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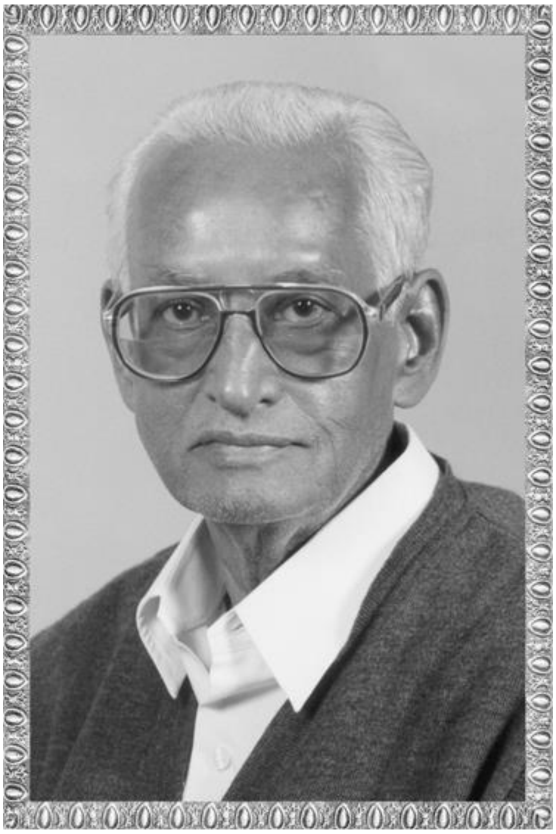

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Shree H.N.Shukla College of Legal Studies *"Sky is the Limit"*

Unit 1 – INTRODUCTION , Memorandum & Article of Association

UNIT NO.	TOPIC NAME
1.1	COMPANY :DEFINITION , THEORIIES OF CORPORATE PERSONALITY
1.2	KINDS OF COMPANIES : PRIVATE COMPANIES-NATURE AND ADVANTAGES- GOVENRMENT COMPAIES-HOLDING AND SUBSIDIARY COMPANIES
1.3	REGISTRATION AND INCORPORTION OF COMPANY
1.4	MEMORANDUM OF ASSOCIATION , VARIOUS CLAUSES , ALTERANTION THEREIN , DOCTRINE OF ULTRA VIRUS AND INCORPORATION OF COMPANY
1.5	ARTICLE OF ASSOCIATION : BINIDING FORCES, ALTERATION WITH MEMORANDUM , DOCTRINE OF CONSTRUCTIVE NOTICE AND INDOOR MANAGEMENT

1.1 Company : Definition , Theories of Corporate Personality :

Introduction:

Company Law in India, is the cherished child of the English parents. Our various Companies Acts have been modelled on the English Acts. Following the enactment of the Joint Stock Companies Act, 1844 in England, the first Companies Act was passed in India in 1850. The Indian Companies Act, 1866, the Indian Companies Act, 1882, the Companies Act, 1913, and the Companies Act, 1956 was earlier law passed in India. Every Companies Act introduced new concepts.

Like, before Amending Act of 1857 there was not concept of limited liability which is now a fundamental concept of the companies law.

To frame a law that enables companies to achieve global competitiveness in a fast changing economy, the Government had taken up a fresh exercise for a comprehensive revision of the Companies Act, 1956, albeit through a consultative process.

As the first step in this direction, a Concept Paper on Company Law drawn up in the legislative format was exposed for public viewing on the electronic media so that all interested parties may not only express their opinions on the concepts involved but may also suggest formulations on various aspects of Company Law.

The response to the concept paper on Company Law was tremendous. The Government, therefore, felt it appropriate that the proposals contained in the Concept Paper and suggestions received thereon be put to merited evaluation by an independent Expert Committee.

A Committee was constituted on 2nd December, 2004 under the Chairmanship of Dr. J J Irani, the then Director, Tata Sons, with the task of advising the Government on the proposed revisions to the Companies Act, 1956 with the objective to have a simplified compact law that will be able to address the changes taking place in the national and international scenario, enable the adoption of internationally accepted best practices as well as provide adequate flexibility for timely evolution of new arrangements in response to the requirements of ever-changing business models. The Committee submitted its report to the Government on 31st May 2005.

Dr. J J Irani Expert Committee on Company Law had submitted its report charting out the road map for a flexible, dynamic and user-friendly new company law. The Committee had taken a pragmatic approach keepingin view the ground realities, and had sought to address the concerns of all the stakeholders to enable adoption of internationally accepted best practices. As one wades through the report, one finds an arduous zeal to ensure that flexibility is coupled with accountability and transparency. Be it the role of directors in the management of the company or the role of promoters at the time of incorporation or the responsibility of professionals in ensuring better governance, the report had made very dynamic and balanced recommendations. The Report of the Committee had also sought to bring in multifarious progressive and visionary concepts and endeavored to recommend a significant shift from the “Government Approval Regime” to a “Shareholder Approval and Disclosure Regime”. The Expert Committee had recommended that private and small companies need to be given flexibilities and freedom of operations and compliance at a low cost. Companies with higher public interest should be subject to a stricter regime of Corporate Governance. Further, Government companies and public financial institutions should be subject to similar parameters with respect to disclosures and Corporate Governance as other companies are subjected to.

The Companies Act, 2013 received the assent of the President on August 29, 2013 and was notified in the Gazette of India on 30.08.2013. The Companies Act, 2013 has undergone amendments four times so far. The Companies (Amendment) Act, 2015, The Insolvency and Bankruptcy Code, 2016, The Companies (Amendment) Act, 2017, and The Companies (Amendment) Act, 2019 amended The Companies Act, 2013. So far Ministry has come out with several circulars, notifications, Orders and various amendment rules to facilitate better and smooth implementation of the Act. The Companies Act 2013 introduced new concepts supporting enhanced disclosure, accountability, better board governance, better facilitation of business and so on. It includes associate company, one person company, small company, dormant company, independent director, women director, resident director, special court, secretarial standards, secretarial audit, class action, registered valuers, rotation of auditors, vigil mechanism, corporate social responsibility, E-voting etc.

MEANING AND DEFINITION OF A COMPANY:

Lets' now understand what is a company and how it is positioned.

The word 'company' is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together. In the leisurely past, merchants took advantage of festive gatherings, to discuss business matters. Nowadays, the company form of organization has assumed great importance.

When they forms their business relations they form a company. In popular parlance, a company or firm denotes an association of likeminded persons formed for the purpose of carrying on some business or undertaking. A company under law is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word 'corporation' is derived from the Latin term 'corpus' which means 'body'.

Accordingly, 'corporation' is a legal person created by a process other than natural birth. As a legal person, a corporate is capable of enjoying many rights and incurring many liabilities of a natural person.

An incorporated company owes its existence either to a Special Act of Parliament or to company law. Public corporations like Life Insurance Corporation of India, SBI etc., have been brought into existence through special Acts of Parliament, whereas companies like Tata Steel Ltd., Reliance Industries Limited have been formed under the Company law i.e. Companies Act, 1956 which is replaced by the Companies Act, 2013.

In the legal sense, a company is an association of both natural and artificial persons and is incorporated under the existing law of a country. In terms of the Companies Act, 2013 (Act No. 18 of 2013) a "company" means a company incorporated under this Act or under any previous company law [Section 2(20)]. In common law, a company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members.

A company is rather a legal device for the attainment of social and economic end. It is, therefore, a combined political, social, economic and legal institution. Thus, the term company has been described in many ways. "It is a means of cooperation and organisation in the conduct of an enterprise". It is "an intricate, centralised, economic and administrative structure run by professional managers who hire capital from the investor(s)".

Lord Justice Lindley has defined a company as "an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share the profit and loss arising therefrom.

The common stock so contributed is denoted in money and is the capital of the company. The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital stock to which each member has contributed entitled is his "share". The shares are always transferable although the right to transfer them may be restricted."

NATURE AND CHARACTERISTICS OF A COMPANY:

Since a corporate body (i.e. a company) is the creation of law, it is not a human being, it is an artificial juridical person (i.e. created by law) and it is clothed with many rights, obligations, powers and duties prescribed by law.

The most striking characteristics of a company are discussed below: (i) Corporate personality A company incorporated under the Act is vested with a corporate personality so it bears its own name, acts under name, may has a seal of its own and its assets are separate and distinct from those of its members. It is a different 'person' from the members who compose it.

Therefore it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its shareholders are its notional owners and do not own anything in it except ownership of shares issued and they can be its creditors simultaneously.

A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company and so they cannot bind it by their acts. The company does not hold its property as an agent or trustee for its members and they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities.

Thus, ‘incorporation’ is the act of forming a legal corporation as a juristic person. A juristic person is in law also conferred with rights and obligations and is dealt in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law [Shiromani Gurdwara Prabandhak Committee v. Shri Sam Nath Dass AIR 2000 SCW 139]

CASE EXAMPLE:

The case of Salomon v. Salomon and Co. Ltd., (1897) A.C. 22 The above case has clearly established the principle that once a company has been validly constituted under the Companies Act, it becomes a legal person distinct from its members and for this purpose it is immaterial whether any member holds a large or small proportion of the shares, and whether he holds those shares as beneficially or as a mere trustee.

In the case, Salomon had, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself, his wife, his daughter and his four sons as the shareholders, all of whom subscribed to 1 share each so that the actual cash paid as capital was £7. Salomon sold his business (which was perfectly solvent at that time), to the Company formed by him for the sum of £38,782.

The company’s nominal capital was £40,000 in £1 shares. In part payment of the purchase money for the business sold to the company, debentures of the amount of £10,000 secured by a floating charge on the company’s assets were issued to Salomon, who also applied for and received an allotment of 20,000 £ 1 fully paid shares.

The remaining amount of £8,782 was paid to Salomon in cash. Salomon was the managing director and two of his sons were other directors. The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liquidation.

The total assets of the company amounted to £6050, its liabilities were £10,000 secured by debentures, £8,000 owing to unsecured trade creditors, who claimed the whole of the company’s assets, viz., £6,050, on the ground that, as the company was a mere ‘alias’ or agent for Salomon, they were entitled to payment of their debts in priority to debentures.

They further pleaded that Salomon, as a principal beneficiary, was ultimately responsible for the debts incurred by his agent or trustee on his behalf. Their Lordships of the House of Lords observed: "…the company is a different person altogether from the subscribers of the memorandum; and though it may be that after incorporation the business is precisely the same as before, the same persons are managers, and the same hands receive the profits, the company is not, in law, their agent or trustee. The statute enacts nothing as to the extent or degree of interest, which may, be held by each of the seven or as to the proportion of interest, or influence possessed by one or majority of the shareholders over others.

There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertakings, or that they should have a mind or will of their own, or that there should be anything like a balance of power in the constitution of company."

CASE EXAMPLE

New Horizons Ltd. v. Union of India, (AIR 1994, Delhi 126) The experience of a shareholder of a company can be regarded as experience of a company. The tender of the company, New Horizons Ltd., for publication of telephone directory was not accepted by the Tender Evaluation Committee on the ground that the company had nothing on record to show that it had the technical experience required to be possessed to qualify for tender. On appeal the rejection of tender was upheld by the Delhi High Court.

The judgement of the Delhi High Court was reversed by the Supreme Court which observed as under: "Once it is held that NHL (New Horizons Ltd.) is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI (Thomson Press India Ltd.), LMI (Living Media India Ltd.) and WML (World Media Ltd.) as well as IIPL (Integrated Information Pvt. Ltd.) had to be taken into consideration, if the Tender Evaluation Committee had adopted the approach of a prudent business man." "Seeing through the veil covering the face of NHL, it will be found that as a result of re-organisation in 1992 the company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr. Aroon Purie hold 60% shares and the Singapore based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field.

The company is in the nature of partnership between the Indian group of companies and Singapore based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risk. In respect of such a joint venture company, the experience of the company can only mean the experience of the constituents of the joint venture i.e. the Indian group of companies (TPI, LMI and WML) and the Singapore based company (IIPL) (New Horizons Ltd. and another v. Union of India (1995) 1 Comp. LJ 100 SC).

(ii) Company as an artificial person:

A Company is an artificial person created by law. It is not a human being but it acts through human beings. It is considered as a legal person who can enter into contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law. It is capable of enjoying rights and being subject to duties.

CASE EXAMPLE

Union Bank of India v. Khader International Construction and Other [(2001) 42 CLA 296 SC] In this case, the question which arose before the Court was whether a company is entitled to sue as an indigent (poor) person under Order 33, Rule 1 of the Civil Procedure Code, 1908. The aforesaid Order permits persons to file suits under the Code as pauper/indigent persons if they are unable to bear the cost of litigation

The appellant in this case had objected to the contention of the company which had sought permission to sue as an indigent person. The point of contention was that, the appellant being a public limited company, it was not a 'person' within the purview of Order 33, Rule 1 of the Code and the 'person' referred to only a natural person and not to other juristic persons.

The Supreme Court held that the word 'person' mentioned in Order 33, Rule 1 of the Civil Procedure Code, 1908, included any company as association or body of individuals, whether incorporated or not. The Court observed that the word 'person' had to be given its meaning in the context in which it was used and being a benevolent provision, it was to be given an extended meaning. Thus a company may also file a suit as an indigent person.

(iii) Company is not a citizen:

The company, though a legal person, is not a citizen under the Citizenship Act, 1955 or the Constitution of India. In State Trading Corporation of India Ltd. v. C.T.O., A.I.R. 1963 S.C. 1811, the Supreme Court held that the State Trading Corporation though a legal person, was not a citizen and can act only through natural persons. Nevertheless, it is to be noted that certain fundamental rights enshrined in the Constitution for protection of "person", e.g., right to equality (Article 14) etc. are also available to company. Section 2(f) of Citizenship Act, 1955 expressly excludes a company or association or body of individuals from citizenship

CASE EXAMPLE

In R.C. Cooper v. Union of India, AIR 1970 SC 564 In this case, the Supreme Court held that where the legislative measures directly touch the company of which the petitioner is a shareholder, he can petition on behalf of the company, if by the impugned action, his rights are also infringed. In that case, the court entertained the petition under Article 32 of the Constitution at the instance of a director as shareholder of a company and granted relief. It is, therefore, to be noted that an individual's right is not lost by reason of the fact that he is a shareholder of the company.

(iv) Company has Nationality and Residence :

Though it is established through judicial decisions that a company cannot be a citizen, yet it has nationality, domicile and residence. In Gasque v. Inland Revenue Commissioners, (1940) 2 K.B. 88, Macnaghten. J. held that a limited company is capable of having a domicile and its domicile is the place of its registration and that domicile clings to it throughout its existence. He observed in this case: "It was suggested that a body corporate has no domicile. It is quite true that a body corporate cannot have a domicile in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicile and nationality can be given to a body corporate."

(v) Limited Liability:

"The privilege of limited liability for business debts is one of the principal advantages of doing business under the corporate form of organisation." The company, being a separate person, is the owner of its assets and bound by its liabilities.

The liability of a member as shareholder, extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. Members, even as a whole, are neither the owners of the company's undertakings, nor liable for its debts. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets.

This means that the liability of a member is limited. For example, if A holds shares of the total nominal value of 1,000 and has already paid Rs.500/- (or 50% of the value) as part payment at the time of allotment, he cannot be called upon to pay more than Rs. 500/-, the amount remaining unpaid on his shares. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

Buckley, J. in Re. London and Globe Finance Corporation, (1903) 1 Ch.D. 728 at 731, has observed: 'The statutes relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantage of the investor as well as of the public, allowed and encouraged aggregation of small sums into large capitals which have been employed in undertakings of "great public utility largely increasing the wealth of the country".

