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A Critical Study on Accountability of Promoters in India

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Abstract

The term "promoter" is commonly accepted by the general public, as a person who is involved in the process of selling a product at the market level. The study is carried out by the data collected from the various people in the public irrespective of their qualification or other requirements through random sampling. The study mainly focuses on the main research problem, is the promoter a vulnerable person when compared to other managerial officials because even after they have been removed from their role the liabilities are imposed on them for the act which they have not intended to do. The promoter is used as an intermediary in the creation of the company and they do not possess the ownership right in the full process of creation of the company. The promoters are given the full power to take necessary steps in the creation of the business without affecting the subscribers and the common public harmony, if they are not following then the liability can be imposed on them. The study found that even if there is a mistake or deceitful act on behalf of any one or all of the officials who performs the managerial function, the promoter is made liable for it even after his role has been ended. The study concludes that the legislature has to make amendment in sections of the Companies Act, 2013 dealing with imposing the liability on the promoters even after he or she is removed from his role. The present work is an attempt to analyze the existing law on the liabilities and obligations imposed on these controlling shareholders who in India are majorly promoters with the help of empirical study as per market capitalization. Further an attempt has been to look into the lacunas which exist in the above-mentioned laws such as the securities law and the Companies Act, 2013 and to suggest measures to curb abuse of power by them.

Keywords

Promoters, intermediate, mistake, liabilities, companies Act 2013.

INTRODUCTION

The promotion is a functioning procedure in a business where more care and keen investigation or cautious steps should be taken to meet the positive results. Promotion is the voice of your organization which conveys your company's image all over the world and is easy for gathering of people. Different social media stages can be utilized to promote your organization and brand. Different limited time techniques can be utilized to promote and market your business relying upon the objectives, destinations and needs of your organization. Without advertising promotion, your company's identity or administration would not have the capacity to collect the consideration of the pre-

possessed clients. The person who is responsible for the promotion of a company is known as a "promoter". A promoter is any individual who follows the vital customs of organization enrolment, identifies executives and investors for the new organization, secures business resources for use by the organization and arranges business contracts for the organization and so forth. Keeping in mind the end goal to be viewed as promoter, it isn't essential that the individual ought to be associated with each phase of organization's development.(Hanhisalo 2017) There is no clear view about who is promoter in legal view because there is no definition in the Companies Act, 2013 but it has been defined in the Securities Exchange Board of India (Ahmad, n.d.) (Disclosure and Investor Protection), 2000. The promoter is a person who do not have a constant position in a company till it is dissolved, but there role ends when the company has been incorporated or registered. The present study focuses mainly on the rights and duties of the promoter and losses occurred in a company due to the promoter's misconduct or negligence.

The researchers has led the study in the direction of knowing the rights and duties of the promoters and to find out occasions when the promoter will be made liable for their deceit or mistakes and also the occasions when they will become a prey to the malicious actions of the managerial officers in the company. To know about the contribution of the promotion in a business development. To study about the rights and obligations of the promoters. To analyze the consequences faced by the promoters due to the misstatement or negligence.

RESEARCH METHODOLOGY

The study is an empirical research type. The researchers used the convenience sampling method by randomly asking questions to the 50 respondents. The suggestions and ideas collected from the respondents are used to conduct the study and also in some places the secondary data collected from various newspapers, journals and articles are also used.

Hypothesis

The Promoters are not the vulnerable person among all managerial personnels. The promoters are the vulnerable person among all other managerial personnels.

Promoters

DIP Guidelines defines the term 'promoter' to include: (a) the person or persons who are in overall control of the company; (b) the person or persons who are instrumental in the formulation of a plan or programme pursuant to which the securities are offered to the public; (c) the persons or persons named in the prospectus as promoters(s).("Promoting Resilience," n.d.) Provided that a director/officer of the issuer company or person, if they are acting as such merely in their professional capacity shall not be included in the Explanation. The term "Control" in the definition, is not properly explaining about the severity or degree of the control given to the promoter to perform their works or duties. But it has been defined in The Takeover Code, 1997 as "Control shall include the right to appoint the majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly(Fine 1990), including by virtue of their shareholding or management rights or shareholding agreements or voting agreements or in any other manner."

Apart from these definitions and meaning in some landmark decisions by the court has defined the term "Promoter" as a person who is a subscriber of a Memorandum of the Association and defined as the person, who, as a principal procures or aids in procuring the formation of the Company is a promoter of the Company.

