACT

When a person or partner or any registered company thinks of formation of company the very first thing that comes in the mind is that the person has idea of that particular business but the who takes the step forward and make the company into existence or establish a company from ground to existence level is called as promoter.

The promoter is the one who has the idea of business and to make that idea into reality he **first** of all try to discover all the opportunities into which that idea can fit in, **secondly**, the promoter do all the necessary investigations and verification on that particular business to avoid any obstacles, and if the promoter is satisfied with its work then, **thirdly**, the promoter will make the financial preparation like to check the profits, feasibility, flexibility and etc, **fourthly**, the promoter will incorporate the company through filing the certain documents with registrar of company the like Memorandum of Association, Articles of Association, List of directors, consent of the directors to take up and pay for their qualification shares, A declaration by an advocate or attorney or a Chartered Accountant or a Director or any Officer of the company that all the requirements of the Companies Act with regard to registration have been complied with. A company with a separate legal identity of its own is deemed

to come into existence on the issue of this Certificate.

The promoter have certain liabilities and rights also and the liability of promoter commences as soon as they have set out for the promotion of company and it does not extend any of their earlier acts.

Hence, the promoter play a very pivotal role from the formation of the company until its finally incorporated and commences its business and has control over the affairs of the company, directly or indirectly.

INTRODUCTION

The purpose to which the company is formed is to earn profits and Before a company is formed, there must be some persons who have intention to form it and take necessary steps to bring into existence. The person who initiate the process of a company are called 'promoters'. They not only conceive the idea of forming the company but also take necessary steps to complete the formalities of incorporation and registration and also make arrangement for capital or assets with which the company is to be started.¹

The main stages for formation of company is (a) Promotion of company (b) its incorporation by registration and (c) commencement of business. The person who assumes the primary responsibility of matters relating to formation and promotion of company are known as promoters of company.²

DEFINITIONS

¹Dr. N.V. Paranjape, Chapter 4. Page - 84

²Dr. N.V. Paranjape, Chapter 4. Page - 84



According to Cockburn C.J “a promoter is one who undertakes to form a company with reference to a given project and set it going and who takes the necessary steps to accomplish that purpose”.

According to Bowen L.J., “ the term promoter is not a term of law, but of business, usually summarising in single word a number of business operation s familiar to the commercial world by which a company is brought into existence.

The term promoter is not defined in law. The promoter is the one who builds the company from zero to upper level. All the important and basic business operation to bring the company into function is called promotion.

The first person of the company who has command over the company,s affair is called promoter. Hence the promoter is the one who commence the promotion.

According section 2(69)³ of Companies Act, 2013 “promoter” means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of

Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity

To sum up, a promoter is a person who undertakes a number of business operations to bring a company into existence and set it going.⁴

Any person who arranges a director, places shares or negotiates preliminary agreement may be called as promoter but a person who merely acts in professional capacity on behalf of promoter such as a solicitor or a valuer who is paid by the promoter is not himself, a promoter. Again, a person does not become a promoter merely because he is a signatory to the memorandum of the company or acts as an agent, banker, or underwriter, in ordinary course of his business.⁵

A person to be called as promoter is depends on the act he performs. A promoter can be a person or can be a registered company. A promoter can also be a person who does not play an salient role but have acted in accordance. A promoter can not be a person who is simply in professional or technical capacity such as accountant, or business consultant.

³The Companies Act 2013

⁴Dr. S.R Myneni, Chapter -2, Pg -88

⁵Dr. N.V Paranjape, chapter -4, pg 85



Kinds of Promoters⁶:

The promoters may be of the following types:

1. Professional Promoters: The term professional means someone who is well qualified or specialised in something he does. So the professional promoters are those who have specialised in promotion of company. When the business starts they basically handover the companies to shareholder. These are the persons who specialise in promotion of companies. They hand over the companies to shareholders when the business starts. There is dearth of professional promoters in India. The professional promoters play crucial role to make the community of business to greater extent. For example : In England, Issue Houses; In U.S.A., Investment Banks and in Germany, Joint Stock Banks have played the role of promoters very appreciably.