Exceptions to the principle of limited liability:

- Members are severally liable in certain cases- if at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

- [Section 3A] : When the company is incorporated as an Unlimited Company under Section 3(2)(c) of the Act l Where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, direct that liability of the members of such company shall be unlimited.
- [Section 7(7)(b)] :Further under section 339(1), where in the course of winding up it appears that any business of the company has been carried on with an intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal may declare the persons who were knowingly parties to thecarrying on of the business in the manner aforesaid as personally liable, without limitation of liability, for all or any of the debts/liabilities of the company.
- [Section 339] : Under Section 35(3), where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person who was a director at the time of issue of the prospectus or has been named as a director in the prospectus or every person who has authorised the issue of prospectus or every promoter or a person referred to as an expert in the prospectus shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.
- As per section 75(1): where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified or such further time as may be allowed by the Tribunal and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to other liabilities, also be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.
- Section 224(5) :states that where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability

Corporate Personality

Corporate personality is a legal concept. The corporate personality hypothesis essentially asserts that a corporation has a separate legal identity from its members. The idea of corporate personality is used in both English and Indian law. The company's creditors can only sue the corporation to recover their money; they cannot sue individual members.

Similarly, the business is not liable for the individual debts of its shareholders/members, and the company's property is solely used for the company's profit. It has certain rights and responsibilities, including the power to own property, enter into contracts, and sue and be sued in the name of the company. The member's rights and obligations are distinct from those of the company's. The company's legal personality and independence are conferred to it when it is granted corporate/legal personality.

Three key requirements must be present in a corporation's legal personality:

- First, a group or body of human persons must be linked for a specific purpose;
- Second, the company must have organs through which it acts; and
- Third, the company is given will/animus by legal fiction.

Theories of corporate personality

A "corporation sole" and a "corporation aggregate" are treated as individuals by the law. These theories have a political subtext in that they tried to portray the relationship that exists between the state and the groups that exist inside it, or they include a metaphysical elaboration for the presence of such legal persons, or they try to address the practical consequences of the presence of such legal persons. Yet, in dealing with numerous issues connected to corporations, the courts have not continuously adopted any one theory and have, for the most part, been led by practical concerns.

Fiction Theory:

Savigny proclaimed the fiction theory, and Salmond, Coke, Blackstone and Holland elaborated on it. A pure legal fiction, according to the fiction theory, attaches a personality to organisations, institutions, and finances. The company's character is distinct from that of its constituents. There is a double fiction in operation in case of a company. The corporation is granted a legal entity in the 1st fiction, and the corporation is blessed against the will of an individual person in the 2nd fiction. As a result of this double illusion, the company develops a personality distinct from its members.

Savigny saw a company as an exclusive legal construct with no existence outside of the company group's individual members, whose fictional deeds are ascribed to the corporate entity. The truth that all of the company members have died has no bearing on the company's continued existence. Only a fake creature of law has survived.

Criticism:

This theory has been criticised because it does not adequately address corporate civil and criminal culpability. If the company's are ascribed to it by the fiction of law, it implies that it should always be legal, because the will bestowed by law could never be utilised for illegitimate or illegal purposes. The firm would only engage in intra vires activities and would never engage in ultra vires activities.

Frederick Pollock has also been harsh in his critique of this theory, claiming that the fiction theory of corporate personhood is not recognised by English common law. In English law, a group of people cannot assume collective obligations or powers unless they can meet the prerequisites for incorporation. In English law, unincorporated entities are not considered legal persons. A group of people must be incorporated as per law before they may have rights and responsibilities as a corporation.

Realist Theory:

Gierke, the eminent German jurist, proposed it. Maitland, Beseler, Lasson, Bluntschli, Zitelmann, Miraglia, Sir Frederick Pollock, Geldat Pollock, Jethrow Brown, and others have all backed up this theory. Every organisation, according to Gierke, has a genuine consciousness, a real will, and a real ability to act. The presence of a group extends beyond the sum of the individualities of the individuals who make up the group. Regardless matter whether it is a political or social group, every group, by this theory, has its own character.

A company has a genuine existence regardless of whether or not it is recognised by the state. The companies will is manifested via the actions of its subordinates and agents. As a juristic person, you have various rights and responsibilities. A company, according to this view, is a social organism, whereas man is a physical organism. It argues that corporations employ men as agents to carry out their duties. The corporation's will is manifested via the actions of its directors, workers, and agents.

Unlike the preceding argument, the presence of a company is founded on actuality rather than fantasy. It is more of a psychological than a physical reality. The company is not a real person; rather, it is a reflection of psychical realities that exist outside of state law and are recognised rather than formed by it. Realist theory is intertwined with Institutional theory, which signifies a move from an individualist to a collectivist perspective. An individual gets integrated into the organization and then becomes a piece of it, as per this theory. They felt that inside the State, which is the highest institution, there were several separate institutions.

Criticism:

Professor Gray denies that collective will exists. The corporate will, he claims, is a fabrication of his imagination. A corporation is not a mythical or legal entity; it is merely a collection of natural individuals, some of whom have rights that differ from those of natural persons in common and descend in various ways.

Concession Theory:

The theory is propounded by savigny, salmond and dicey. It tied to the sovereign state ideology. The sovereign and the individual are the sole realities according to this view. They are considered as individuals solely as a result of the sovereign's concession. Only the law may provide legal personality. It assumes that a company has enormous importance as a legal person since it is accepted by the state or the law.

Juristic personality, as per this theory, is a concession provided by the state to companies. Recognize or not is totally at the discretion and judgement of the State. The idea is similar to the fiction theory in that it argues that none of its members have a legal personality. This theory varies from the fiction theory in that it emphasises the State's discretionary authority when it comes to identifying the corporation's personality.

Criticism:

Overemphasis on state discretion w hen it comes to recognising corporations that are not alive. This might result in authoritarianism and arbitrary limits on business organisations, especially political ones.

Purpose theory:

Brinz, a German jurist, is the principal proponent of this theory. This notion was endorsed in England by E.I. Bekker, Aloysand Demilius. The notion is founded on the premise that companies can be recognised like individuals for certain reasons. It is based on the premise that only living humans may be the subject of rights and responsibilities, and that companies, as non-living organisations, have no such rights or obligations. To address this, the theory contends that a corporation's personality was required in order for it to be viable of possessing rights and obligations.

The foundations or building upon which the construction of the juristic person may be created can be followed back to the Stiftung of German Law, i.e. the underpinnings or edifice for which the construction of the juristic person can be built. Duguit, a well-known jurist, had a distinct approach to aim theory.

According to him, the goal of law, in its broadest meaning, is to establish social cohesion. If an unit is pursuing an objective that is in line with social solidarity, then all of its acts that fall within that goal must be safeguarded by law by bestowing legal personality on the unit.

Bracket theory:

The Symbolist theory, often referred as the Bracket theory, is linked to the well-known German jurist Ihring. As per this theory, legal individuality is a symbol that helps corporate bodies perform more efficiently. According to this view, members of a company have specific rights and responsibilities that are delegated to the corporation in order for commercial transactions to go smoothly. It is not usually practical or easy to refer to numerous members of a company. Hohfeld, an American jurist, has argued for this notion in a somewhat modified form.

Corporate personality, in his opinion, is the development of arbitrary legal norms meant to assist legal procedures by and against an established company. Only human beings are individuals, according to Hohfeld, and legal personality is nothing more than the establishment of arbitrary procedural norms. A corporate person is just a procedural form of a lot of individuals that is recognised in order to establish legal relationships between them. Corporate personality, as per Hohfeld, is just a way of accounting for mass individual interactions. He indicated that a company's unity is a handy mechanism for courts of law to decide matters.

Criticism:

This theory has a flaw in it from the beginning. It does not specify when the bracket can be removed and raised in order to take notice of the members who make up the corporation.

The Organism Theory:

According to this theory, a company is similar to an organism, with (limbs in the form of members), a head (top authorities), and other organs. Furthermore, an individual has one head, a body, and legs, which aid in the fulfilment of desires and the performance of functions. As per the theory, a corporation has its own will and body, and also legal rights and responsibilities.

To have legal rights, you don't have to be a human person. A body that has its own will and life might have legal rights as well as legal obligations or duties. A social entity with members, a will, and a body is referred to as a corporate personality. As a result, the core of this theory would be that a corporate personality must have a body (head, limbs, and organs), collective volition, and legal recognition.

Ownership Theory:

This theory was devised by Bzinz, Bekker, and Demelius, and it was expanded by Planiol. Humans, not companies, are said to have legal rights, according to this idea. In addition, it states that a legal person or company is not a person in any case. These are subjectless property, which is a legal fabrication, and this fictional identity exists solely for the purpose of owning common property. Personalities like this are nothing more than a kind of ownership. As a result of their ownership, these persons may enter into contracts and pursue legal action in the same way that real people can.

When it comes to estates and money that are solely owned by corporations, this ownership theory holds some significance. Furthermore, human beings could only be entitled to certain rights and duties. As a result, if such a personality cannot be entitled to such rights and obligations, it should be classified as subjectless property. The core of this view is that the law protects particular human purposes and interests, and property acquired by a juristic person does not belong to anybody but is controlled for a certain objective and purpose. Furthermore, these legal professionals are there to put some genuine goals into action.

1.2 Kinds of Companies: Private Companies-nature and advantage-Government companies-holding and subsidiary:

IMPORTANT DEFINITIONS:

Section 2 of Companies Act, 2013 contains definitions: Clause (20) “Company” means a company incorporated under this Act or under any previous company law.

Clause (21) “Company Limited by Guarantee” means a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up.

Clause (22) “Company Limited by Shares” means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.

Clause (68) “Private Company” means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, – (i) restricts the right to transfer its shares; (ii) except in case of One Person Company, limits the number of its members to two hundred: Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member: Provided further that— (A) persons who are in the employment of the company; and (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and (iii) prohibits any invitation to the public to subscribe for any securities of the company;

Clause (71) “Public Company” means a company which – (a) is not a private company; (b) has a minimum paid-up share capital , as may be prescribed: Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;

Clause (46) “Holding Company”, in relation to one or more other companies, means a company of which such companies are subsidiary companies; Explanation : For the purpose of this Clause, the expression “Company” includes any Body Corporate.

Clause (87) “Subsidiary Company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company – (i) controls the composition of the Board of Directors; or (ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies: Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.—For the purposes of this clause,— (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company; (b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors; (c) the expression “company” includes any body–corporate; (d) “layer” in relation to a holding company means its subsidiary or subsidiaries; Before going to discuss Body Corporate, it is prudent to discuss Associate companies.

Clause (6) “Associate Company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. Explanation.—For the purpose of this clause,— (a) the expression “significant influence” means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement; (b) the expression “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement

Clause (11) “Body Corporate” or “Corporation” includes a company incorporated outside India, but does not include— (i) a co-operative society registered under any law relating to co-operative societies; and (ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

Clause (42) “Foreign Company” means any company or body corporate incorporated outside India which— (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.

Clause (52) “Listed Company” means a company which has any of its securities listed on any recognised stock exchange;

Clause (45) “Government Company” means any company in which not less than fifty-one percent of the paid up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

Clause (9) “Banking Company” means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949.

Clause (39) “Financial Institution” includes a scheduled bank, and any other financial institution defined or notified under the Reserve Bank of India Act, 1934.

1.3 Kinds of Companies : Private Companies- nature and advantages –Government companies- Holding and Subsidiary companies.

The Companies Act, 2013 differentiates companies based on the number of members. The Micro, Small and Medium Enterprises (MSME) Act classifies companies into micro, small and medium companies to grant them MSME benefits. Companies can also be classified based on the liability of their members, company ownership and listing status. The various types of companies based on different parameters are covered below.

Types of Company Under Companies Act, 2013:

One Person Company
The Act introduced the concept of a One Person Company (OPC). As per the Act, an OPC is a company that has only one member. The member can also be the director of the company. Though the OPC should have only one member, it can have a maximum of 15 directors.

Private Limited Company
A private limited company is a company where there cannot be more than 200 members. A minimum of two members are required to establish a private limited company. The members cannot transfer their share, and it is suitable for businesses that prefer to register as private entities. There needs to be a minimum of two directors, and there can be a maximum of 15 directors in a private limited company.

Public Limited Company
A public limited company means a company where the general public can hold the company shares. There is no maximum shareholders limit for a public limited company, but there needs to be a minimum of seven members to establish a public company. The company needs to have three directors and can have a maximum of 15 directors.

Section 8 Company (NGO)
An association of persons or individuals can register a company under section 8 of the Act for charitable purposes. These companies are established to promote commerce, science, art, education, sports, research, religion, social welfare, charity, the protection of the environment, or such other objects. The company should apply its profits and other incomes to promote its activities. Such companies intend to prohibit any dividend payments to their members.

Types of Companies Based on Size
The MSME Act classifies companies based on their size to give benefits provided by the government for MSMEs. The differentiation of companies based on size to obtain MSME benefits is as follows:

Micro Companies
A micro company is a company whose investment in plant and machinery does not exceed Rs.1 crore, and the annual turnover does not exceed Rs.5 crore.

Small Companies
A small company is a company whose investment in plant and machinery does not exceed Rs.10 crore, and the annual turnover does not exceed Rs.50 crore.

However, the Companies Act, 2013, also provides many benefits to small companies. A company with a paid-up share capital of below Rs.4 crore and an annual turnover of below Rs.40 crore is considered a small company under the Companies Act.

Medium Companies
A medium company is a company whose investment in plant and machinery does not exceed Rs.50 crore, and the annual turnover does not exceed Rs.250 crore.

Types of Company Based on Liability
The members of a company have either limited or unlimited liability. The liability of the company member arises at the time of bankruptcy, company loss, winding up or paying the company's debt. Thus, a company established under the Companies Act, 2013 can also be classified based on the liability of its shareholders.

Limited By Shares
A company limited by shares means the liability of the company members is limited by the Memorandum of Association (MOA). The company members are liable only for the unpaid amount on the shares respectively held by them. The equity shares held by a member measure the shareholder's ownership in the company.

Limited by Guarantee
A company limited by guarantee means the member's liability is limited to the amount they guarantee to contribute towards the company's assets. The member's liability is limited by the company MOA. The members undertake in the MOA to contribute the guaranteed amount in the event of the company being wound up. The percentage of the member's ownership is based on the amount guaranteed by them.

Unlimited Company
An unlimited company means the company members do not have any limit on their liability. If any debt arises, the member's liability is unlimited and extends to their personal assets. Usually, the company entrepreneurs choose not to incorporate this type of company.

Types of Company Based on Control
The companies can be classified based on the ownership structure and control as follows:

Holding Company
A holding company is a company having the majority of voting powers of another company (subsidiary company). The holding company is the parent company controlling the subsidiary company's policies, assets and management decisions. However, it remains uninvolved in the subsidiary's day-to-day activities.

Subsidiary Company
A subsidiary company is owned by another company (holding company) either partially or entirely. The holding company controls the composition of the board of directors of the subsidiary company or more than 50% of its voting powers. Where a single holding company holds 100% voting powers, the subsidiary is known as the Wholly Owned Subsidiary (WOS) of the holding company.

Types of Company Based on Listing
The companies are classified into listed and unlisted companies based on access to capital. Every listed company must be a public company, but vice versa need not be true. An unlisted company can be a private or public limited company.

Listed Company
A listed company is a company which is registered on various recognised stock exchanges within or outside India. The shares of the listed companies are freely traded on the stock exchanges. They have to follow the guidelines given by the Securities Exchange Board of India (SEBI).

A company that wishes to list its shares on stock exchanges should issue a prospectus to the general public for subscribing to its debentures or shares. A company can list its shares through an Initial Public Offer (IPO), while an already listed company can make a Further Public Offer (FPO).

Unlisted Company
An unlisted company is a company that is not listed on any recognised stock exchange, and its shares are not freely tradable on the stock exchanges. These companies fulfil their capital requirements by obtaining funds from friends, family members, relatives, financial institutions, or private placement. An unlisted company must convert to a public company and issue a prospectus if it wishes to list its securities on the stock exchanges.