Types of Promoters in India under the Act:

Most of the people has a misleading thought that the promoters always tries to become a professional officer after the incorporation procedure, there are promoters who do not

take part in the company's functioning in some cases(Dine 1998), (United Nations. Economic Commission for Europe 2004) like mentioned in the following types

Professional Promoters

These are the people who have some expertise in advancement of organizations. They hand over the organizations to investors when the business begins. In India, there is absence of expert promoters. In numerous different nations, proficient promoters have assumed a critical part and pushed the business network as it were. In England, Issue Houses; In U.S.A., Investment Banks and in Germany, Joint Stock Banks have assumed the part of promoters apparently.

Occasional Professor:

These promoters appreciate coasting a few organizations. They are not in advancement chip away at a normal premise but rather take up the advancement of some organization (Head, Brown, and Connors 2008; Burnell 2014) and after that go to their prior calling. For example, engineers, legal advisors, and so forth may coast a few organizations.

Financial Promoters:

Some money related establishments of lenders may take up the advancement of an organization. They for the most part take up this work when budgetary condition is good at the time.

Managing Agents as a Promoters:

In India, Managing Agents assumed a vital part in advancing new organizations. These people used to skim new organizations and afterward got their Managing Agency rights. Overseeing Agency framework has since long been abrogated in India.

Role of Promoters:

The promoters has a fundamental part in the development of a business. An organization is conceived just when it is properly consolidated. For including an organization different reports are to be readied and different conventions are to be followed. This work is finished by promoters. Gerstenberg has characterized advancement as the disclosure of business openings and the ensuing, association of fund and property and administrative capacity into a business worry to make benefits along these lines.(Sharma 2009), (Fine 1990) After the thought is imagined, what promoter does is to influence definite examinations to discover the shortcomings and solid purposes of the thought, to decide the measure of capital required and gauge the working costs and plausible wage. On being happy with the financial reasonability of the thought, the promoters make all the important strides for consolidating the organization and begin changing individuals' lives.

Duties of Promoters Under The Companies Act, 2013:

In Section 34 and 35 of Indian Companies Act, 2013 deals(Fine 1990) with the force obligation for false explanation in plan and for deceitful exchanging (as said in the section 339 and 447). Specifically two obligations in trustee position are:

1. Obligation not to make mystery benefit
2. Obligation to reveal to the co. any enthusiasm for an exchange

1. Obligation Not to Make Secret Profit:

A promoter appreciates a favorable position in connection with access to data, business opportunity and chance to offer in organization arrangement process. He may offer his own territory, protected innovation, proficient administrations at sensible rate to organizations and in that he can make revealed benefits yet he isn't permitted to make mystery benefits. In instances of open organizations in the primary Annual General Meeting all measurements of advancement and a wide range of pre-fuse ascension are examined so as check whether advancement was done fastidiously and sincerely or not and if promoter is found to make mystery benefit he might be made responsible for that. Anyway a promoter is permitted to make benefit if the same is revealed.

In *Gluckstein v. Barnes* a syndicate of persons bought 'Olympia' (an amphitheatre) and sold this to a company promoted by them and made secret profit of 20,000 £, not disclosed in prospectus. It was held profit of 20000 £ is a secret profit and promoters are bound to pay it to the company because the disclosure was not sufficient. Also in the case of *Erlanger v. New Sombrero Phosphate Co.* a syndicate of which Erlanger was a member, purchased an island consisting phosphate mines for 5,000£. A nominee of syndicate sold the property to co. for 1,10,000 £ formed by Erlanger details of sale were not disclosed to the directors. It was held that the company can rescind the contract as there had been no disclosure of the profit which was made.

Disclose to Whom:

An applicable inquiry emerges that such benefits ought to be pronounced to whom and how. In such manner it might be presented that such divulgements of individual benefits might be made to tailing:

- I. Board of directors or
- ii. Article of Association or
- iii. Prospectus or
- iv. To existing and intended shareholders.

By and large all such revelations are made in detail in outline or offer archive. Subtle elements of property, including value buys from promoters inside two years must be uncovered by Issue of Capital and Disclosure Requirements Regulation, 2009 of SEBI. Be that as it may, in specific conditions it is difficult to discover free governing body like for Solomon's Case, in such conditions the genuine truth ought to be unveiled to the individuals who are welcome to end up investors and not only to initial couple of investors.

