

Introduction and Case Analysis

A company in common parlance means a group of person associated together for the attainment of common end, social or economic. It has no strict legal and technical meaning. It represents different kinds of association both business or otherwise. A companies must be registered under the Companies Act, 2013. Lindley, L.J defines a company as an association of many person who contribute money or money's worth to a common stock and employ it in some common trade or business and who share the profit or loss arising therefrom. **The company is entitled with the responsibility or features –**

1. Independent Corporate existence- A company comes into existence on its incorporation. It has the personality of its own as distinct from the personality of its members.
2. Perpetual succession- A company being an artificial person has a perpetual succession. It means that the company continues its existence inspite of the death, insolvency, incapacity of the members or director of the company.
3. Common seal- Since the company has no physical existence , it act through its agent and all such contracts entered into by its agent must be under the seal of the company.
4. Separate property- The property of the company belongs to the company itself and through its member or directors, a company has a right like any other person to enjoy or dispose of its property without the specific right of the share holders in respect o such property,
5. Can sue, can be sued- Company being a juristic member can sue or be sued in its own name.

6. Contract in its own name- A company can enter into contract in its own name and not in the name of the director.
7. Limited liability- A company is a distinct legal person and therefore the debt of the company have to be paid by the company itself rather than by its member.
8. Transferable shares- The capital of the company is divided into parts called shares. The shares are easily transferable.

These are the basic features of the company and are the essentials of the company which are fulfilled in the formation of the company.

Kinsela family, carried on funeral business and was a directors and shareholder in various companies. The companies are well reputed and they were happy. The company offered insurance against the cost of its client funeral. They used to get small amount of payment and in contribution they used to provide free funeral. They suffered huge losses and their liabilities get increased.

When the Funeral Fund Act 1979 was enacted for protecting the interest of creditors. They had to give huge credit now they suffered loss. During the sufferance they thought their family business could continue inspite of the collapse. Mr Kinsela thought of giving lease for 3 years. In April they thought of being wound up because of the several losses. The Director who was unable to maintain balance in the company and they could not work in proper mechanism which led to huge loss and sufferance. It is the duty of the Director, to resolve all the problems before winding up the company and it shall operate in favour of all the contributors of the Companies if it had

been made out of joint petition of the creditor and of a contributory. It is the responsibility of the director to look at the asset and transfer the money due from the creditors.

The liability arises when they give lease as lower market value, the company became insolvent. During liquidation, the lease was challenged the Director was unable to pay the creditor's liability.

Though the company is an artificial person, it suffers from one disability. It lacks both body and mind, unlike a natural person it cannot act itself. It is intangible and invisible and function through the complex mechanism of human agency as an invisible hand, a company reign through its formal seal. So, the director is with responsibility with administration and management. Sec 252 of the Companies Act, 19, 56 provides for atleast three directors for public company and two director for private companies. Director has gained statute recognition, but inspite of the fact, position of the director are not defined in the statute itself. So the director is sometimes described as agency, some times as trustee, some times as employee, sometimes as managing promoter, sometimes as organ of the company.

Director should work under due care and diligence. Director are the trustees of the company and act as an agent during the transaction of money. **Directors position in respect of-**

1. Director as an employee of the company- Director are paid employees or the servant of the company and stand in no better position than in ordinary employee.

This is received in the context of Sec 319 of the Companies Act, 1956 as amended by the Act of 1960. The director like any other employee draws financial reward from the company for the service rendered by him for the benefit of the company. In this respect there is master servant relationship between the company and the director. The company with an invisible eye control and directs the activities of director. In a case, Normandy V India Coope and co. director not a servant or member of the staff but sometimes more than that.

2. Director as Managing Partners- It is based on partnership business. A director is the partner must hold interest in the company. Partner are concerned with benefits of a third party, director are benefits of the company.
3. Director as trustees- A trustee is a person who hold property on trust for another. The Director are considered to be the trustees in relation to a company.
4. Director as an agent- Director are primarily recognized as agent of the company. The company act through its directors. Where the director contract in the name and in behalf of the company , it is the company which is liable and not the director.
5. Director as an organ of the company- A company has no physical existence , it just an abstraction of law. Any thing done by the directors in the course of and within the scope of their duties and deemed to be the act of the company. The

company is entitled to the benefit or liable to compensation that is arising out of transaction.

In this case, the director as an organ of the company, as agent, trustee, managing director, as an employee of the company does not able to fulfill the obligations. The director had acted in breach of its duties, as a shareholder his act was detriment toward the duties to creditors. Shares of the company shall be movable property transferable in the manner provided to by the Articles of the company. It means that subject to the restriction if any , which may have been imposed by an Articles, a shareholder has an absolute right to dispose of his shares or debentures. A comp

According to the Companies Act, 2013 (CA 13), the director means a group of director known as the Board of Director. He as an officer in default of fixing out the liability of the company. Article of Association gives specific power to the directors. Director being an agent act on behalf of the company. Director act in fiduciary duty and had responsibility toward the company. In this case , the director was not able to maintain the company, his idea of upliftment led to huge loss and sufferance. The company could not bear the cost of loss as a result led to the winding up of the company.