2. Occasional Promoters: they may be called as temporary promoters they do not do promotion work on regular basis but they do take interest in floating some companies. These promoters take interest in floating some companies. They are not in promotion work on a regular basis but take up the promotion of some company and then go to their earlier profession. For example, engineers, lawyers, etc. may float some companies.

3. Financial Promoters: Some financial institutions of financiers may take up the promotion of a company. They generally

take up this work when financial environment is favourable at the time.

4. Managing Agents as Promoters: In India, Managing Agents played an important role in promoting new companies. These persons used to float new companies and then got their Managing Agency rights. Managing Agency system has since long been abolished in India.

ROLE OR FUNCTIONS OF A PROMOTER

A promoter plays a pivotal role in formation of company. A promoter is influential spirit behind the company. The functions of promoter are :

1. Discovery of business opportunity : in general sense when somebody has an idea to start a business the very first thing comes in their mind will be to grab all the possible opportunities and before starting the firm they will prepare or process their idea and properly investigate all the profits, losses, and flexibility, similarly goes with the promoter, it can be any discovery from use of new invention to supply of existing product.

2. Assembling the ideas: after all of the detailed investigation and verification of work when he seems satisfied he further take step forward to make the proposition of his work in reality by making all necessary arrangements of technical or marginal work, recruitment, and equipment etc

3. Financing the Proposition: The promoter, at this stage, has to prepare a plan

⁶<http://www.yourarticlelibrary.com/company/promoters-of-a-company-definitions-characteristics-and-other-details/42057>



setting out the mode of getting the necessary finance. He should not only think about the long term but also for short requirements of capital. He also should think about all the necessary proposition of kinds of securities and methodology to further raise the capital.

4. **Incorporation⁷** : he must arrange for the preparation and filing of the following documents with the registrar of joint stock company:

- (a) Memorandum of association
- (b) Articles of association
- (c) List of directors
- (d) consent of the directors to take up and pay for their qualification shares
- (e) A declaration by an advocate or attorney or a Chartered Accountant or a Director or any Officer of the company that all the requirements of the Companies Act with regard to registration have been complied with. A company with a separate legal identity of its own is deemed to come into existence on the issue of this Certificate.

5. **Presentation of the Proposition⁸**:- Finally, after making necessary arrangements and modes of raising finance, he gets the necessary documents such as Memorandum etc. printed, filed with the Registrar and then arranges for their publication. He should take the aid of legal experts in preparing the documents and should see that the documents are strictly in accordance with the provisions of the Companies Act.

Characteristics of a Promoter:

1. To set up a business promoter creates an idea.
2. He does investigate all the possible grounds of business from initial to last stage and thus safeguard the future prospectus of the company.
3. He brings together various persons who agree to associate with him and share the business responsibilities.
4. To company get incorporated he does all the paper or documentation work.
5. To maintain the company in the market he also raises the required finances..

LEGAL STATUS OF A PROMOTER

In *Lydney & Wigpool Iron Ore Co. V. Bird⁹* it was held that A promoter is not an agent or trustee of the company, because the company before incorporation is a non - entity. But he is in the situation akin to that of agent or trustee of the company and his dealings with it must be open and fair. Hence he occupies the position of quasi trustee.

FIDUCIARY POSITION OF A PROMOTER (Liability)

In *Erlanger v. New Sombrero Phosphate Co.¹⁰*

The fiduciary position of a promoters is as follows:

1. **Not to make any profit at the expense of the company** : The promoter must not make , either directly or indirectly, any profit at the expense of the company which is being promoted. If any secret profit is made in violation of this rule, the company may, on discovering it, compel

⁷Dr, S.R Myneni, Chapter -2 , pg - 89

⁸<https://accountlearning.com/promoter-meaning-functions-legal-position/>

⁹[(1866) 33 Ch.D 85]

¹⁰[(1878) 3 App.Cases 1218]



him to account for and surrender such profit.