2. Obligation to Disclose Interest:

In a Transaction notwithstanding his obligation not to influence mystery to benefit, a promoter is additionally compelled by a sense of honor to reveal to organization any intrigue which he has in an exchange entered in to or proposed to be entered into by it. This is and, after its all said and done when he pitches his own particular property to the organization raised by him since he gained the property before the advancement started. Such revelations must be made to the organization and in full. After consolidation of organization if a property is gotten by promoters he is trustee of such property and all must be given over to organization at the appointed time generally the promoter might be obligated for change or misappropriation or rupture of trust of property. (Jones 2017), (Tricker 2011) For the most part an organization is an infant offspring of promoter so he doesn't arrange off, such properties which are useless on a high rate however there can be situations where he may attempt to wash off his hands from awful properties by pitching the same to an organization advanced by him as he has a superior access to it.

Liabilities for Misstatement or Misconduct:

A promoter holds a superior position in corporate administration and has data to vital and delicate data which are undisclosed and he can abuse such data for individual and personal stakes so the new Companies Act holds the promoter at risk as officer and officer in default wherever he contradicts the arrangements of the Companies Act and other corporate and securities laws. A promoter is by and large at risk for outfitting incorrectly data and qualifications for joining of organization, owes a common and criminal obligation for error in outline, exposures of interests in intermittent yearly return documented to Registrar and SEBI, divulgence of interests in see served in AGM. (Puliani and Puliani 2001) He likewise assumes critical part in arrangement of first executives of the organization, if chiefs are not designated by promoters, they are dealt with as esteemed executives of the organization. He additionally assumes critical part in corporate mergers, amalgamation and takeovers. He additionally assumes exceptionally vital part in ending up of the undertakings of the organization. Organizations Act, 2013 under Sections 336 to 342 accommodates different offenses and discipline there for, conferred by officers of organizations which similarly covers promoters which turns out

amid ending up of organization. Sections 447 to 453 accommodates certain offenses which are conferred by officers of organization and others and make it culpable.(Smitha and Chendroyaperumal 2011) It is a general arrangement can be connected to any instance of extortion and spreads a misrepresentation submitted in course of advancement. Section 450 is of residuary nature. This Section again settles more noteworthy measure of risk in connection with consistency and corporate revelations to different specialists under different corporate and Securities laws. SEBI under SEBI Act, 1992 is likewise have tremendous forces to avoid such individuals who are enjoyed fake exercises to approach capital market as backer, financial specialist or mediator.

1. Regarding Prospectus:

Section 26 of the Companies Act, 2013 and ICDR Regulations 2009 accommodates substance and matters to be given in offer record i.e. outline. Plan is a report which introduces the general data, monetary data and issue data before planned financial specialists in order to assist them with taking choice in regards to share membership of the specific organization. In the event that if the plan incorporates any announcement which is false or misdirecting in frame or setting in which it is incorporated or where any consideration or exclusion of any issue is probably going to delude then promoters of the organization owe common and criminal risk under Section 34 and 35 of the Act and in like manner they will be obligated for discipline under Section 447(Stevens 2014; Singh, n.d.) with detainment for a term which will not be under a half year but rather which may stretch out to ten years and will likewise be subject to fine which will not be not as much as the sum associated with the misrepresentation, however which may reach out to three times the sum engaged with the extortion. Aside from this the imminent financial specialists can document a common suit or some other activity for rescission, suit for legally binding rupture and harms in Section 37 of the Act for deceiving data in plan. However, under Section 35 general and exceptional barriers are accessible to such individuals who are sued under Section 35 for criminal obligation. On the off chance that they are rendering proficient administrations or they pulled back their assent for approving the issue or they are insensible about error in plan; they will not be obligated.

2. For Fraud:

Endorsers can disavow the agreement and require the cash go under it. If there arise an occurrence of false explanation in plan a move might be made against chiefs and promoters of a company.(Bhatia and Sethi 2012) On the off chance that there is disappointment or oversight in outline he may make chiefs and also promoters at risk. Notwithstanding promoters and executives all officers of co. who approve the outline with false explanation might be made subject. (Singh, n.d.)

Pre Incorporation Agreement:

Joining of organization incorporates assortment of exercises which are finished by assentions for instance purchasing land for assembling and enrolled office, innovation exchange, advance understanding, concurrence with stock trade, concurrence with delegates, concurrence with outsiders for acquisition of crude materials and preparation of stock in exchange.(Lukens 1928) Before the incorporation, organization has no legally binding limit so in the interest of a planned organization every single such understanding are marked by promoters and these agreements are known as pre-incorporation contracts.(“Corporations. Preincorporation Agreements. Joint Adventure Agreement Requiring Maintenance of Parties’ Interests in Fixed Proportion Survives Incorporation” 1956) No agreement can tie the company before it winds up fit for shrinking by fuse.(Commissioner 1979) An exceptionally adept inquiry in such manner is that what will be risk of promoter or organization or outsider in pre-consolidation understanding. Regardless of whether organization and promoters may abuse their situation in these agreements or not? The issue in pre-consolidation agreements is twofold. On the direct the promoters are in danger as the organization may maintain a strategic distance from such understandings holding that these were past the extent of joining and it can make the promoters by and by obligated and on the second hand the outsiders might be in

danger as the agreement might be evaded by organization after consolidation saying with the goal that it was not approved by it.(Dignam and Lowry 2016)