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PRIVATE COMPANIES : ITS NATURE AND ADVANTAGES :

A private limited company is a company held privately by a group of persons. The member’s liability is limited to the shares held by them in the company. However, the shares of the private limited company cannot be publicly traded.

A private limited company is a popular form of business structure in India. It can be registered with just two members and two directors. However, the maximum number of members is 200. It is the most recommended form of business structure for millions of small and medium businesses that are professionally managed or family-owned.

Section 2(68) of the Companies Act, 2013 defines a private limited company as follows:

A company having a minimum paid-up share capital.
It restricts the right to transfer shares through its Articles of Association (AOA).
It limits the number of its members to 200.
It prohibits the issuance of a public invitation for subscribing to its securities.

Minimum Requirement of a Private Limited Company

Minimum of two members.

Members cannot be artificial legal entities.

Minimum of two directors.

A minimum of one director should be an Indian citizen residing in India.

Minimum authorised share capital of Rs.1 lakhs.

Digital Signature Certificate (DSC) of the directors.

Registration Process of a Private Limited Company

The process of registration of a private limited company is entirely online. It should be registered by applying the SPICe+ form on the MCA portal. The e-MOA (Memorandum of Association) and e-AOA must be uploaded with the SPICe+ form. The subscribers and directors of the company must digitally sign the e-MOA and e-AOA. Thus, the directors need to obtain the DSC before applying for registration.

The process of registration of a private limited company is as follows:

Apply for company name reservation in Part-A of the SPICe+ form with two proposed names. The company name must adhere to the provisions of the Companies Act, 2013 for it to be approved by the Registrar of Companies (ROC).

Fill Part-B of the SPICe+ form within 20 days of the name approval by the ROC. A company can apply for the following registrations by filling the Part-B of the SPICe+ form:

Company incorporation.

Application for Director Identification Number (DIN).

PAN and TAN application.

GSTIN application.

EPFO and ESIC registration.

Opening of a company bank account.

After filling out Part-A and Part-B of the SPICe+ form, upload the required documents, pay the respective fees and submit the form.

The ROC will examine the application and issue the Certificate of Incorporation.

Advantages of a Private Limited Company

No Minimum Paid-up Capital

After the amendment of the Companies Act, 2013, private limited companies do not require a minimum paid-up capital. It can be registered with a nominal amount of Rs.1,00,000 authorised share capital.

Separate Legal Entity

A private limited company has a legal entity separate from its members. A separate legal entity means the law identifies the company as an entity with its own assets and liabilities. It can sue and be sued in its own name, i.e. company name. There is a separation of management and ownership. Thus, the managers are responsible and answerable for the company's loss.

Limited Liability of Members

The members of the private limited company have limited liability. It means that if the company faces a loss, the personal assets of the members will not be used to pay the company's debts. The members are liable to pay the debts only to the extent of how much they own towards their shareholding, i.e. the unpaid share value.

Fund Raising

It is easier for a company to raise funds than a sole proprietorship or partnership firm. Angel investors and venture capitalists invest only in private limited companies or public limited companies.

Perpetual Existence

A private limited company has a perpetual succession, which means it has a continued or uninterrupted existence until it is legally dissolved. Since the company is a separate legal person, the death of the founders, directors or members does not affect its existence. It continues its business irrespective of the changes in membership.

Foreign Direct Investment (FDI)

In a private limited company, 100% Foreign Direct Investment (FDI) is allowed, which means any foreign person or entity can directly invest in the company. FDI will help the company grow across the nation and even globally.

Credibility

The financial statements and incorporation details of a private limited company are available on the MCA website. This improves the company's credibility since it makes it easy for investors, financial institutions and clients to easily authenticate company details before associating with it.

Disadvantages of a Private Limited Company

Number of Members

The members of a private limited company are limited. It can only have a maximum of 200 members, while a public limited company can have unlimited members.

Restriction on Transfer of Shares

In a private limited company, the transfer of shares is not allowed under its AOA, and these shares cannot be listed on the stock exchanges.

Cannot Issue Prospectus

A private limited company cannot issue a prospectus inviting the public to subscribe to its shares. The shares of the company cannot be listed on the stock exchanges.

These are the advantages and disadvantages of a private limited company. An entrepreneur must consider the advantages and disadvantages before deciding to incorporate a private limited company.

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Government companies are also referred to as Public Sector Undertakings. The public sector companies in India were formed with two main goals in mind:

To achieve more significant equity within the distribution of the wealth of the country's citizens.

To build encouragement in the nation's growth.

Public Sector Insurance Companies or the government insurance company in India are as follows:

Life Insurance Corporation Of India

General Insurance Corporation Of India

The New India Assurance Company Limited

United India Insurance Company Limited

The Oriental Insurance Company Limited

Features of a Government Company

It is a distinct legal BODY.

It was formed in compliance with the Companies Acts 1956 and 2013.

The provisions of the Companies Act to control and restrict management.

The Memorandum and Articles of Association control the appointment of the workforce.

A government company is supported by government shareholdings IN TERMS OF FUNDS as well as other private stock holdings are added reasons. The company can also raise funds on the stock exchange.

A central government nominated authority evaluates a government company. This agency is largely responsible for India’s Comptroller and Auditor General (C&AG).

Government companies in India

Central Public Sector Undertakings or Government companies in India with the highest profit margins are as follows:

Oil and Natural Gas Corporation Limited (ONGC)

Coal India Limited (CIL)

Power Grid Corporation of India (PGCIL)

National Thermal Power Corporation (NTPC)Gas Authority of India Limited (GAIL)

Mahanadi Coalfields (MCL)

Power Finance Corporation Limited (PFCL)

Northern Coalfields (NCL)

Rural Electrification Corporation (REC)

Nuclear Power Corporation of India Ltd (NPCIL)

A few more government company examples are as follows:

Hindustan Steel Limited, Hindustan Shipyard, Airports Authority of India (AAI), Bharat Coking Coal Limited (BCCL), Bharat Electronics Limited (BEL), Power Grid Corporation of India(PGCIL), Hindustan Petroleum Corporation Limited (HPCL).

Advantages of a Government Company

To form a government corporate entity, all clauses of the Companies Act must be pursued.

The government entity has full authority in managerial practices and adaptability in day-to-day operations.

These corporations have power over the regional market and must maintain it to stop unethical business malpractices.

Limitations of a Government Company

These businesses are subject to a great deal of government involvement and intervention by public servants, government members, and legislators.

Because the government subsidizes these companies, they are exempt from all constitutional obligations such as reporting to the legislature.

The company's productive operations are hindered because the board of directors is primarily made up of legislators and public servants who are more worried about satisfying their political group colleagues or owners and less worried about the company's progress and expansion.

Role and Importance

The significance and nature of public companies have evolved. Let's take a look at how these companies contribute to the country's growth.

Scale economies

Sectors where a massive sum of money is needed, which private sector companies usually do not encompass, are handled by public sector companies. Public sector companies regulate power generation plants, oil and gas, and petroleum.

Regional equilibrium

Businesses will not affect multiple regions that are monetarily behind for the country's general development. The majority of the development took place near port facilities, and the interior of the country was never managed to reach. To ensure that the entire nation grows balanced, public sector organizations take the lead and develop underserved areas.

Infrastructure development

At the time of independence, all major industries were few and had limited efficiency. Construction, steel, and iron, petroleum & gas refining and marketing, heavy goods machinery, and so on were among these industries.

Monopoly and Restrictive Trade Practices Control

The role of public sector companies in influencing the monopoly created by private sector companies is critical. Companies in the public sector adhere to Monopolistic and Restrictive Trade Practices guidelines.

Substitution of Imports

Public enterprises are also implicated in the fabrication and production of machinery and equipment that was initially imported from other countries. Organizations such as Metals and Minerals Trading Corporation of India have played a pivotal role in broadening Indian export and trade markets.

―public company :

means a company which— (a) is not a private company; (b) has a minimum paid-up share capital as may be prescribed: Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles ;

Characteristics of a Public Limited Company

Directors

As per the provisions of the Companies Act, 2013 to start a public limited company, a minimum of 3 directors are required and there can be a maximum of 15 directors.

Limited Liability

The liability of each shareholder is limited. In simple words, a shareholder of a public limited company isn’t personally responsible for any loss or debts of the company for any amount greater than the amount invested by them; contrary to partnerships and sole proprietorships, where the partners and business owners are jointly and severally liable for the debts of the business.

However, this characteristic of a public limited company does not offer immunity to the shareholders. The shareholders will be held responsible for their own illegal actions.

Share Capital

A public limited company is not required to have a minimum paid-up capital. However, it should have an authorised share capital of a minimum of Rs.1 lakh.

Prospectus

There is a requirement under the Act for public limited companies to issue a prospectus. A prospectus is a comprehensive statement of the affairs of the company issued by a public limited company for its public. However, there are no such provisions for private limited companies. This is because private limited companies cannot invite the public to subscribe to their shares.

Name

It is a compulsory requirement under the Act for all public companies to add the word ‘limited’ after their name.

Advantages of Public Limited Companies

More capital

Shares are offered to the general public at large i.e. anyone can invest in a public limited company. Hence, improves the capital of the company.

More attention

Being listed on a stock market ensures that mutual funds, hedge funds and other traders take note of the business of the company. This may result in better business opportunities for the public limited company.

Spreading risk

Since the shares are sold to the public at large, the unsystematic risk of the market is spread out.

Growth and expansion opportunities

Due to less risk, there is a perfect opportunity for growing and expanding the business by investing in new projects from the money raised through shares.

Requirements for Registration of a Public Limited Company

There are various rules and regulations prescribed under the Act for the formation of a public limited company. Here is what you should keep in mind when registering a public limited company:

Minimum 7 shareholders are required to form a public limited company.

Minimum of 3 directors is required to form a public limited company.

A minimum authorised share capital of Rs. 1 lakh is required.

Digital Signature Certificate (DSC) of one of the directors is needed while submitting self-attested copies of identity and address proof.

Directors of the proposed company will need a Director Identification Number (DIN).

The name of the company must be as per the provision of the Company Act and Rules.

Documents like the Memorandum of Association (MOA), Articles of Association (AOA) and duly filled Form DIR - 12 is needed.

Payment of the prescribed registration fees to the ROC is required.

Procedure for Registration of a Public Limited Company

Step 1: Digital Signature Certificate (DSC)

Since the registration procedure of a company is entirely online, a digital signature will be required for filing the forms on the MCA portal. For all proposed directors as well as the subscribers of the memorandum and articles of association, DSC is compulsory.

Step 2: Director Identification Number (DIN)

It is an identification number concerning a director; it has to be procured by anyone who intends to become a director in a company. DIN of a proposed director in addition to the name and address proof has to be mentioned in the company registration form.

Step 3: Registration on the MCA Portal

A completed SPICe+ form has to be submitted on the MCA portal in order to apply for company registration. To fill the SPICe+ form and submit the required documents, the director of a company needs to register on the MCA portal. After the registration process is completed, the director will get access to the MCA portal services which comprises filing e-forms as well as viewing public documents.

Step 4: Certificate of Incorporation

After the registration application is submitted along with the concerned documents, the Registrar of Companies (ROC) will inspect the application. After the application is verified, he will issue the Certificate of Incorporation of the Public Company. After obtaining the certification of incorporation from the ROC, the company should apply for the 'Certificate of business commencement' also.

Documents Required for Incorporating a Public Limited Company

Proof of identity of all the shareholders and directors.

Proof of address of all the directors and the shareholders.

PAN number of all the shareholders and directors.

Utility bill of the proposed office i.e. proposed registered office for the company.

A NOC (No Objection Certificate) from the landlord where the office of the company will be situated.

Director Identification Number (DIN) of all the directors.

Digital Signature Certificate (DSC) of the directors.

Memorandum of Association (MOA).

Articles of association (AOA).

HOLDING AND SUBSIDIARY COMPANY :

Clause (46) “Holding Company”, in relation to one or more other companies, means a company of which such companies are subsidiary companies;

controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies: Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed. Explanation.—For the purposes of this clause,—

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression “company” includes anybody corporate;

(d) “layer” in relation to a holding company means its subsidiary or subsidiaries; COMPANY INCLUDES BODY CORPORATE: As per Sec 2(87) Company include a ‘Body Corporate’. As per Sec 2(11) body corporate includes a ‘Company incorporate out of India’.

Thus, an Indian company in which more than 50% shares are held by a foreign body corporate will be a ‘Subsidiary Company’. Similarly, any Indian body corporate can be ‘holding company’ even if that body corporate is not registered as ‘company’ under company Act.

An Indian company can be holding/subsidiary of a foreign body corporate even if it is not registered as a Company. SOME DECISIONS OF CASES: A holding company is not liable for provident dues of a Subsidiary Company. Workmen of subsidiary Company are not workmen of holding Company.

It was held that holding company is not liable for wages of its subsidiary company which was under winding up. A holding Company can’t be penalized for violation of foreign exchange provisions of Subsidiary Company. Holding and subsidiary companies are independent legal entities, and are to be treated as such. These can’t be treated as one single unit for all purposes. Holding and subsidiary are separate and distinct legal entities.

1.3 Registration and Incorporation of companies:

The Companies Act 2013 (‘Act’) regulates the company incorporation procedure and the provision of the company registration certificate. A company established in India cannot run its business without the registration certificate granted by the Registrar of Companies (ROC). The ROC will issue the registration certificate when the company complies with the provisions of the Act.

The company founders should apply for company registration on the Ministry of Corporate Affairs ('MCA') website. The MCA introduced a new company incorporation form, i.e. SPICe+ form, on 23 February 2020 for incorporation of the company. The SPICe+ form applies to all the new companies incorporated after 23 February 2020.

Pre-requisite for Company Incorporation

Certain pre-requisites must be complied with by the company before filing the company incorporation form, which is as follows:

Digital Signature Certificate (DSC)

The company registration process is entirely online. SPICe+ form should be filed on the MCA website. Digital Signature Certificate (DSC) is required to file forms on the MCA website. Thus, all the company's proposed directors are required to obtain DSC for filing the company incorporation form. Since the e-MOA (Memorandum of Association) and e-AOA (Articles of Association) are to be filed with the SPICe+ form, the subscribers of the MOA and AOA must also obtain DSC.

Selection of Name

The company founders and proposed directors must select an appropriate name for the company. The ROC will reject the company name if it is similar or identical to the name of an already registered company. The company name should also not be similar to a registered trademark. Thus, it is better to conduct a trademark search before finalising the company name.

It should also not contain the words or expressions prohibited to use in a company name as provided under the Company (Incorporation) Rules, 2014. The company founders or promoters should first apply for reservation of the company name in Part-A of the SPICe+ form. The ROC will either approve or reject the name. If the ROC rejects the name, the company founders must re-apply with a different name and get the company name approval from the ROC.

Members and Directors

A One Person Company (OPC) should have a maximum number of one members and a minimum of one proposed director for applying to company registration. A private limited company must have a minimum of two members and two directors. A public limited company must have a minimum number of seven members and three directors before applying for registration.

Process for Company Incorporation Under Companies Act, 2013

Below is the process of applying for company incorporation, i.e. SPICe+ form:

Login to MCA

A promoter or proposed director of a company must first log in to the MCA website to apply the SPICe+ form. To log in, the proposed director or promoter (applicant) must first create an account on the MCA website. After the account is created, the applicant will get the login details. After that, they can log in to the MCA website with the login details to file the company incorporation form and, subsequently, the annual compliance forms after the company is registered.

The process to create an account on the MCA form is as follows:

Clicking on the 'Sign In/Sign Up' option on the top right-hand side of the homepage. On the next page, click on the 'Register' button.

Next, select the 'User Category' as 'Business User', select the 'User Role', enter the PAN number, and click on the 'Next' button. Enter the personal, contact, and login details and click the 'Create My Account' button.