2. **To give benefit of negotiations to the company** : the promoter must, when once he has begun the act in the promotion of a company give to the company the benefit of any negotiations or contracts into which he enters in respect of the company.

3. **To make a full disclosure of interest or profit** : section 26(1)(a)(xiv) of the Companies Act, 2013 now requires the promoters earnings to be disclosed in the prospectus it self. It is not the profit by the promoter which the law forbids, but the non - disclosure of it or the non - disclosure of interest in the transaction. If full disclosure is made, the profit is permissible.

The disclosure must be made to an independent Board of directors. Where there is no Board, disclosure must be made to the intended shareholders as a whole.

The measure of damages is the actual loss suffered by the company as a result of transaction in question.

4. **Not to make unfair of position** : the promoter must not make an unfair or unreasonable use of his position and must take care to avoid anything which has the appearance of undue influence or fraud.

In Re, Leeds and Hanley Theatres of Varieties Ltd¹¹, : it was held that promoters were liable in damages and the measure of damages was the profit made in the sale.

¹¹[(1902) 2 Ch. 809]

In Gluckstein v. Barnes¹² : duties of the promoter:-

The promoter must see that the prospectus issued should contain the necessary particulars and does not contain any untrue or misleading statements or does not omit any material fact. If the promoter fails to perform this duty -

(a) Allotment of shares may be set aside in the case of a fraudulent or innocent misrepresentation

(b) He may be sued for damages

(c) He may be sued for compensation for misrepresentation

(d) He may be sued for damages by shareholders who have suffered by reason of his non compliance with the statutory requirement as to the contents of the prospectus ; and

(e) He may become liable to criminal proceedings.

In the English Case Ladgwell Mining Co. V. Brooks¹³ The Court ruled that the liability of promoters commences as soon as they have set out for the promotion of the company and it does not extend to any of their earlier acts.

RIGHT OF PROMOTERS¹⁴

¹²[(1900) 2 Ch. 809]

¹³35 Ch D 400.

¹⁴Dr. S.R Myneni, Chapter-2, pg - 93



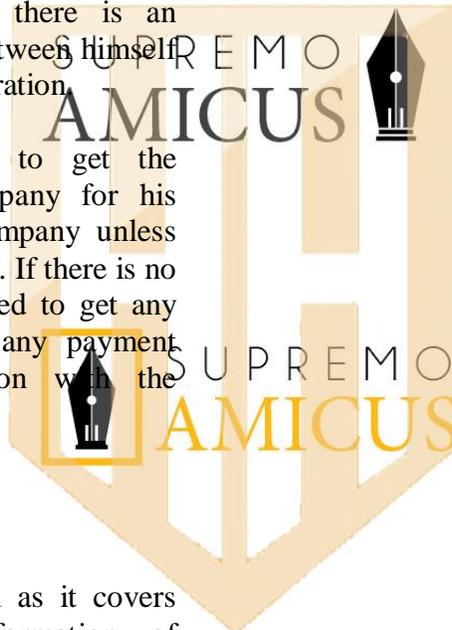
1. He is entitled for reasonable remuneration for the services rendered. He can get commission from the vendor of property or from company itself for under - writing its shares.

company into existence or can say by the idea of which company gets established.

2. He can recover the price of any property he has purchased for the company. But the transaction must be ratified by an independent Board of directors constituted after the incorporation of the company.

3. He can recover from the company preliminary expenses he has incurred prior to incorporation , provided there is an express or implied contract between himself and the company after incorporation.

A promoter has no right to get the compensation from the company for his services in promoting the company unless there is a contract to that effect. If there is no such contract, he is not entitled to get any compensation in respect of any payment made by him in connection with the formation of the company.



CONCLUSION

The role of promoter is vital as it covers wide variety like from formation of company to commencement of business. The promoter covers all the important functions to establish a company which includes money, Material required for project, share capital, and also covers all the preliminary investigations and verification before incorporation of company. Hence with the above points it can be concluded that promoter is the one who by his idea of business alone sets a step forward to make