Findings:

Crosstab

			Are you aware that for registering a 1 as a Company one should invest minimum of one lakh as a capital?			Total
			Yes	No	Maybe	
Gender	Male	Count	9	2	1	12
		% within Gender	75.0%	16.7%	8.3%	100.0%
		% within Are you aware that for registering a 1 as a Company one should invest minimum of one lakh as a capital?	23.1%	50.0%	12.5%	23.5%
Female	Female	Count	30	2	7	39
		% within Gender	76.9%	5.1%	17.9%	100.0%
		% within Are you aware that for registering a 1 as a Company one should invest minimum of one lakh as a capital?	76.9%	50.0%	87.5%	76.5%
Total	Total	Count	39	4	8	51
		% within Gender	76.5%	7.8%	15.7%	100.0%
		% within Are you aware that for registering a 1 as a Company one should invest minimum of one lakh as a capital?	100.0%	100.0%	100.0%	100.0%

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	2.103 ^a	2	.349
Likelihood Ratio	1.941	2	.379
Linear-by-Linear Association	.098	1	.756
N of Valid Cases	51		

a. 3 cells (50.0%) have expected count less than 5. The minimum expected count is .94.

The P < 0.05.

The Chi-square value is 0.349.

The null hypothesis rejects, there is an association between two variables.

DISCUSSION

Out of 51 responses around 40 members are aware that for the establishment of a company minimum of one lakh is needed to start up a business. Albeit, the society is aware that the functioning of the Company and other aspects relating to it but at the same time has a half knowledge about it even though all of the respondents are well educated. For each and every question asked the women gender has given correct answers when compared to men. Everyone at the same time has a common misleading understanding that the tax rate on the company after the implementation of the GST has been raised by the raise in the other commercial products. The promoters relationship with the company do not end once it has been registered, it continues even after it during the situation like where he or she has made any mistake in prospectus. The promoters are made liable even for the mistake made by the other parties or members in a Company while performing their functions. From this it is understood that the promoters are the most vulnerable player in the company among the other.

Suggestions

The legislative body should compulsorily include the definition of the term Promoter in the Companies Act, 2013. There should be even more clear ideas about the what are the roles to be done by the promoter. The promoter should not come onto the play of the company's activities once he has registered it. The customer or the members should make a claim against the promoter for the misstatement but not the managerial members when there is a lost for the people.

CONCLUSION

From the lights of the above mentioned data and analysis it is understood that the Promoters are the sole person who does all types of work for the creation of the company and he acts as an owner of it till the registration of the company. In this era, the director act as a nominal leader of the company even after the registration of the company. The promoter has both an extreme level of freedom and restrictions to be followed by him during the creation process of the company and at the same time they are the vulnerable one in the whole company personnels. From the findings it is understood that the people in the present society have a wide knowledge about the company and its creation process. Everyone is aware of the hardships and risks involved in it, if anyone tries to deceive others then not only that person but everyone who acts as a managerial officer are included for the liabilities.