An OTP will be sent to your mobile number. Enter the OTP and click on the 'Submit' button. A registration confirmation message will be sent to your email address and displayed on the screen.

Click on the 'Sign In/Sign Up' button on the homepage. Enter the user ID and password and click on the 'Login for Company Filing' option.

Fill Part-A of SPICe+ Form

After logging into the MCA website, the applicant should click on the 'MCA Services' option on the homepage. Next, the 'SPICe+' option should be selected under the' Company Services' heading. On the next page, select the 'New Application' option. The SPICe+ Part-A form will appear as shown below.

The company name must be reserved in this section. The applicant must select the 'Type of Company', 'Class of Company', 'Category of Company' and 'Sub-Category of Company'. Enter the 'Main division of industrial activity of the Company', i.e. mention the code of the industrial activities. Next, enter the 'Particulars of the proposed or approved name'. Click on the 'Auto-Check' button and then the 'Submit' button.

An applicant can choose to reserve the proposed name first and later file the Part-B of the SPICe+ form. A maximum of two names can be applied to the SPICe+ form when the applicant chooses to fill the Part-B of the SPICe+ form later. Out of two proposed company names, the ROC will approve a single name as available by the Central Registration Centre (CRC).

The approved name will be reserved for 20 days from the approval date, within which the applicant should fill the SPICe+ form Part-B. When the applicant does fill the Part-B SPICe+ form within 20 days, the entire application will be rejected, and the applicant must re-apply Part-A SPICe+ form for name reservation. When the applicant chooses to fill the whole incorporation application at one go, i.e. SPICe+ Part-A and Part-B together, then only one name can be entered in the Part-A SPICe+ form.

Fill Part-B of SPICe+ Form

The applicant must enter the details in the Part-B SPICe+ form after filling the Part-A SPICe+ form. When the applicant chooses to fill the Part-B SPICe+ form later, i.e. after name approval from ROC, the applicant can click on the 'Fill' button available against the SPICe+ Part-A SRN displayed on the dashboard and click on the 'Proceed' button.

The following details must be filled in the Part-B SPICe+ form:

Nature of the business

Authorised capital and paid-up capital

Company registered office address

Company Email ID

Details of directors and subscribers

Shares held by subscribers

Details for PAN and TAN

Business/profession code

Name, membership, address, associate or fellow of professional (CA, CMA, CS, Advocate)

Part-B SPICe+ form is a consolidated form through which an applicant can apply for various registrations required for a company. An applicant can file for the following registrations on the SPICe+ form:

Company incorporation

DIN (Director Identification Number) application

PAN (Permanent Account Number) application

TAN (Tax Deduction Account Number) application

Fill AGILE-PRO Form

The AGILE-PRO-S form is an application for registration of Employee State Insurance Corporation (ESIC), Goods and Service Tax Identification Number (GSTIN), Employees' Provident Fund Organisation (EPFO), the opening of bank account, Professional Tax Registration (in Karnataka, Maharashtra and West Bengal) and Shops and Establishment Registration Number. The SPICe+ form should accompany the AGILE-PRO-S form.

Upload SPICe+ Form

After filling up the Part-B SPICe+ form, the applicant should upload the required documents. Then the applicant has to carry out a 'pre-scrutiny' check. After the 'pre-scrutiny' is successful, the applicant should click on the 'Submit' button. A confirmation message is displayed upon submission of the form. Next, the applicant should download the PDF of the submitted Part-B SPICe+ form for affixing the DSC.

The applicant should upload the Part-B SPICe+ on the MCA website. A Service Request Number (SRN) is generated to make the fee payment toward company incorporation. After the applicant pays the company incorporation fees, the form will be processed. The ROC will examine the company application form, i.e. SPICe+ form and grant the Certificate of Registration upon satisfaction of the correctness of the application.

Documents to be Attached with SPICe+ Form

The documents required to be attached with the SPICe+ form are as follows:

e-MOA and e-AOA

Declaration by the first directors and subscribers

Proof of company office address

A resolution passed by the promoter company

Copy of utility bills

The interest of first directors in other entities

Proof of identity and address of subscribers

Consent of Nominee (INC–3) (in case of OPC)

Proof of identity and address of the nominee

Proof of identity and address of the applicant

Copy of certificate of incorporation of a foreign body corporate (if any)

Optional attachments (if any)

The documents required to be attached for AGILE-PRO are as follows:

Proof of principal place of business

Proof of appointment of the authorised signatory for GSTIN

Proof of identity and address of authorised signatory for opening a bank account

Specimen signature of the authorised signatory for EPFO

Precautions For Filing Incorporation Application

The precautions to be taken while filing the SPICe+ form is as follows:

Director and the professional should digitally sign the company incorporation form

DSC must be validated

Proposed directors should not be disqualified under the provisions of the Companies Act, 2013

The size of the documents attached should be within the prescribed limit

Uploaded documents should be legible

The maximum attachment size in SPICe+ form is 6 MB for each PDF form

All copies of documents should be self-attested by respective directors

Documents for proof of identity – Driving license, PAN, Voter ID card or passport

Documents for address proof – Voter ID, bank statement, utility bills not older than two months (telephone bill, electricity bill or mobile bill)

Commencement of Business

Every company incorporated having a share capital cannot commence business or exercise borrowing powers if it does not comply with the below conditions:

The director should file a declaration in form INC-20A with the ROC within 180 days of the incorporation of the company verified by a CA/CS/CMA in practice that every subscriber to the MOA has paid the value of the agreed shares on the date of filing of declaration

The company has filed for verification of its registered office with the ROC in form INC-22 within 30 days of the incorporation date

A company founder or promoter must apply the company incorporation form, i.e. SPICe+ form, with ROC for legally establishing the company. The incorporation of the company is entirely online. After submitting the company incorporation form on the MCA website, the ROC will examine the form and documents and issue the Certificate of Registration.

1.4 Memorandum of Association :

A company is formed and registered when a number of people come together for achieving a specific purpose. This specific purpose is usually commercial in nature. Companies are generally formed to earn profit from business activities. To register a company, an application form has to be filed with the Registrar of Companies (ROC).

This application form is required to be submitted with a certain number of specified documents. One of the fundamental documents that are required to be submitted with the application form for incorporation of company is the Memorandum of Association (MoA). What is Memorandum of Association?

Memorandum of Association is a legal document which describes the purpose for which the company is formed and therefore identified the possible scope of its operations beyond which its action cannot go. It defines as well as confines the powers of the company. If anything is done beyond these powers that will be ultra vires (beyond the powers) of the company and so void. l The first step in the formation of a company is to prepare a document called the memorandum of association.

In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013 (hereinafter referred to as ‘Act’).

“The Memorandum of Association”, as observed by Palmer, “is a document of great importance in relation to the proposed company”

The requirement of memorandum is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose:

- by seven or more persons, where the company to be formed is a public company;
- two or more persons, where the company to be formed is a private company; or
- one person, where the company to be formed is a One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

Definition and provisions pertaining to Memorandum under the Companies Act, 2013:

According to Section 2(56) of the Act “memorandum” means the memorandum of association of a company as originally framed and altered, from time to time, in pursuance of any previous company law or this Act.

CASE LAW

In the celebrated case of Ashbury Railway Carriage & Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653, Lord Cairn observed: “The memorandum of association of a company is its charter and defines the limitations of the powers of the company. It contains the both which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it states negatively, if it is necessary to state, that nothing shall be done beyond that ambit” [Egyptian Salt and Soda Co. Ltd. v. Port Said Salt Association Ltd. (1931) A.C. 677]. In Re Attorney General Vs. Great Eastern Railway (1880) 5 AC 473, It was held that the court will consider ancillary/incidental objectives along with main objects of the company.

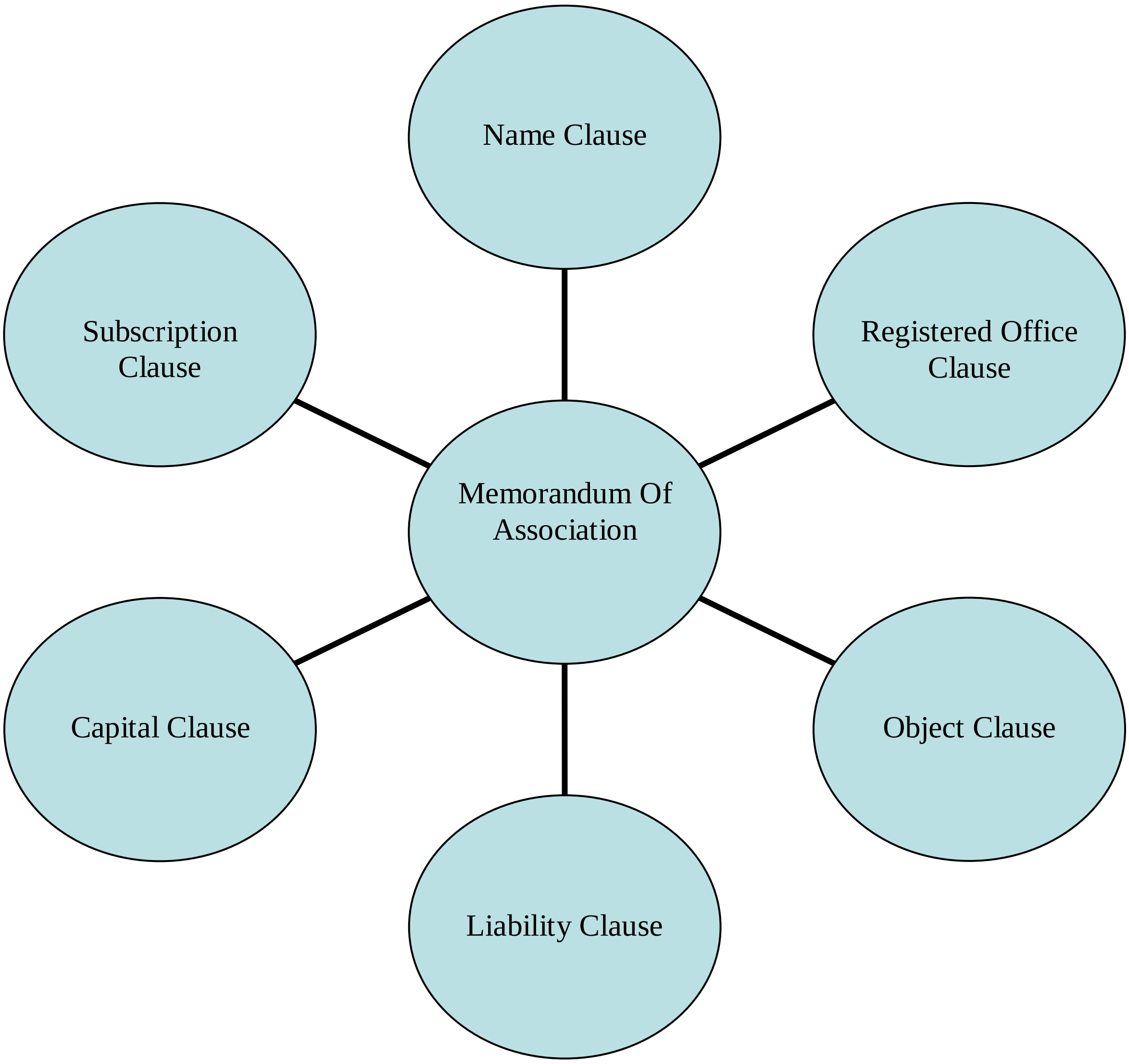
Memorandum enables shareholders, creditors and all those who have business terms with company to know what its powers are and what is the range of its activities. An intending shareholder can find out the purposes for which his money is going to be used by the company and what type of risk he is taking by investing the company. In same manner, anyone dealing with the company, viz. supplier of goods, will know whether the transaction he intends to make with the company is within the objects of the company and not ultra vires its objects.

FORM OF MEMORANDUM OF ASSOCIATION:

Section 4(6) of the Act provides that the memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

Tables	Company
Table A	Companies limited by shares
Table B	Companies limited by guarantee not having a share capital
Table C	Companies limited by guarantee having a share capital
Table D	Unlimited companies not having a share capital
Table E	Unlimited companies having a share capital

CONTENTS OF MEMORANDUM [SECTION 4 READ WITH SCHEDULE I]:


Name Clause
Subscription Clause
Registered Office Clause
Memorandum Of Association
Capital Clause
Object Clause
Liability Clause

As per Section 4(1), the memorandum of a limited company must state the following:

(a) the name of the company with "Limited" as its last word in the case of a public company; and "Private Limited" as its last words in the case of a private company; (Name Clause) This shall not apply in case of companies registered under section 8. Similarly, in case of government companies the name of the company need not be ended with the words "Limited" or "Private Limited". This is as per the exemptions to Government Companies under Section 462 of Companies Act, 2013 vide notification dated June 5, 2015;

(b) the State in which the registered office of the company is to be situated (Situation Clause);

(c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof (Objects Clause);

d) the liability of members of the company, whether limited or unlimited, and also state,—(Liability Clause):
(i) in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
(ii) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute –
(A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
(B) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

(e) in the case of a company having a share capital, — (Capital Clause) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount; Subscription Clause:
(i) the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
(ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

(f) in the case of a One Person Company, the name of the person who, in the event of the death of the subscriber, shall become the member of the company. According to section 4(7), any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. The above clauses are compulsory and are designated as "conditions" prescribed by the Act, on the basis of which a company is incorporated.

1. Name Clause: This clause defines the name of the company. The name of the company should not be identical or resemble too nearly to any existing company. Also, if it is a private company, then it should have the word ‘Private Limited’ at the end. And in case of public company public company, then it should add the word “Limited” at the end of its name.

Example:
a) ABC Private Limited in case of the private company;
b) ABC Limited for a public company.

According to section 4(2), the name stated in the memorandum shall not –
(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or (b) be such that its use by the company – (i) will constitute an offence under any law for the time being in force; or (ii) is undesirable in the opinion of the Central Government. Section 4(3) of the Act provides that without prejudice to the provisions of section 4(2), a company shall not be registered with a name which contains –

(a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(b) such word or expression, as prescribed in rule 8 of the Companies(Incorporation) Rules, 2014, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

CASE LAW

The Registrar must make preliminary enquiries to ensure that the name allowed by him is not misleading or intended to deceive with reference to the Objects Clause of the memorandum [Methodist Church v. Union of India, (1985) 57 Com Cases 443 (Bombay)]. The Registrar is not, however, required to carry out any elaborate investigation at the time of registration of the company. Unless the purpose of the company appears to be unlawful ex-facie or is transparently illegal or prohibited by any statute, it cannot be regarded as an unlawful association [T.V. Krishna v. Andhra Prabha (P) Ltd., (1960) 30 Com Cases 437 (AP)].

2. Situation Clause:

This clause connotes the name of the State in which the registered office of the company is situated. This helps to determine the jurisdiction of the Registrar of Companies (RoC). The company is required to inform the location of the registered office to the Registrar of Companies within 30 days from the date of incorporation of the company and all time thereafter, the company must have a registered office to which all communications and notices may be sent.

Publication of Name and Address of the Company: According to Section 12(3) of the Act, every company is required to display its name and address in legible letters in conspicuous position and in all its business letters, bill heads, letter papers. Accordingly, the company shall –

(a) paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed therefor are not those of the language or of one of the languages in general use in that locality, also in the characters of that language or of one of those languages;

(b) have its name engraved in legible characters on its seal, if any;

(c) get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and

(d) have its name printed on negotiable instruments such as hundies, promissory notes, bills of exchange and such other document as may be prescribed. Every company which has a website for conducting online business or otherwise, shall disclose/publish its name, address of its registered office, the Corporate Identity Number, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries or grievances on the landing/home page of the said website.

However, where a company has changed its name or names during the last two years, it shall paint or affix or print, as the case may be, along with its name, the former name or names so changed during the last two years. Further, in case of One Person Company, the words ‘‘One Person Company’’ shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved. Ministry of Corporate Affairs (MCA) has clarified that display of its name in English in addition to the display in the local language will be a sufficient compliance with the requirements of the section.