Director is liable for the debt of the company due to mismanagement of business. Director owe fiduciary duty on behalf of the company. It is not responsible for the act of third party but is responsible for the act of company.

In **exceptional case**, director calls the third party for settlement of its business.

When the director act in misrepresentation or induces the third party to enter into contract then he is liable for the act of third party.

The director would be liable for indemnity and personally liable for the obligation as a third party.

The director will also be liable for making personal benefit.

The director will be liable under statute. He will be liable for unpaid taxes under Income Tax Act. Non-recovery of taxes led to gross negligence, misfeasance and breach of duty.

Functions of directors-

- Director is liable for the management of the company.
- The decisions are taken by him through Board of Directors.
- Directors are defined in the Article of association.
- Director may also appoint for executive functions.
- Director liability during insolvency.

Following provisions are kept in mind during insolvency. The director may be liable for various act during liquidation.

1. Sec 214 deals with wrongful trading. The director is personally liable to contribute to the company's assets. There is no reasonable prospects and the director could not save from the losses.
2. Sec 213 deals with fraudulent trading. When the person carries business in order to defraud the creditors, the company would be liable and he had to pay from his assets.
3. Sec 212 deals with recovery of misfeasance.
4. Sec 238 transaction at an undervalue. A company sale the assets in less price than it worth.
5. Sec 239 deals with preferences. A company during liquidation give better position to the creditors.

In this case, the company was liable for wrongful trading, fraudulent trading and also selling the assets of the company in less prices.

Sec 425 of the companies Act 2002 provides the following two modes of winding up of the company –

1. Winding up by the Tribunal
2. Voluntary winding up

Winding take place due to the following reason-

1. If the company has resolved by special resolution, that the company be wound up by the Tribunal.
2. If there is default in delivering the statutory report to the register.
3. If there is default in holding the statutory meeting.
4. If the company does not commence its business.
5. If the company is unable to pay the debt.
6. If the number of the public company is reduced below 7 and private company below 2.

In this case the company was in burden of huge debt. They were suffering huge loss. It was not possible for them to run the company. But the director had the responsibility to clear the debt, so as a result the case arose. The company incurred huge loss as a result they decided to wind up the company.

The winding up of the company shall take place through an official liquidator and is appointed under (Sec 448) of the Companies Act. The official liquidator shall conduct the proceedings in the winding up of a company and performs such duties as the Tribunal may specify in this behalf.

The powers of the liquidator (Sec 457)-

1. To institute or defend any suit, prosecution.
2. To sell movable and immovable property.
3. To carry on the business of the company so far as may be necessary for the beneficial winding up of the company.
4. To sell the whole of the undertaking of the company as a going concern.
5. To raise loans on the security of the assets of the company.

6. To do all other things as may be necessary for winding up the affair of the company.
7. To inspect the record and returns of the company on the files to register without payment of fees.

The Tribunal order for the winding up of the company. **The consequences** for the winding up of the company that the Tribunal within the period not exceeding 2 weeks from the date of the passing of the order cause intimation. Thereof to be sent to the official Liquidator and the Registrar.

The effect of winding up- An order for winding up of a company shall operate in favour of all the creditors and all the contributors of the companies if it had been made out on the joint petition of the creditors and of the contributory.

In case of creditors voluntary winding up the company shall cause a meeting of the creditor of the company to be called for the day or the next following day on which there is to be held the General Meeting of the Company at which the resolution for voluntary winding up is to propose.

In this case Kinsela v Russell Kinsela Pty Ltd (in liq) (1986), it was decided that the director acted in breach of its duties and their conduct were detriment towards the creditors. During the liquidation it was decided that the company's asset would be the asset of the shareholder.

References

Decision making by the General Meeting. (2017). *Uni Study Guides*. Retrieved 18 May 2017, from http://wiki/Decision_making_by_the_General_Meeting

Kinsela v Russell Kinsela Pty Ltd (In Liq): 1986 - swarb.co.uk. (2017). *swarb.co.uk*. Retrieved 18 May 2017, from <http://kinsela-v-russell-kinsela-pty-ltd-in-liq-1986/>

Kinsela v. Russell Kinsela Pty Ltd (in liq) (1986). (2017). *prezi.com*. Retrieved 18 May 2017, from http://2qbn5w3x_88o/kinsela-v-russell-kinsela-pty-ltd-in-liq-1986/

West Mercia Safetywear Ltd v Dodds: CA 1988 - swarb.co.uk. (2017). *swarb.co.uk*. Retrieved 18 May 2017, from <http://west-merciasafetywear-ltd-v-dodds-CA-1988/>

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