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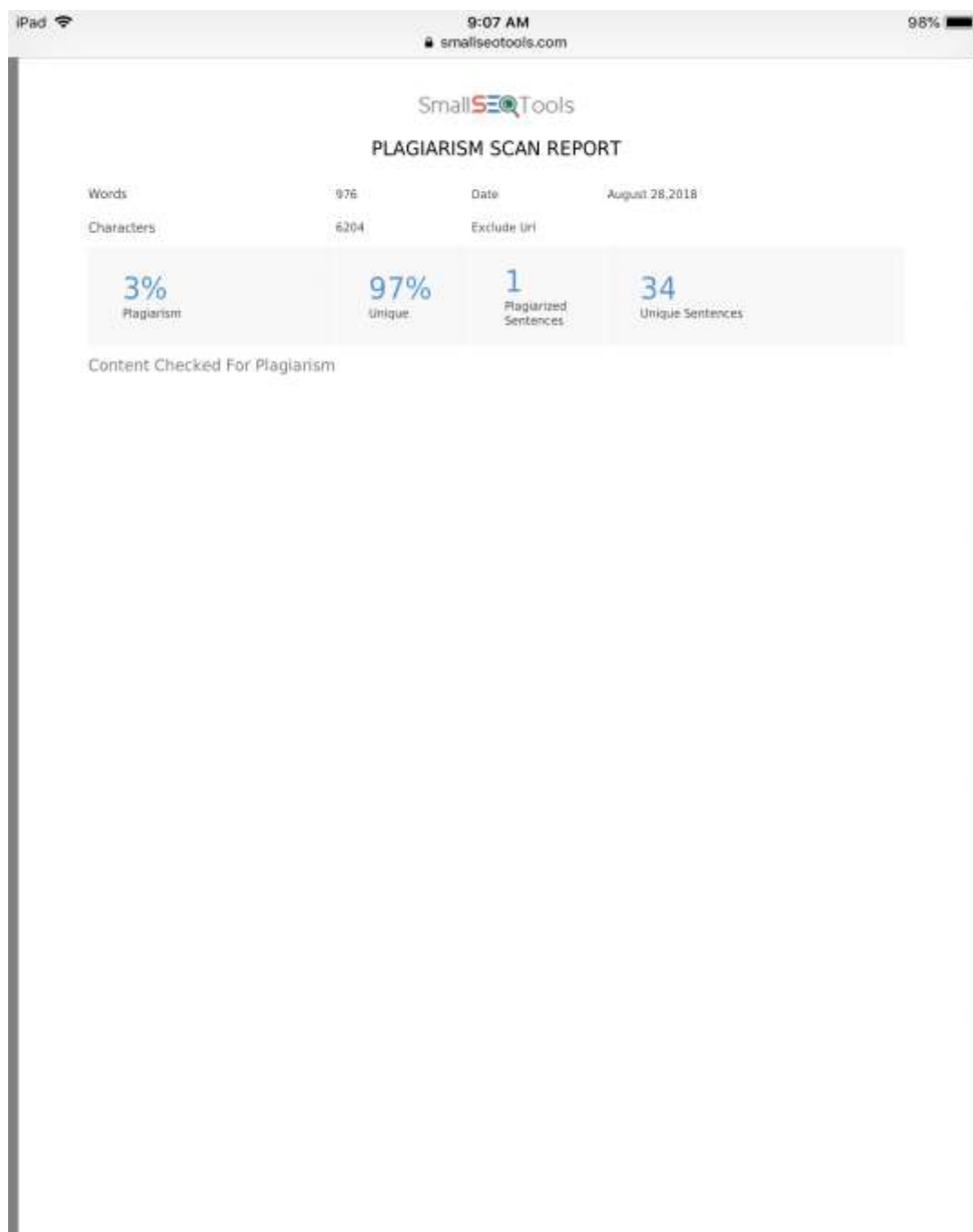
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Gluckstein v. Barnes 1900 AC 240