CASE LAW

The words ‘outside of every office’ do not mean outside the premises in which the office is situated [Dr. H.L. Batliwalla Sons & Company Ltd. v. Emperor (1941) 11 Com Cases 154 : AIR 1941 (Bom.) 97]. Where office is situated within a compound, the display outside the office room, though inside the building, is sufficient.

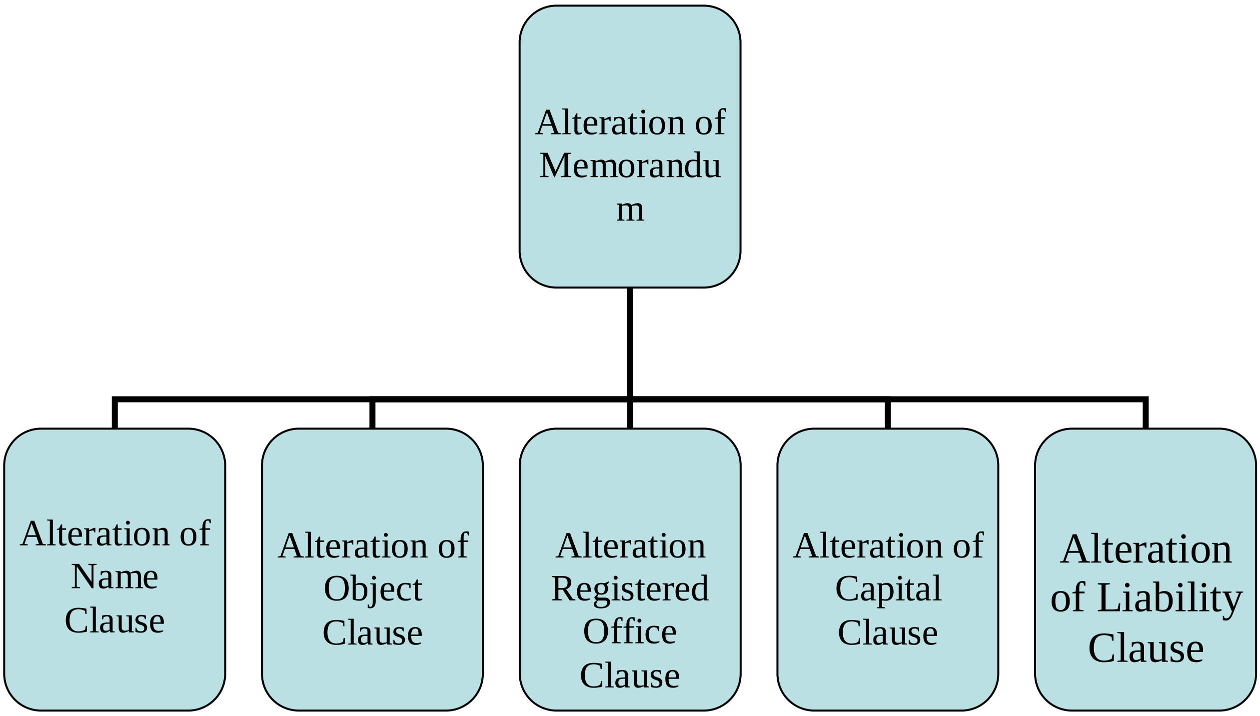
3. Object Clause: Under section 4(1)(c) of the Act, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. It defines the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts.

4. Liability Clause: It states the liability of the members of the company. In case of an unlimited company, the liability of the members is unlimited whereas in case of a company limited by shares, the liability of the members is restricted by the amount unpaid on their share. For a company limited by guarantee, the liability of the members is restricted by the amount each member has agreed to contribute at the time of incorporation. Section 4 sub-section 1(d) of the Act, states that the liability of members of the company is to be specifically mentioned in the MoA. It is provided that the liability of member may either be limited or unlimited. 5. Capital Clause: This clause specifies the maximum capital that a company can raise which is also called the authorized/ nominal capital of the company. This also explains the division of such capital amount into the number of shares of a fixed amount each. The capital is variously described as “nominal”, “authorized” or “registered”. The amount of nominal capital is determined having regard to the present as well as future requirements of the company with reference to its objects. The usual way to state the capital in the memorandum is: “The capital of the company is 10,00,000 rupees divided into 1,00,000 equity shares of 10 rupees each”. This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013. If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorized to issue capital beyond its authorized/nominal/registered capital.

5. Subscription Clause: The Subscription Clause defines who are signing the memorandum of company. Each subscriber must state the number of shares he is subscribing to. The subscribers have to sign the memorandum in the presence of two witnesses. Each subscriber must subscribe to at least one share. The subscribers to the memorandum declare: “We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names”. Then follow the names,

addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness.

ALTERATION OF MEMORANDUM OF ASSOCIATION (MOA):



ALTERATION OF MOA DUE TO CHANGE IN NAME CLAUSE [SECTION 13 (2) AND (3)]

The name of the company can be altered by a special resolution and with the approval of the Central Government in writing. Approval of the Central Government is not required, in case where the change in the name of the company relates to the addition/deletion of the word 'Private' to the name of the company consequent to the conversion of a company into a public company and vice versa [Section 13 (2)]. l If through inadvertence or otherwise, a company on its first registration or on its registration by a new name has been registered with a name which, in the opinion of the Central Government, is identical with or too closely resemble the name of an existing company, the company may change its name within a period of three months from the issue of such direction by passing an ordinary resolution and by obtain the approval of the Central Government in writing. (Section 16)

When any change in the name of a company is made under section 13(2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and such change in the name shall be complete and effective only on the issue of such a certificate [Section 13(3)]. According to Rule 29 of Companies (Incorporation) Rules, 2014, the change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be. An application shall be filed in Form No. INC-24 along with the fee for change in the name of the company and a new certificate of incorporation in Form No. INC-25 shall be issued to the company consequent upon change of name.

CASE LAWS

In Re cGMP Pharmaplan (Pvt) Ltd. Vs. Regional Director, Ministry of Corporate Affairs (2011) 105 SCL 675 NNE Pharmaplan Ltd. filed a representation before the office of Regional Director of MCA under section 16 (the then section 22) seeking a direction that the petitioner company incorporated on later date with the name cGMP Pharmaplan (Pvt) Ltd, it should change its name. Regional Director of the MCA

Procedure for Alteration in Name Clause of Memorandum:

1. Calling of Board Meeting (a) Issue notice in accordance with the provisions of section 173(3) of the Companies Act, 2013, for convening a meeting of the Board of Directors to consider the reason for changing name of the company and get its approval for change in name of the Company. (b) Pass a Board resolution authorizing the Company Secretary/ Director to make the required application to the Registrar of Companies.

2. Seeking name availability for proposed new name from the ROC As per section 4(4) of the Act read with Rule-9 of Companies (Incorporation) Rules, 2014, application for the reservation/availability of name shall be in RUN along with prescribed fee of Rs. 1,000/- . In selection of a Company name, it should be in accordance with name guidelines given in Rule-8 of Companies (Incorporation) Rules, 2014. However, as per the Rule-9 substituted by the Companies (Incorporation) Amendment Rules, 2014, An application for reservation of name shall be made through the web service available at www.mca.gov. in by using RUN (Reserve Unique Name) along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre.

3. Obtaining ROC Approval and Name Availability Letter After approval of name, ROC will issue a name availability letter w.r.t. approval for availability of name for a proposed company. As per section 4(5), upon receipt of an application for reservation of name, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of twenty days from the date of approval or such other period as may be prescribed. Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of sixty days from the date of approval.

On receipt of approval of name, the Company Secretary/Director shall convene another Board meeting:
(a) To take note of the name approval received from ROC.
(b) To fix date, time and place for holding Extra-ordinary General meeting (EGM) to get approval of shareholders, by way of Special Resolution, for amendment in Name clause of Memorandum. This amendment in Name clause of Memorandum shall be in accordance with the requirement of section 13 of the Companies Act, 2013.

(c) To approve notice of EGM along with agenda and explanatory statement pursuant to section 102 of the Companies Act, 2013 to be annexed to the notice of General Meeting as per section 102(1) of the Companies Act, 2013.

(d) To authorize the Director or Company Secretary to issue Notice of the Extra-ordinary General meeting (EGM) as approved by the board.

4. Issue of Notice of Extra-ordinary General Meeting (EGM) Issue Notice of the EGM to all the Members, Legal Representatives of any deceased member or assignee of an insolvent member, Directors and the Auditors of the company in accordance with the provisions of Section 101 of the Companies Act, 2013.

5. Holding of Extra ordinary General Meeting Hold the Extra-ordinary General meeting on the fixed date and pass the necessary Special Resolution under section 13(1) of the Companies Act, 2013, for change in the Name clause of Memorandum.

6. ROC filings As per section 13(6), the Company is required to file Special Resolution passed by shareholders for alteration of Memorandum with concerned ROC and file Form MGT -14 (certified by a Practicing Professional i.e. CS/ CA/CWA) within 30 days of passing the resolution with prescribed fees. Also, the application for the fresh certificate of incorporation in the new name of the company be made in form INC-24 to the Registrar within the 30 days along with the prescribed fees.

7. After scrutiny of the documents filed, the ROC shall issue a fresh certificate of incorporation digitally signed in Form INC-25.

8. Intimate all concerned persons/authorities about the changed name of the Company, particularly the Stock Exchanges, National Securities Depository Ltd., Central Depository Services (India) Ltd., statutory and other authorities like Inspector of Factories, Regional Provident Fund Commissioner, suppliers of raw materials, customers, banks etc.

9. Arrange for a new Common Seal and have the same adopted at a meeting of the Board of directors and keep it under safe custody and get stationery printed with the new name and/or affix rubber stamp of the new name on all the existing documents. However, it is also to be noted that having the common seal is no longer mandatory requirement.

10. Get the new name of the Company painted on all the signboards or name boards wherever they are displayed.

11. Correct all records, registers including the Register of Members, every copy of Memorandum and Articles of Association, other books and documents pertaining to the company's business and affairs to display the new name.

12. It is also to be noted that in every document as above-mentioned the company shall paint, affix or print as the may be the former name or names so changed during the period of last two years. (First proviso to Section 12(3)).

EFFECT OF CHANGE IN NAME CLAUSE

The name of change shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it , and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.
By change of name , constitution of company does not change; the only thing changes is its name; all the rights and obligations under the law of old company pass to the new company.

B. ALTERATION OF SITUATION/REGISTERED OFFICE CLAUSE IN THE MOA [SECTION 13(4)(5) AND (7)]:

(a) Change within the local limits of same town:

A company by passing board resolution can change the situations of its registered office within the limits of the same city, town or village .
An intimation of the change of registered office and verification of registered address shall be given to registrar. E –form INC -22 is required to be filled within 30 days of such change. This does involve alteration of memorandum.

(b) Change outside the local limits of any city, town or village:
According to section 12(5) of the act except on the authority of a special resolution passed by a company, the registered office of the company shall not be changed.

(c) Change within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies:

No company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director. {Proviso to Section 12(5)} l Section 12(6) states that the Regional Director, after hearing the parties shall pass necessary orders within a period of thirty days from the date of the receipt of the application. l Thereafter, the company concerned shall file a copy of the said order with the Registrar of Companies (ROC) within a period of sixty days from the date of the confirmation order by Regional Director. l The said ROC shall record the ordered changes in its records. l The ROC of the state where the registered office of the company was previously situated, shall transfer all the documents and papers to the new ROC.

d) Change of Registered office from one State to another l The change of registered office from one State to another State involves alteration of memorandum, and the change can be effected by a special resolution passed by the company which must be confirmed by the Central Government on an application made to it [Section 13(4)]

The Central Government shall dispose of the application under sub-section (4) within a period of sixty days and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge. [Section 13(5)]. A company shall, in relation to any alteration of its memorandum involving change of registered office from one State to another, file with the Registrar the special resolution passed by it in MGT 14 [Section 13(6)].

Where an alteration of the memorandum results in the shifting of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within 30 days' time from the receipt of the certified copy of the order and in INC-28, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. [Section 13(7) read with Rule 31 of the Companies (Incorporation) Rules, 2014].

C. ALTERATION OF MOA DUE TO CHANGE IN OBJECT CLAUSE [SECTION 13 (8) AND (9)]:

l According to section 13(1), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. l It means that a company can change its objects by passing a special resolution. l Further section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1). l As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13(6)(a).

D. ALTERATION OF LIABILITY CLAUSE:

According to section 13(1) of the Act, a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change the liability clause of its memorandum of association by passing a special resolution.

E. ALTERATION OF CAPITAL CLAUSE IN MOA [SECTION 61 READ WITH SECTION 64]:

Types of alteration of capital clause in the general meeting of a company limited by shares as per section 61 (1) of the Companies Act, 2013 can be enumerated as below: -

(a) increase its authorised share capital by such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares: Provided that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

(c) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled. All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders shall not take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of the passing of the resolution along with an altered memorandum. [Section 64(1)] The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both.

REGISTRATION OF ALTERATION:

Section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar: (a) the special resolution passed by the company under section 13(1); and (b) the approval of the Central Government under section 13(2), if the alteration involves any change in the name of the company. The special resolution shall be filed with the Registrar within thirty days of the passing or making thereof in the prescribed manner and payment of prescribed fees within the time specified under section 403.

As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13 (6)(a). Further section 13(7) provides that where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. The certificate of incorporation shall be conclusive evidence that all the requirements of this Act with respect to the alteration and confirmation thereof have been complied with. The Registrar of the State from which the registered office is transferred will send to the Registrar of the other State all the documents relating to the company registered in his office. No alteration made under section 13 (i.e., alteration of memorandum) shall have any effect until it has been registered in accordance with the provisions of this section. [Section 13(10)].

The main spirit behind Section 13(7) of the Companies Act, 2013 in regard to the filing of the order confirming the transfer of the company's registered office from one State to another State with the Registrar of Companies of each State is that the Registrar of Companies from whose State the registered office is transferred should keep the order duly registered in his office as an evidence to such shifting and should transfer all other records of the company to the Registrar of Companies to whose State the Registered Office of the company has been so shifted. The other Registrar of Companies will register the other copy of the order and keep that order with the records transferred to him by his counterpart.

ARTICLES OF ASSOCIATION:

Introduction:

Articles of association form a document that specifies the regulations for a company's operations and defines the company's purpose.

The document can be thought of as a user's manual for a company, defining its purpose and outlining the methodology for accomplishing necessary day-to-day tasks. l Articles of association lays out how tasks are to be accomplished within the organization, including the process for appointing directors and the handling of financial records. Definition and provisions pertaining to Articles According to Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company. Further, In terms of section 5(1), the articles of a company shall contain the regulations for management of the company.

The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association. The general functions of the articles have been aptly summed up by Lord Cairns, L.C. in Ashbury Railway Carriage and Iron Co. Ltd.

v. Riche, (1875) L.R. 7 H.L. 653 as follows: “The articles play a part that is subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made... The memorandum, is as it were... the area beyond which the action of the company cannot go; inside that area shareholders may make such regulations for the governance of the company as they think fit”. Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum. The articles must not contain anything illegal or ultra vires the memorandum, nor should it be contrary to the provisions of the Companies Act 2013.

REGISTRATION OF ARTICLES:

Section 7(1) provides that at the time of incorporation of a company the company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in the prescribed manner.