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Solomon's Case 1872 AC 22

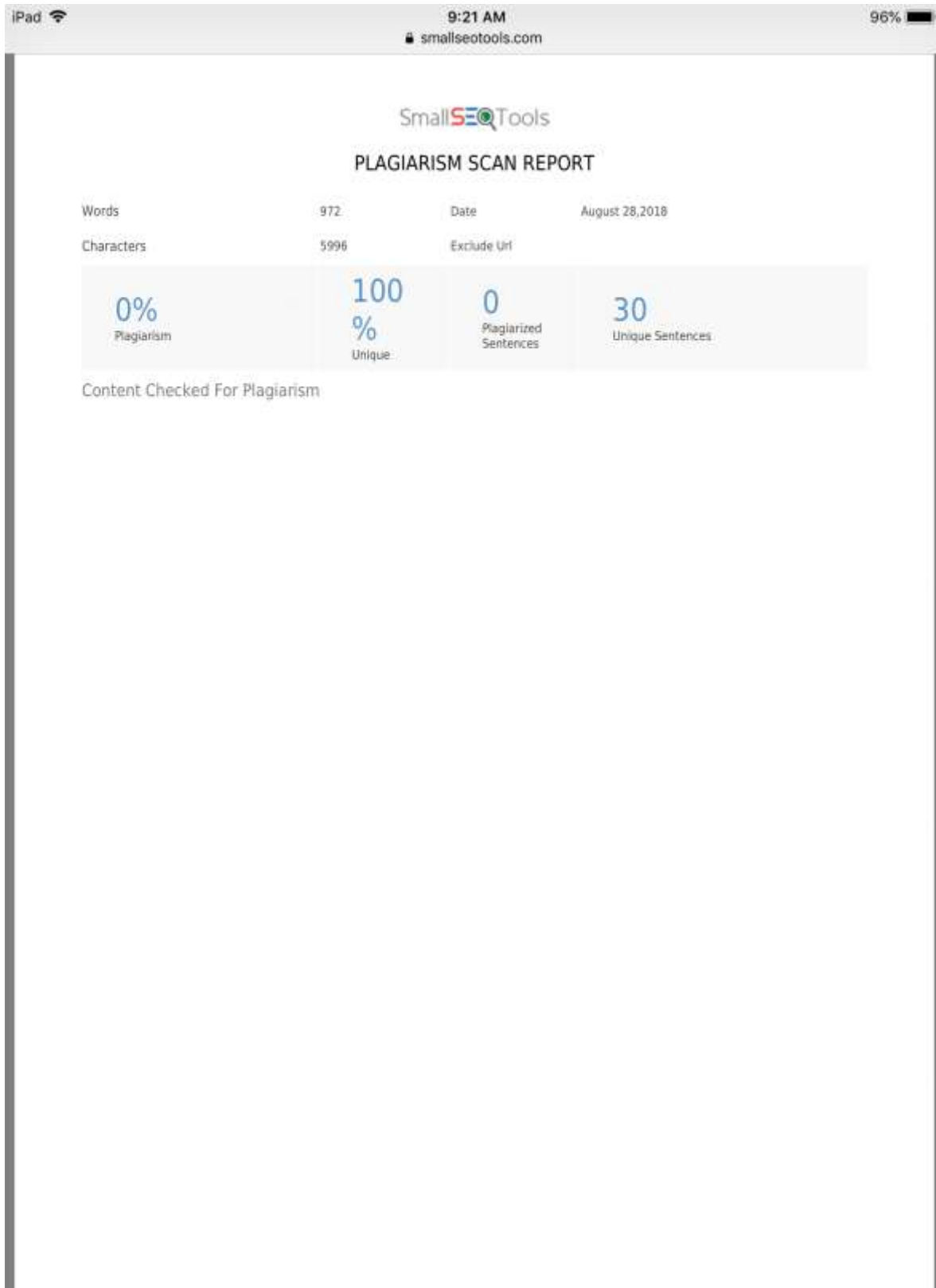
Re Lady Forrest (Murchison) Gold Mine Co. Ltd, (1901) 1 Ch.D. 582



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Sources	Similarity
2. Definitions Compare text control the management or policy decisions exercisable by a person or persons acting, individually or in concert, directly or indirectly, including by virtue of their shareholding, or management rights or shareholders agreements or voting agreements or in any. http://www.mca.gov.in/SearchableActs/Section2.htm	4%