The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company either in totality or otherwise. [Section 5(6)]. l A company may adopt all or any of the regulations contained in the model articles applicable to such company. [Section 5(7)].

l In terms of Section 5 of the Companies Act, 2013, a public company limited by shares may at its option register its articles of association signed by the same subscribers as to the memorandum, or alternatively it may adopt all or any of the regulations contained in Table F of First Schedule of the Act. l If articles are not registered, automatically Table F in Schedule I would apply, and if registered, Table F in Schedule I would apply except in so far as it is excluded or modified by the articles. To avoid any confusion, normally every public company delivers its articles along with the memorandum for registration. Further, it will be specifically stated therein that Table ‘F’ will not apply. l The articles of a private company must contain the three restrictions as contained in Section 2(68). l However, nothing in section 5 shall apply to the articles of a company registered under any previous company law unless amended under this Act [Section 5(9)].

ALTERATION OF ARTICLES OF ASSOCIATION OF A COMPANY Any Company which intended to make any change to the Articles, will have to comply with the provisions as mentioned under section 14 of Act along with any other applicable provisions of the Act and applicable rules. A Company may alter its Articles in accordance with the above provisions in any of the following manner: (a) by adoption of new set of articles; (b) by addition/insertion of a new Clause/s; (c) by deletion of a Clause/s ; (d) by amendment of a specific Clause/s ; (e) by substitution of a specific Clause/s. i) Section 14(1) provides that subject to the provisions of the Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of – A) a private company into a public company; or B) a public company into a private company. First proviso to section 14(1) lays down that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company.

Further, the second proviso to section 14(1) stipulates that any alteration having the effect of conversion of a public company into a private company shall not take effect unless it is approved by an order of the Central Government on an application made in prescribed form shall make such order as it may deem fit. ii) Every alteration of the articles under this section and a copy of the order of the Central Government approving the alteration as per section 14(1) shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same. [Section 14 (2)] iii) Any alteration of the articles registered under section 14(2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles. [Section 14(3)]

CASE LAWS

In Re Cyrus Investments (P.) Ltd. vs. Tata Sons Ltd. [2019] 112 taxmann.com 264 (NCLAT) If any company decides to alter its articles having effect of conversion of a 'Private Company' into a 'Public Company' or a 'Public Company' into a 'Private Company', it is required to pass a special resolution and as per sub-section (2) of section 14, it requires approval by Tribunal In Re Walker v. London Tramway Co. (1879) 12 Ch. D. 705 The right to alter the articles is so important that a company cannot in any manner, either by express provisions in the articles or by independent contract, deprive itself of the powers to alter its articles.

DOCTRINE OF ULTRA VIRUS :

Companies have to borrow funds from time to time for various projects in which they are engaged. Borrowing is an indispensable part of day to day transactions of a company, and no company can be imagined to run without borrowing from time to time. Balance sheets are released every year by the companies, and you will hardly find any balance sheet without borrowings in the liabilities clause of it.

However, there are certain restrictions while making such borrowings. If companies go beyond their powers to borrow then such borrowings may be deemed as ultra-vires.

It is a Latin term made up of two words "ultra" which means beyond and "vires" meaning power or authority. So we can say that anything which is beyond the authority or power is called ultra-vires. In the context of the company, we can say that anything which is done by the company or its directors which is beyond their legal authority or which was outside the scope of the object of the company is ultra-vires.

Doctrine of Ultra-Vires

Memorandum of association is considered to be the constitution of the company. It sets out the internal and external scope and area of company's operation along with its objectives, powers, scope. A company is authorized to do only that much which is within the scope of the powers provided to it by the memorandum. A company can also do anything which is incidental to the main objects provided by the memorandum. Anything which is beyond the objects authorized by the memorandum is an ultra-vires act.

Origin of the doctrine

The doctrine of ultra-vires first time originated in the classic case of Ashbury Railway Carriage and Iron Co. Ltd. v. Riche, (1878) L.R. 7 H.L. 653, which was decided by the House of Lords. In this case the company and M/s. Riche entered into a contract where the company agreed to finance construction of a railway line. Later on, directors repudiated the contract on the ground of its being ultra-vires of the memorandum of the company. Riche filed a suit demanding damages from the company. According to Riche, the words "general contracts" in the objects clause of the company meant any kind of contract. Thus, according to Riche, the company had all the powers and authority to enter and perform such kind of contracts. Later, the majority of the shareholders of the company ratified the contract. However, directors of the company still refused to perform the contract as according to them the act was ultra-vires and the shareholders of the company cannot ratify any ultra-vires act.

When the matter went to the House of Lords, it was held that the contract was ultra-vires the memorandum of the company, and, thus, null and void. Term "general contracts" was interpreted in connection with preceding words mechanical engineers, and it was held that here this term only meant any such contracts as related to mechanical engineers and not to include every kind of contract. They also stated that even if every shareholder of the company would have ratified this act, then also it had been null and void as it was ultra-vires the memorandum of the company. Memorandum of the company cannot be amended retrospectively, and any ultra-vires act cannot be ratified.

What is the need or purpose of the doctrine of ultra-vires?

This doctrine assures the creditors and the shareholders of the company that the funds of the company will be utilized only for the purpose specified in the memorandum of the company. In this manner, investors of the company can get assured that their money will not be utilized for a purpose which is not specified at the time of investment. If the assets of the company are wrongfully applied, then it may result into the insolvency of the company, which in turn means that creditors of the company will not be paid. This doctrine helps to prevent such kind of situation. This doctrine draws a clear line beyond which directors of the company are not authorized to act. It puts a check on the activities of the directors and prevents them from departing from the objective of the company.

Basic principles regarding the doctrine

1. Shareholders cannot ratify an ultra-vires transaction or act even if they wish to do so.
2. Where one party has entirely performed his part of the contract, reliance on the defense of the ultra-vires was usually precluded in the doctrine of estoppel.
3. Where both the parties have entirely performed the contract, then it cannot be attacked on the basis of this doctrine.
4. Any of the parties can raise the defense of ultra-vires.
5. If a contract has been partially performed but the performance was insufficient to bring the doctrine of estoppel into the action, a suit can be brought for the recovery of the benefits conferred.
6. If an agent of the corporation commits any default or tort within the scope of his employment, the company cannot defend it from its consequences by saying that the act was ultra-vires.

Exceptions to the doctrine

1. Any act which is done irregularly, but otherwise it is intra-vires the company, can be validated by the shareholders of the company by giving their consent.
2. Any act which is outside the authority of the directors of the company but otherwise it is intra-vires the company can be ratified by the shareholder of the company.
3. If the company acquires property in a manner which is ultra-vires of the contract, the right of the company over such property will still be secured.
4. Any incidental or consequential effect of the ultra-vires act will not be invalid unless the Companies Act expressly prohibits it.
5. If any act is deemed to be within the authority of the company by the Company's Act, then they will not be considered as ultra-vires even if they are not expressly stated in the memorandum.
6. Articles of association can be altered with retrospective effect to validate an act which is ultra-vires of articles.

Doctrine of Indoor Management :

The 'Doctrine of Indoor Management' which is famously known as the 'Turquand's Rule' is an old established principle which came to be recognized 150 years ago in the context of 'Doctrine of Constructive Notice'. The Doctrine of Indoor Management is an exception to the Doctrine of Constructive Notice. The doctrine of Constructive Notice seeks to protect the company from the outsider whereas the Doctrine of Indoor Management seeks to protect the outsider from the company.

This doctrine emphasizes on the concept that an outsider whose actions are in good faith and has entered into a transaction with a company can have a presumption that there are no irregularities internally and all the procedural requirements have been complied with by the company. This is the protection which is provided by the Doctrine of Indoor Management. Though it is necessary for the outsider to be well versed with the Memorandum and Articles of Association of the company in order to seek remedy for the same. The government authorities are also within the purview of this doctrine.

Origin

The Doctrine of Indoor Management has originated from an English case called *Royal British Bank v. Turquand* [1]. Hence, the alternative name to this doctrine is the 'Turquand Rule'. In this case, the directors of the company had been authorized by the Articles to borrow on bonds that sum of money as they should from time to time by passing a special resolution in a General Meeting of the company. A bond under the seal of the company which was signed by the secretary and the two directors were given to the plaintiff to draw on the current account without the authority of any resolution. Turquand sought to bind the company's action on the basis of such bond. Thus, the main question of law in this matter was whether the company can be held liable for that bond. The court, in this case, held that the bond was binding on the company as Turquand was entitled to presume that the resolution of the company has been passed in the general meeting.

The Memorandum and Articles of Associations are Public documents and hence can be inspected by the public. But whatever is happening internally in the company is not known to the public. An outsider is oblivious to the internal procedures of the company and hence the outsiders are entitled to presume that all the internal procedures are catered by the company.

Position under the Indian Companies Act, 1956

The Doctrine of Indoor management can also be traced in the Indian Companies Act, 1956 under Section 290, which is explained as follows:

Validity of acts of Directors

Acts done by a person as the director shall/can be valid notwithstanding that later it may be discovered that his appointment was invalid due to any disqualification or defect or was terminated by any provision of the Act or the Articles. Provided that nothing in the section shall give validity to any of the acts done by a director after his appointment has been shown to the company to be invalid or terminated.

Judicial Interpretation of Doctrine of Indoor Management

The Judicial interpretation of the Doctrine of Indoor Management is viewed in light of the purpose of this doctrine. Business is a field which demands the protection of all parties under a contractual relationship. This doctrine of Indoor Management is apparently for protection of the outsiders dealing with the company but additionally, it's more important purpose is to promote the investments in the business sector in order to strike a balance between the business and the economy.

In the case of *Dey v. Pullinger Engg* Co.[2] Justice Bray had rightly pointed out that the wheel of commerce would not go smoothly if outsiders dealing with companies were forced to conduct an investigation of the internal procedure and machinery of the company to see if something is not wrong.

Additionally, Lord Simonds in the case of *Morris v.* Kanssen[3] Stated that the people in the business world would be shy in entering into transactions with companies if they were to check into the depth of the internal workings of the company.

An Investor only has a tendency to invest in companies if they are secured in all aspects. If the Investors are not secured, then the companies will lack investments which overall will negatively impact the economy. Thus, the protection given to the investors under this doctrine is a pertinent step towards promotion of trade and commerce.

Exceptions to the Doctrine of Indoor Management

The Doctrine of Indoor Management is more than a century old. The companies in today's time have come to occupy the centric position in economic and social life in the modern communities, it is important to widen the scope of this doctrine, else it stands narrow and in complete favour of the outsiders to the company and brings a lot of risk to the Companies. Eventually, in the modern time, the Doctrine of Indoor Management has been subjected to various exceptions which are as follows:

Knowledge of Irregularity

When an outsider who is entering into a transaction with a company has constructive or actual notice of the irregularity in relation to the internal management of the company, then He/she cannot seek remedy under the doctrine of Indoor Management. There can be some cases, where the outsider is himself/herself a part of the internal procedure.

For example, in the case of *T.R. Pratt(Bombay) Ltd. v. E.D. Sassoon & Co. Ltd.*[4] Company A had lent money to Company B for mortgaging its assets. The procedure for the same which was laid down in the Articles for such nature of transactions were not complied with. The Directors of both the companies were the same. It was held by the Court that the lender was aware of such an irregularity and hence the transaction was not binding.

Another Example of the same is, X and Y are two directors of a company. A transfer of shares in the company had been approved by both X and Y. X was not validly appointed and Y was disqualified by reason of being the transferee itself. These material facts were known to the Transferor of the shares; Hence the transfer of shares was not binding and stood ineffective.

Forgery

It is pertinent to note that the Doctrine of Indoor Management does not apply in cases where an outsider relies on a document which is forged in the name of the company. A company can never be held liable for the forgeries committed by its officers.

For example, In the case of *Ruben v. Great Fingall Ltd.*[5] The Plaintiff was a transferee of the share certificate issued under the seal of the defendant company. The certificate was issued by the Company's secretary who has forged the signature of the two directors of the company and had affixed the seal of the Company. The plaintiff, in this case, had contended that whether the signature was forged or genuine comes under the purview of the internal management of the company, therefore the company shall be held liable for the same, But it was held by the court that the doctrine of Indoor Management has never extended to cover a forgery. Lord Loreburn had interpreted that an outsider dealing with companies are not bound to inquire into their indoor management and will not be affected by any irregularities of which they are unaware of.

Negligence

Where an outsider entering into a transaction with a company could discover the irregularities in the management of the company if he/she would have made proper inquiries, then he/she cannot seek remedy under the doctrine of Indoor Management. The remedy under this doctrine is also not available where the circumstances and situations surrounding the contract are so suspicious that it invites inquiry, and the outsider of the company does not make any efficient inquiry for the same.

For example, in the case of *Anand Bihari Lal v. Dinshaw &* Co.[6] The Plaintiff had accepted a transfer of a company's property from the accountant of the company. It was held by the court that the transfer is void in nature as such a transaction was beyond the scope of the accountant's authority. It was the duty of the plaintiff to check the power of attorney that was executed in favour of the accountant by the company.

Acts that are beyond the scope of apparent authority

Acts done by an officer of a company which are beyond the scope of its apparent authority will not make the company liable for any of the defaults caused by the officer. In such a case, the outsider cannot seek any remedy under the doctrine of Indoor Management simply because Articles did not delegate the power to the officer to do such acts. The outsider can only sue the company under the doctrine of Indoor Management if the officer had the delegated power to act on those grounds.

For example, in the case of *Kreditbank Cassel v. Schenkers* Ltd.[7], the branch manager of the company had endorsed a few bills of exchange in the name of the company in favour of a payee to whom he was personally indebted. The Company did not give him any authority to do so. It was held by the court that the company was not bound. Additionally, it was also stated that if the officer of the company commits fraud under his apparent authority on behalf of the company, then the company will be held liable for the act of fraud committed by the officer.

The same can be observed in *Sri Krishna v. Mondal Bros. &* Co.[8] The manager of the company had the apparent authority under the Memorandum and Articles of Associations of the company to borrow money. The manager borrowed money on a *hundi* but did not place the same in the strong box of the company. It was held by the court that the company was bound to acknowledge the *hundi*, As the creditor had a bona fide claim for recovering the money on the grounds of fraudulent acts done by the officer of the company.

Representation through Articles

This exception is the most confusing and highly controversial aspect of the Turquand Rule. Articles of Association generally contain a clause of "power of delegation." For example, in the case of *Lakshmi Ratan Cotton Mills v. J.K. Jute Mills* Co.[9] One B was the Director of the company. The company comprised of managing agents of which B was also a Director. The Articles of Association authorized the directors to borrow money and also empowered them to delegate this power to one or more of them. B borrowed a sum of money from the plaintiff. Further, the Company refused to be bound by the loan on the ground that there was no resolution passed directing to delegate the power to borrow given to B. Yet it was held in the case that the company was bound by the loan as the Articles of Association had authorized the director to borrow money and delegate the power for the same.

Doctrine of Constructive Management :

Businesses and companies function within the framework of guidelines, protocols, and regulations to guard agency's management from outside elements and minimise their legal liabilities. These measures ensure that everyone is aware of the company's regulations, guidelines, and operations. The concept of constructive notice is crucial, as it establishes the need to take measures to shield the company from potential harm caused by third parties.

The doctrine has developed over time through judicial interpretations. According to this doctrine, individuals who engage with or intend to enter into an agreement with the enterprise are responsible for inspecting and being aware of some public documents. These public documents include documents such as the Memorandum of Association (MOA) and Articles of Association (AOA). Constructive notice refers to an indirect form of notification that is generally communicated in a manner which assumes that individuals have received it.

Constructive notice is a legal term which means that someone is informed of the case that could affect their interest whether or not they truly received it, i.e., if certain procedures established by the law have been followed, it would be deemed that the person has received the notice, even if in fact they did not. Whart defines constructive notice as "*the knowledge which law implies the party to have had, whether he actually had it or not.*"

A notice is defined as a formal communication with the intent to inform a person about important facts and records, thereby enabling them to take suitable actions on that behalf.

Notices are of two types-

Actual

The actual notice, as the name suggests, is the information and records which are provided in the 'written form'. They are, preferably, written with the help of paper and ink. These kinds of notices are sent to individuals or institutions to get them to know about the enclosed information.

Constructive or deemed

Constructive notices or deemed notices do not exist physically. These kinds of notices are generally meant to be comprehended in order to convey a particular fact.

The Doctrine of constructive notice falls under the second category, i.e. constructive or deemed. It serves as an official notification of unique data concerning the MOA and AOA.

This Doctrine is formed on the principle of presumption of knowledge and holds utmost importance within the domain of laws relating to companies. Every enterprise is obliged to formally register their company's MOA and AOA with the registrar under Section 7(1)(a) of the Companies Act, 2013 who acts as a public office.

MOA and AOA are the documents that outline the goals and authority of a company and upon registration, these files become accessible to the general public and are assumed to be 'Public documents' under Section 399 of the Companies Act, 2013. These Public documents are available for everyone to read either for free or for a nominal fee. Outsiders who wish to enter into a contract with the company can read essential information about the company such as its capabilities and shares through these documents. In *Oakbank Oil Co. v. Crut*, it was established that anyone dealing with a company is expected to have gone through these documents and have comprehended them entirely.

Section 17 of the Companies Act read with Rule 34 of the Company (Incorporation) Rules, 2014 provides that a company shall on payment of a prescribed fee send a copy of MOA or AOA to the member within seven days of the request. It can be said that the company is obligated to provide copies of these registers and reports to its shareholders, within a fixed period of time. However, if the company provides false information in its documents, it would be subjected to penalties as mentioned under Section 448 of the Act.

It is presumed that anyone willing to or engaging with the company has very well examined and comprehended these files. This process of being aware of the documents is generally referred to as the doctrine of constructive notice.

If an individual engages with a business enterprise in violation of the company's MOA or AOA or partakes in a transaction exceeding the business enterprise's authorised scope and power, they may no longer be given any legal protection and be held completely responsible for the resulting consequences.

This doctrine serves as a preventive measure rather than an affirmative doctrine, as it provides a safeguard to the company from the outsider person and vice versa. It helps in the prevention of unfair and wrongful trade practices. The main aim of the doctrine is to disallow claims of any individual that he was unaware of the company's regulations, in case he files a suit against the company. Consequently, it would become the duty of the contracting party to thoroughly go through the files and recognise their implications.

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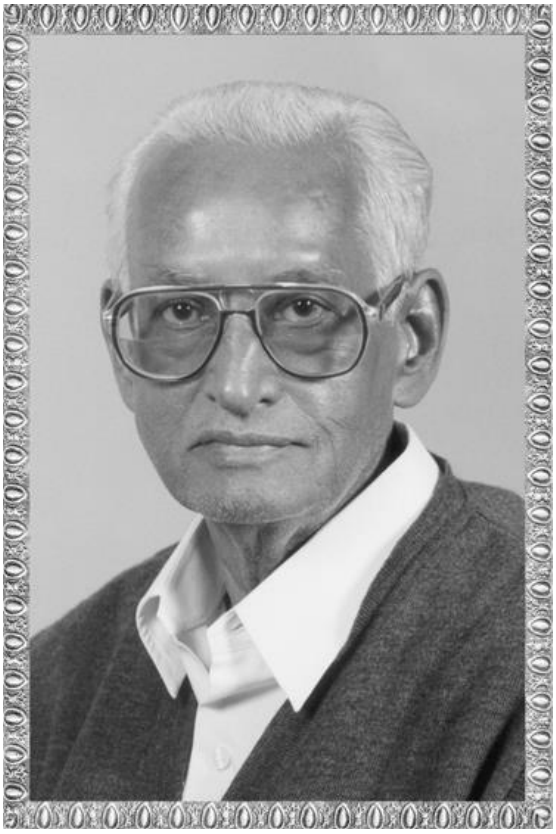

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Unit 2 PROSPECTUS, PROMOTERS,SHARE HOLDER & MEMBERS, SHARE CAPITAL

UNIT NO.	TOPIC NAME
2.1	PROSPECTUS: CONTENTS, SHELF PROSPECTUS, MISREPRESENTATION IN PROSPECTUS, REMEDIES FOR MISREPRESENTATION AND LIABILITIES THEREOF
2.2	PROMOTERS, SHARES, GENERAL PRINCIPLES FOR ALLOTMENT , STATUTORY RESTRICTION, SHARE CERTIFICATES, TRANSFER OF SHARES, DEMETARIALIZED SHARES(DEMAT)
2.3	SHAREHOLDER AND MEMBERS OF COMPANY: DISTINCTION , MODES OF BECOMING MEMBERS OF COMPANY
2.4	SHARE CAPITAL : KINDS, ALTERATION AND REDUCTION OF SHARE CAPITAL, BUYBACK OF SHARES

2.1 PROSPECTUS : CONTENTS, SHELF PROSPECTUS, MISREPRESENTATION IN PROSPECTUS, REMEDIES FOR MISREPRESENTATION AND LIABILITIES THEREOF:

In general parlance prospectus refers to an information booklet or offer document on the basis of which an investor invests in the securities of an issuer company. It has been defined under section 2(70) so as to mean any document described or issued as a prospectus and includes a red-herring prospectus referred to in Section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.

The Companies Act, 2013 defines a prospectus under ***section 2(70***). Prospectus can be defined as "any document which is described or issued as a prospectus". This also includes any notice, circular, advertisement or any other document acting as an invitation to offers from the public. Such an invitation to offer should be for the purchase of any securities of a corporate body. Shelf prospectus and red herring prospectus are also considered as a prospectus.

Essentials for a document to be called as a prospectus

For any document to considered as a prospectus, it should satisfy two conditions.

1. The document should invite the subscription to public share or debentures, or it should invite deposits.
2. Such an invitation should be made to the public.
3. The invitation should be made by the company or on the behalf company.
4. The invitation should relate to shares, debentures or such other instruments.

Statement in lieu of prospectus

Every public company either issue a prospectus or file a statement in lieu of prospectus. This is not mandatory for a private company. But when a private company converts from private to public company, it must have to either file a prospectus if earlier issued or it has to file a statement in lieu of prospectus.

Advertisement of prospectus

Section 30 of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. This section states that when in any manner the advertisement of a prospectus is published, it is mandatory to specify the contents of the memorandum of the company regarding the object, member's liabilities, amount of the company's share capital, signatories and the number of shares subscribed by them and the capital structure of the company. Types of the prospectus as follows.

- Red Herring Prospectus
- Shelf Prospectus
- Abridged prospectus
- Deemed Prospectus

Shelf Prospectus

Shelf prospectus can be defined as a prospectus that has been issued by any public financial institution, company or bank for one or more issues of securities or class of securities as mentioned in the prospectus. When a shelf prospectus is issued then the issuer does not need to issue a separate prospectus for each offering he can offer or sell securities without issuing any further prospectus.

The provisions related to shelf prospectus has been discussed under ***section 31 of the Companies Act, 2013.***

The regulations are to be provided by the Securities and Exchange Board of India for any class or classes of companies that may file a shelf prospectus at the stage of the first offer of securities to the registrar.

The prospectus shall prescribe the validity period of the prospectus and it should be not be exceeding one year. This period commences from the opening date of the first offer of the securities. For any second or further offer, no separate prospectus is required.

While filing for a shelf prospectus, a company is required to file an information memorandum along with it.

Information Memorandum [Section 31(2)]

The company which is filing a shelf prospectus is required to file the information memorandum. It should contain all the facts regarding the new charges created, what changes have undergone in the financial position of the company since the first offer of the security or between the two offers.

It should be filed with the registrar within three months before the issue of the second or subsequent offer made under the shelf prospectus as given under ***Rule 4CCA of section 60A(3) under the Companies (Central Government's) General Rules and Forms, 1956.***

When any company or a person has received an application for the allotment of securities with advance payment of subscription before any changes have been made, then he must be informed about the changes. If he desires to withdraw the application within 15 days then the money must be refunded to them.

After the information memorandum has been filed, if any offer or securities is made, the memorandum along with the shelf prospectus is considered as a prospectus.

Misrepresentation in Propectus :

The purpose of this article is to examine the liability for misstatements in the prospectus of a company. Before going to the details of liability, a brief overview of the meaning and significance of the prospectus would be helpful.

Pursuant to section 2(70) of the Companies Act, 2013, prospectus is a document that invites offers from the public for the subscription or purchase of the securities of a company. The term 'prospectus' includes not only a document described or issued as prospectus but also notices, circulars and advertisements offering invitation to purchase or subscribe the securities.

Likewise, any document that offers sale of shares of a company by its members will also be deemed to be a prospectus (sec. 28(2)). The prospectus must contain such information and reports on financial information specified by the Securities and Exchange Board of India (SEBI) in consultation with the Central Government (sec. 26(1)). The date of publication of the prospectus is deemed to be the date indicated in the prospectus. The Central Government, the Tribunal or the Registrar can invoke all powers in matters related to prospectus (sec. 24 Explanation).

Sec. 26 of the Companies Act sets out the matters to be stated in the prospectus as well as the steps required to comply with its registration. Sec. 26(9) deals with the punishment for issuing prospectus in contravention of the said provisions. A company issuing such a prospectus shall be punishable with a fine of minimum fifty thousand rupees and a maximum of three lakh rupees. Also, every person who has a knowledge of the issue of such prospectus shall be punishable with imprisonment that may extend to three years or with a minimum of fifty thousand rupees as fine. The fine may extend to three lakh rupees, and the person may be awarded both fine and imprisonment. (How do we determine the mental culpability of a person? As in, how do we determine that he had the knowledge that it is a prospectus in contravention? What is the standard and on whom does the burden of proof lie?)

Misstatements in the prospectus

Since prospectus is relied on by the members of the public to subscribe or purchase the securities of a company, any misstatements on it invite penal consequences. Misstatement may occur when a statement which is untrue or misleading in form or context is included in the prospectus. Also, any inclusion or omission of any matter which is likely to mislead will also be considered as a misstatement (sec. 34). For e.g., a statement on the purpose of offering shares which is untrue, or statement on the locations of offices for a company which is misleading will amount to misstatement in the prospectus.

Liability for misstatement in the prospectus

A person who has signed and given consent to the prospectus is liable for misstatement. Persons who had the management of the whole, or substantially whole of the affairs of the company can be held liable for misstatement in prospectus if they have signed the prospectus and had given consent for the same. Managers, Company Secretaries, and Directors will come under this category. However, the mere signing of the declarations in the prospectus will not result in liability for misstatement if the person signing is neither a manager of the company nor draw salary from the company. *In the Matter of Sahara India Commercial Corporation Ltd.*, SEBI 31 Oct. 2018. Here, SEBI considered the submission of the Company Secretary that he signed the prospectus on behalf of the directors under their power of attorney and concluded that he was not liable for misstatement as the director of the company.

A misstatement in the prospectus can invoke criminal (sec. 34) and civil liabilities (sec. 35). Misstatements can lead to punishment for fraud under Sec. 447.

- **Criminal liability**

A person who authorizes the issue of a prospectus which has untrue or misleading statements is liable for punishment under Sec. 34. Such a punishment is for fraud as set out in Sec. 447. “Fraud” under Sec. 447 includes an act, omission, concealment of any fact with an intent to deceive, gain undue advantage, or to injure the interests of the company or its shareholders or its creditors or any other person. It is not necessary that such an act involve any wrongful gain or wrongful loss. Abuse of position committed by a person is also considered fraud under this section. **Sec. 447** further sets out the **punishment for fraud**:

- **If the fraud involves an amount of ten lakh rupees or more, or one per cent. of the turnover of the company** (whichever is lower) the person who is found guilty of fraud shall be punishable with imprisonment for a minimum term of six months which may extend to ten years. Such a person shall also be liable to a fine of an amount not less than the amount involved in the fraud and the fine may extend to three times of such amount.
- **If the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company** (whichever is lower) and does not involve public interest, the imprisonment may extend to five years or with fine which may extend to fifty lakh rupees or with both.
- **If the fraud in question involves public interest**, the term of imprisonment shall not be less than three years.
- **Civil liability**

Civil liability for misstatements in prospectus will arise when **a person has sustained any loss or damage by subscribing securities of a company based on a misleading prospectus (sec. 35).** In such instances **the following persons shall be liable under sec 447 and will have to pay compensation** to persons who have sustained such loss or damage:

1. director of the company at the time of the issue of the prospectus;
2. person who has agreed to be named as a director in the prospectus and is named as a director of the company, or has agreed to become such director;
3. is a promoter of the company;
4. has authorised the issue of the prospectus; and
5. is an expert who has been engaged or interested in the formation or promotion or management of the company.
6. Remedies for misrepresentation
7. Damages for Deceit:
8. This remedy is available when the party knowingly makes a false statement with the intent to deceive the other party.
9. Damages awarded aim to compensate for the actual losses suffered as a direct result of the deceitful misrepresentation.
10. Compensation:
11. Compensation is available when the misrepresentation was not fraudulent but still resulted in losses due to the negligent behavior of the party making the statement.
12. The injured party must prove that the misrepresentation was made negligently and that they relied on it to their detriment.

13. Compensation aims to put the injured party in the position they would have been in had the misrepresentation not occurred.
14. Rescission for Misrepresentation:
15. Rescission allows the injured party to unwind the contract, returning both parties to their original positions before the contract was formed.
16. It's available when a contract was entered into based on a misrepresentation that induced the party to enter into the contract.
17. Rescission restores parties to their pre-contractual positions, with consideration returned and obligations discharged.
18. Liability for Untrue Statements in the Prospectus:
19. If a prospectus contains false or misleading information, investors who relied on this information to make investment decisions may have legal remedies.
20. Investors may be able to seek damages, which could cover the financial losses suffered due to the untrue statements.

Regulatory authorities might also impose penalties on those responsible for the untrue statements, ensuring accountability.

2.1 PROMOTERS:

Establishing a company is not a one-day task. Before a firm may take its ultimate form, it must complete many processes. Promoters play an important role right from the start of the process. The process of forming a corporation is extensive and involves several steps. The ‘promotion’ stage of the formation process is the first step. An individual or a group of people known as promoters comes up with the concept of starting a business at this stage. Various processes must be completed to incorporate a firm. The promoters carry out these functions and establish the firm. The term has been used frequently in Indian company matters. The Indian Companies Act, 1956 used it to fix liability on promoters, but did not define it and accepted their established position under the common law principle. Subsequently, the Indian Companies Act, 2013 defined the term for the first time. It is a common misconception that the promoters’ job continues until the business has purchased the property, raised initial money, and the board of directors has taken over control of the company’s activities. However, a review of the different provisions of the Companies Act of 2013 demonstrates that the promoters’ role cannot be overlooked even when the board of directors assumes control of the company’s business. This can be carried over to the period when the firm is operating as a going concern and even to the time when the company’s affairs are being wound up.

Definition of promoter

The definition of the phrase “promoter” has been defined in Section 2 (69)[of Companies Act, 2013. The term has been used specifically in Sections 35, 39, 40, 300 and 317 of the Act. Section 2 (69) of the Act states that promoter is a person whose name has been mentioned in the prospectus of the company or is identified in the annual returns of the company, or any person who has direct or indirect control over the affairs of the company, whether as a stakeholder or as a director, or on whose direction the Board of

Directors act. In simple words, a promoter is a person who performs the various preliminary steps like making the prospectus of the company, floating the securities in the market, etc. but if a person is doing this in a professional capacity, he wouldn't be considered a promoter.

In Bosher v. Richmond Land Co. (1892), the term Promoter has been defined as a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation itself.