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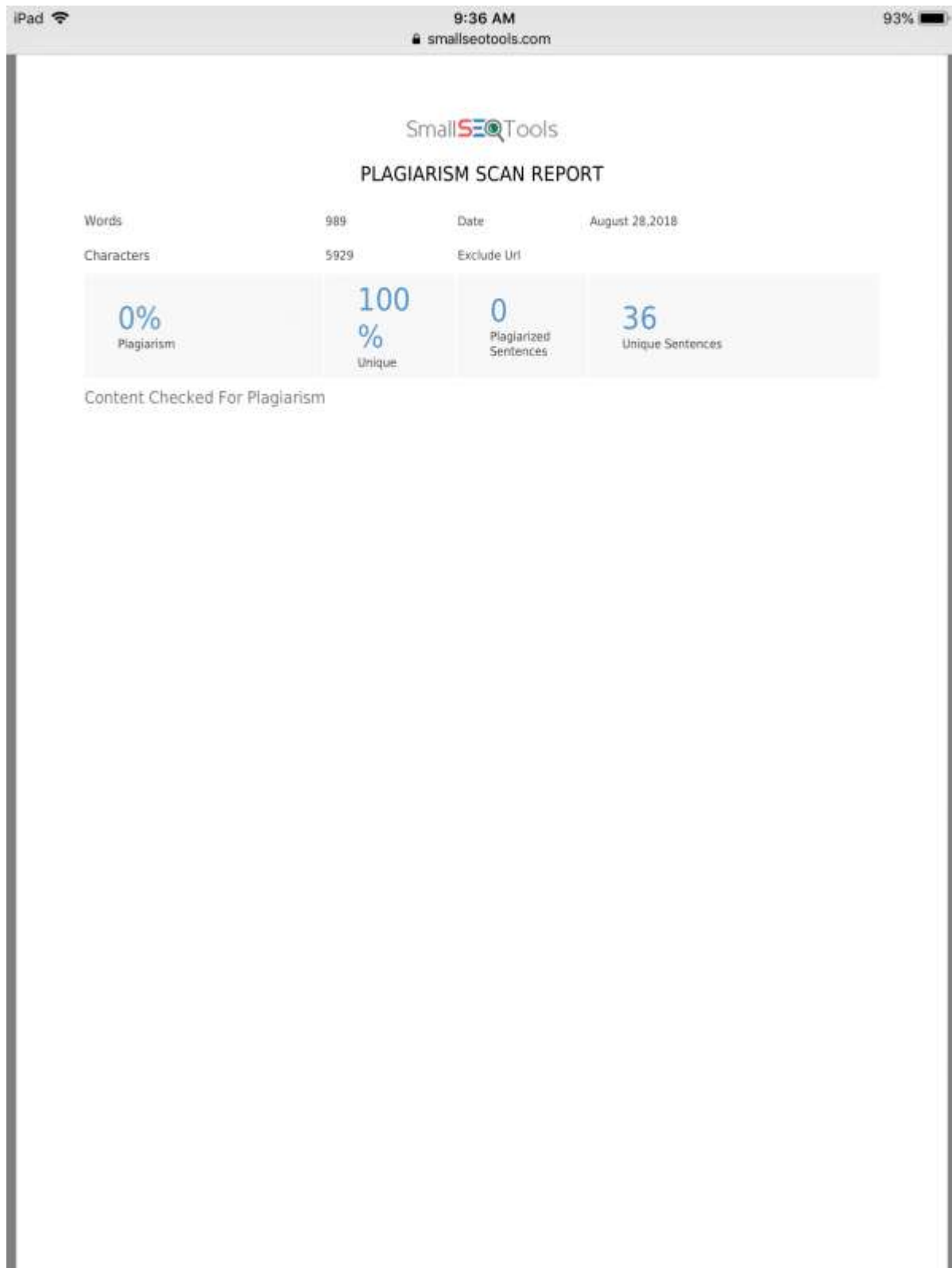
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Be that as it may, in specific conditions it is difficult to discover free governing body like for *Solomon's Case*, in such conditions the genuine truth ought to be unveiled to the individuals who are welcome to end up investors and not only to initial couple of investors. 2. Obligation To Disclose Interest: In a Transaction notwithstanding his obligation not to influence mystery to benefit, a promoter is additionally compelled by a sense of honor to reveal to organization any intrigue which he has in an exchange entered in to or proposed to be entered into by it. This is and, after its all said and done when he pitches his own particular property to the organization raised by him since he gained the property before the advancement started. Such revelations must be made to the organization and in full. After consolidation of organization if a property is gotten by promoters he is trustee of such property and all must be given over to organization at the appointed time generally the promoter might be obligated for change or misappropriation or rupture of trust of property. (Jones 2017) For the most part an organization is an infant offspring of promoter so he doesn't arrange off, such properties which are useless on a high rate however there can be situations where he may attempt to wash off his hands from awful properties by pitching the same to an organization advanced by him as he has a superior access to it. **LIABILITIES FOR MISSTATEMENT OR MISCONDUCT:** A promoter holds a superior position in corporate administration and has data to vital and delicate data which are undisclosed and he can abuse such data for individual and personal stakes so the new Companies Act holds the promoter at risk as officer and officer in default wherever he contradicts the arrangements of the Companies Act and other corporate and securities laws. A promoter is by and large at risk for outfitting incorrectly data and qualifications for joining of organization, owes a common and criminal obligation for error in outline, exposures of interests in intermittent yearly return documented to Registrar and SEBI, divulgence of interests in see served in AGM. He likewise assumes critical part in arrangement of first executives of the organization, if chiefs are not designated by promoters, they are dealt with as esteemed executives of the organization. He additionally assumes critical part in corporate mergers, amalgamation and takeovers. He additionally assumes exceptionally vital part in ending up of the undertakings of the organization. Organizations Act, 2013 under Sections 336 to 342 accommodates different offenses and discipline there for, conferred by officers of organizations which similarly covers promoters which turns out amid ending up of organization. Sections 447 to 453 accommodates certain offenses which are conferred by officers of organization and others and make it culpable. It is a general arrangement can be connected to any instance of extortion and spreads a misrepresentation submitted in course of advancement. Section 450 is of residuary nature. This Section again settles more noteworthy measure of risk in connection with consistency and corporate revelations to different specialists under different corporate and Securities laws. SEBI under SEBI Act, 1992 is likewise have tremendous forces to avoid such individuals who are enjoyed fake exercises to approach capital market as backer, financial specialist or mediator.

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1.Regarding Prospectus: Section 26 of the Companies Act, 2013 and ICDR Regulations 2009 accommodates substance and matters to be given in offer record i.e. outline. Plan is a report which introduces the general data, monetary data and issue data before planned financial specialists in order to assist them with taking choice in regards to share membership of the specific organization. In the event that if the plan incorporates any announcement which is false or misdirecting in frame or setting in which it is incorporated or where any consideration or exclusion of any issue is probably going to delude then promoters of the organization owe common and criminal risk under Section 34 and 35 of the Act and in like manner they will be obligated for discipline under Section 447 with detainment for a term which will not be under a half year but rather which may stretch out to ten years and will likewise be subject to fine which will not be not as much as the sum associated with the misrepresentation, however which may reach out to three times the sum engaged with the extortion. Aside from this the imminent financial specialists can document a common suit or some other activity for rescission, suit for legally binding rupture and harms in Section 37 of the Act for deceiving data in plan. However, under Section 35 general and exceptional barriers are accessible to such individuals who are sued under Section 35 for criminal obligation. On the off chance that they are rendering proficient administrations or they pulled back their assent for approving the issue or they are insensible about error in plan; they will not be obligated. 2.For Fraud: Endorsers can disavow the agreement and require the cash go under it. If there arise an occurrence of false explanation in plan a move might be made against chiefs and promoters of co. On the off chance that there is disappointment or oversight in outline he may make chiefs and also promoters at risk. Notwithstanding promoters and executives all officers of co. who approve the outline with false explanation might be made subject. PRE INCORPORATION AGREEMENT: Joining of organization incorporates assortment of exercises which are finished by assentions for instance purchasing land for assembling and enrolled office, innovation exchange, advance understanding, concurrence with stock trade, concurrence with delegates, concurrence with outsiders for acquisition of crude materials and preparation of stock in exchange. Before fuse, organization has no legally binding limit so in the interest of a planned organization every single such understanding are marked by promoters and these agreements are known as pre-incorporation contracts. No agreement can tie the company before it winds up fit for shrinking by fuse.(Commissioner 1979) An exceptionally adept inquiry in such manner is that what will be risk of promoter or organization or outsider in pre-consolidation understanding. Regardless of whether organization and promoters may abuse their situation in these agreements or not? The issue in pre-consolidation agreements is twofold. On the direct the promoters are in danger as the organization may maintain a strategic distance from such understandings holding that these were past the extent of joining and it can make the promoters by and by obligated and on the second hand the outsiders might be in danger as the agreement might be evaded by organization after consolidation saying with the goal that it was not approved by it.(Dignam and Lowry 2016) FINDINGS: The $P < 0.005$. The Chi-square value is 0.349. The null hypothesis rejects, there is an association between two variables. The Society is aware that the establishment of a Company is very easy and the capital required for it can be minimum of one lakh. For each and every question asked the women gender has given correct answers when compared to men. Everyone at the same time has a common misleading understanding that the tax rate on the company after the implementation of the GST has been raised by the raise in the other commercial products. The promoters relationship with the company do not end once it has been registered, it continues even after it during the situation like where he or she has made any mistake in prospectus. The promoters are made liable even for the mistake made by the other parties or members in a Company while performing their functions. From this it is understood that the promoters are the most vulnerable player in the company among the other. SUGGESTIONS: The legislative body should compulsorily include the definition of the term Promoter in the Companies Act, 2013. There should be even more clear ideas about the what are the roles to be done by the promoter. The promoter should not come onto the play of the company's activities once he has registered it. The customer or the members should make a claim against the promoter for the misstatement but not the managerial members when there is a lost for the people. CONCLUSION: From the lights of the above mentioned data and analysis it is understood that the Promoter's are the sole person who does all type of work for the creation of the company and he acts as a owner of it till the registration of the company. In this era, the director act as a nominal leader of the company even after after the registration of the company. The promoter has both an extreme level of freedom and restrictions to be followed by him during the creation process of the company and at the same time they are the vulnerable one in the whole company personnels. From the findings it is understood that the people in the present society has a wide knowledge about the company and its creation process. Everyone is aware of the hardships and risks involved in it, if anyone who tries to involve in deceit others then not only that person but everyone who act as a managerial officers are included for the liabilities.

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