Statutory definition – Section 2(69) of the Companies Act, 2013

The Companies Act, 2013 contains a statutory definition of the promoter which is also more or less in terms of functional categories: Promoter means a person

1. who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92;
2. who has control over the affairs of the company, directly or indirectly, whether as a shareholder, director or otherwise;
3. in accordance with whose advice, directions or instructions the Board of directors of the company is accustomed to act. The proviso excludes persons acting in a professional capacity

Functions of a promoter

A promoter plays various functions in the formation of a company, from conceiving the idea to taking all the necessary steps to convert the idea into reality. Some of the functions of a promoter are-

- One of the main functions of a promoter is to comprehend the idea of formation of the company
- The promoter looks into the viability and feasibility of the idea that whether the formation of the company will be profitable and practicable or not.
- After the idea has been conceived, the promoter collects and organizes the resources available to convert the idea into a reality.
- The promoter decides the name of the Company and also settles the content regarding the Articles of Association and the Memorandum of Association of the Company.
- The promoter is the one who decides where the head office of the company will be situated. The promoter also nominates people or associations for vital posts. For instance, the promoter may appoint the bankers, auditors and Directors of the company for the first time.
- The promoter also prepares all the other necessary documents which are required to incorporate a company.

- The promoter must undergo a detailed investigation, and after analyzing all the concepts related to the idea discovered, the promoter must think about the cost, profitability, production, demand of the product, supply of such product in the market, etc.
- The promoter has to enter into a preliminary contract with the third parties on behalf of the company to collect all the resources necessary to form a company. The promoter makes contracts for the purchase of material, land, and machinery, and he also recruits staff for the initial functioning of the company.
- The promoter decides who can be the signatories to both the MoA and AoA of the company. The signatories are those who become the directors of the company, and the promoter gets written consent from such signatories that they will act as the directors.
- The promoter makes all the publicity for the company by way of advertisement and marketing strategies during the period of promotion of the company

Duties of a promoter

The promoters who form the company have certain basic duties towards the company. A promoter has a relationship of confidence and trust with the company, i.e., a fiduciary relationship. Keeping this fiduciary relationship in mind, the promoter is under the obligation to disclose all the material facts which relate to the formation of the company. The promoter is also under the obligation to not take any secret profit while carrying out the promoting activities like buying a property and then selling it to the company for profit, without making any disclosure. The promoter is not barred from making profits while dealing with various parties. The only condition is that he is under the duty to disclose such profits and not make any secret profits.

Fiduciary position of the promoter

The fiduciary position of the promoter with regards to a company was first explained in the case of *Erlanger v. New Sombrero Phosphate Co. (1878)*. Lord Cairns, in this case, stated that the promoters undoubtedly stand in a fiduciary position. The creation and molding of the company is in their hands. They have the power of defining when and how, in what shape and under whose supervision the company shall come into existence and begin to act as a business corporation.

Since the concept of promotion of a company gives a very advantageous position to the promoter in relation to the company proposed, the responsibility of a fiduciary position is fixed upon the promoter by the courts. The first and foremost duty of a promoter is that if he attains any form of profit through transactions with the company and obtains money from the shareholders, he must disclose all facts faithfully relating to such transactions.

Liabilities of a promoter

Liability regarding irregularities in the prospectus

Section 26 describes what should be stated in the prospectus and what reports should be included. The promoter may be held accountable by the shareholders if this provision is not followed.

Civil liability

Section 35 outlines the civil liabilities for any prospectus misstatements. Under this Section, a person who has subscribed for the company's shares and debentures on the basis of the prospectus can hold the promoter accountable for any false statements in the prospectus. The promoter may be held liable for any loss or damage suffered by any person who subscribes for shares or debentures as a result of the false statements made in the prospectus. Specific provisions have also been provided under Section 62 regarding the reasons on which the promoter can avoid his liability. These remedies are available to anyone who can be held accountable for a prospectus misstatement.

Criminal liability

Section 34 deals with the criminal liabilities of drafting a prospectus that contains false claims. The promoters can be held criminally accountable, in addition to the civil liabilities described in the previous two examples, if the prospectus they released contains misstatements. The penalty is either a two-year prison sentence or a fine of up to 5000 rupees, or both. Unless he can show that the inaccurate statement was inconsequential or that he was justified in believing, on reasonable grounds, that the statement was truthful at the time of prospectus issuing, the promoter may be held criminally liable for misstatements.

SHARE :

The world's economies are growing and changing at a greater pace than they ever did in the past. In an era where managing finances is a bit tricky, one may own up a share of big companies to boost their finances. As we know and have read in company law, owning a share means having a say in a company's major decisions. But let me break this to you. It is not that straightforward or easy. There are many rules and regulations that one has to comply with to control the buying and selling of shares. Nowadays, there are many trading apps available to guide you about how to invest, where to invest, etc. But one must be aware of what he's dealing with. So to enhance and upgrade your knowledge about shares, this article will deal with the definitions, types, legalities, investment strategies, and many more. Understanding the evolution of a share is important for a person to manage their money strategically. Also, one must be highly aware of the legal implications of the same.

What is a share?

A share is the stake of a person, i.e., shareholder, in a company. It represents the interest of a member of a company. It is the interests of a shareholder in a company and helps to calculate the dividend value that is to be delivered to each shareholder. Section 2(84) of the Companies Act, 2013 defines a share as a share in the share capital of a company, and it includes stock. While a share represents the unit of ownership in a company by the investor, common stock shares enable voting rights. The investor exchanges capital in return for these units. There are various rights and liabilities attached to a share.

Shares are movable property and are generally transferable in nature in the manner prescribed in the Articles of Association (AOA) of a company.

The terms shares and stocks are often used interchangeably by the common man, but they have different roles to play in the representation of a company's share capital. This may initially seem confusing, but one can easily understand it by using an example. For example, ABC Company issued stock in public, and Mr. X purchased 10 shares of it. Now, if each share represents 1% of a company, Mr. X is the owner of 10% of the company in this case. In short, the company issued stock, and Mr. X purchased a share of it. Layman uses the term stock to refer to the financial instrument a company issues, while shares are what a person actually buys.

Concept of allotment of shares

Before diving deep into the topic of allotment of shares it is necessary to understand what allotment really means. The allotment is the allocation of a portion of shares to an underwriting participant during Initial Public Offering (IPO). When the shares allotted to the underwriting form, the remaining shares are allotted to other forms that participate in the same.

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General principles as to allotment of shares

An allotment to be effective has to comply with the requirements of the law of contract relating to the acceptance of an offer.

- Allotment by proper authority

An allotment should be made by a resolution of the Board of directors. The Allotment is the primary duty of the directors and this duty cannot be delegated except in accordance with the provisions of the articles.

- Within reasonable time

allotment should be made within a reasonable period of time otherwise the application fails. Reasonable time should remain a question of fact in each case. The interval of six months between application and allotment has been held unreasonable. If the reasonable time expires Section 6 of the Contract Act applies and the application must be deemed to be revoked.

- Must be communicated

The allotment should be properly communicated to the applicant. Posting of a properly addressed and stamped letter of allotment is sufficient communication, even though the letter is lost or held up.

- Absolute and unconditional

Allotment should be absolute and should be according to the terms and conditions of the application if any.

Nature of the shares

According to Section 44 of Companies Act, 2013 the shares of a company are immovable property and according to the articles of the company, are transferable in the manner specified therein. In the case of *Vishwanath v. East India Distilleries*, the nature of share is incorporeal and also has a bundle of rights and obligations.

Provisions of Companies Act relating to issue and allotment of shares

1. A public company should file a prospectus or declaration in lieu of a prospectus inviting offers from the public for the purchase of shares.
2. After reading the prospectus, the public applies for the company shares in printed forms. The company can ask the issue price to be paid in full, together with the application money or to be paid in instalments as share application money, share first call, second call, etc. The application money must be paid at least five percent of the nominal value of the share.
3. The Allotment of shares cannot be made unless the minimum amount that is the minimum subscription stated in the prospectus is subscribed or applied. The minimum subscription should be mentioned in the prospectus.
4. The share application amount should be deposited in the bank which can be operated by the company only after the commencement certificate.
5. The company has to return and refund the entire subscription amount instantly if 90% of the issue amount is not achieved by the company within 60 days. For further delay, which is beyond 78 days, the company has to pay 6% interest per annum.

After allotment of shares, the company can call for the full amount or instalments which are due on shares from the shareholders according to rules mentioned in the prospectus. Usually, the articles of the company include provisions regarding calls. If there are no such provisions then the following provisions are applicable:

1. No call should be for more than 25% of the nominal value of each share.
2. The interval between two calls should not be less than a month.
3. At least 14 days should be provided to each member for the call mentioning the amount, date, and place of payment.
4. Calls should be made on a uniform basis on the entire body of shareholders falling under the same class.

A company makes an offer to subscribe to its shares by way of an application. "The allotment of shares precedes the issue of shares. Allotment of shares means appropriation of unissued shares to any particular person preliminary to the issue of shares. Issue of shares is something distinct from allotment and is some subsequent act whereby the title of the allottee becomes complete. A re-allotment and re-issue of shares which have already been issued and have subsequently been forfeited is not an issue of shares. An issue of a share creates a movable property in the shape of the issued share. There can be no issue of a share which has already been issued and which is already an existing article of property."

Statutory restrictions on allotment (S. 39):-

The first step towards a valid allotment is the fulfillment of required minimum subscription amount. Every company offering shares to the public has to state a minimum subscription amount in the prospectus. Further, there is a restriction on the company towards allotment of shares until the minimum stated amount has been subscribed and the application money has been received by the company in the form of a cheque or any other instrument. Also, the minimum application money cannot be less than five percent of the nominal value of security or any other percentage or amount specified by SEBI.

Another restriction imposed upon the company is towards receiving of minimum subscription amount within a period of thirty days, failing which the company has to return the amount so received within a period as may be specified. Also, a company making allotment of securities is required to file a return of allotment with the registrar of companies in a prescribed manner.

Consequences of default- The penalty to be paid towards non-compliance by the company or the officer-in-charge is of Rs. 1,000 for each default for each day the default continues or Rs. 1,00,000 whichever is less.

Applicable Rules: (Prospectus and allotment of securities) Rules, 2014-
1.Rule 11- If the minimum amount has not been subscribed and application money has not been received then a company is obligated to return the money within fifteen days. Further, the application money can be credited only to the bank account from which the subscription was remitted.

2.Rule 12- A company having a share capital makes an allotment of securities is required to file a return of allotment with the registrar of companies within thirty days in form PAS-3 along with fees as specified in (Registration offices and fees) Rules, 2014.

Shares to be dealt in on stock exchange (S. 40):-

The company offering shares or debentures to the public by way of a prospectus is required to first make an application to one or more recognized stock exchanges and has to obtain its consent for the securities to be dealt with in the stock exchange(s).

Further, it is required to state in the prospectus, the name(s) of the stock exchange in which the securities shall be dealt with.

Also, it is mandatory to keep all the money received towards subscription from the public on application in a separate bank account and it can only be used for adjustment against allotment of securities if the securities have been permitted to be dealt with in the stock exchange(s) specified in the prospectus or towards repayment to the applicants in case the allotment of securities is not possible for any other reason, within a time period prescribed by SEBI.

Any condition which may require or bind the applicant to waive compliance with respect to any requirements under this section is void. Further, a company is allowed to pay commission to any person in connection with the subscription to its securities subject to certain prescribed conditions.

Consequences of default-A penalty of minimum five lakhs can be imposed upon the company which may extend to fifty lakhs in case a default is made with respect to this section and every officer who is in default shall be punishable with imprisonment upto one year or with a minimum fine of fifty thousand which can be extended upto three lacs or with both.

Applicable Rules: (Prospectus and allotment of securities) Rules, 2014-

Rule 13- A company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely:-
(1) the articles of association of the company shall authorize the payment of such commission;
(2)the commission may be paid out of proceeds of the issue or the profit of the company or both;
(3)the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five per cent of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;
(4)the prospectus of the company shall disclose-(i) the name of the underwriters; (ii)the rate and amount of the commission payable to the underwriter; and (iii)the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
(5)there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;
(6)a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

Private Placement (S.42):-

A company can make a private placement by way of issue of offer letters. An offer of securities/ invitation to subscribe to securities can be made to a number of persons not exceeding 50 or to such number of people as are prescribed. This proviso excludes the qualified institutional buyers and employees of the company being offered securities under a scheme of employee stock option. Thus, this section does not regulate the offer being made to an existing shareholder of the company. Further, if an offer is made to the people exceeding the prescribed number, the same is deemed to be a public offer and is governed by the provisions relating to public issues. Further, no fresh offer/invitation for allotment of securities can be made unless the ones made earlier have been completed or withdrawn by the company.

Moreover, any offer which is in non-compliance with the provisions of this section is required to be treated as a public offer and the same has to comply with the requirements of the Securities Contracts (Regulations) Act, 1956 and SEBI Act, 1992.

The mode of payment towards subscription of securities is only by way of cheque, demand draft or other banking channels, but in way can it be done by way of cash.

Consequences of default-In case a company fails to allot the securities within sixty days of receipt of the application money for such securities, the company is obligated to return the money within fifteen days from the date of completion of sixty days. Further, in case the company is unable to return the money within the specified period then the company shall be liable to pay the money along with a twelve percent interest rate from the expiry of sixtieth day.

The company is obligated to keep the money received on application in a separate bank account and the same can only be used for either adjustment against allotment of securities or for repayment of monies when the company is unable to allot securities.

[Exemption- As per notification [GSR 08(E)] dated 04/01/2017 and [GSR 09(E)] dated 04/01/2017 , a Specified IFSC Public company and Specified IFSC Private company respectively is allowed to allot securities within ninety days of receipt of the application money for such securities.]

Further, any offer made under this section can only be made to such persons whose names are recorded by the company prior to the invitation to subscribe. Also, such persons should receive the offer by name, and that a complete record of such offers is required to be maintained by the company in a prescribed manner and the same is to be filed with the registrar within a period of thirty days of circulation of relevant private placement offer letter.

A company offering securities under this section is prohibited from using any public platform such as releasing any public advertisements or to utilize any media etc. to inform the public at large about such an offer.

A company making any allotment of securities under this section, is required to file with the Registrar a return of allotment in a prescribed manner including a complete list of all security-holders, with their full names, addresses, number of securities allotted and other prescribed relevant information.

Penalty for contravention- A company making an offer or accepting monies in contravention of this section, along with its promoters and directors is liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company is also required to refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

Applicable Rules: (Prospectus and allotment of securities) Rules, 2014-

Rule14- A Company can make an offer or invitation to subscribe to securities through issue of a private placement offer letter in Form PAS-4.

A private placement offer letter shall be accompanied by an application form serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within thirty days of recording the names of such persons in accordance with sub-section (7) of section 42.

Proviso- That no person other than the person so addressed in the application form is allowed to apply through such application form and any application not conforming to this condition shall be treated as invalid.

A company cannot make a private placement of its securities unless-

(a) the proposed offer of securities or invitation to subscribe securities has been previously approved by the shareholders of the company, by a Special Resolution, for each of the Offers or Invitations.

(b) Such offer or invitation is to be made to not more than two hundred persons in the aggregate in a financial year.

(c) the value of such offer or invitation per person is to be with an investment size of not less than twenty thousand rupees of face value of the securities;

(d) the payment to be made for subscription to securities is to be made from the bank account of the person subscribing to such securities and the company shall keep the record of the Bank account from where such payments for subscriptions have been received.

Proviso- that monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application.

The company shall maintain a complete record of private placement offers in Form PAS-5. Proviso- that a copy of such record along with the private placement offer letter in Form PAS-4 shall be filed with the Registrar with fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and where the company is listed, with the Securities and Exchange Board within a period of thirty days of circulation of the private placement offer letter.

A return of allotment of securities under section 42 shall be filed with the Registrar within thirty days of allotment in Form PAS-3 and with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 along with a complete list of all security holders containing-

(1) the full name, address, Permanent Account Number and E-mail ID of such security holder;

(2)the class of security held;
(3)The date of allotment of security;
(4)the number of securities held, nominal value and amount paid on such securities; and particulars of consideration received if the securities were issued for consideration other than cash.

SHARE CERTIFICATE :

Issue of Share Certificates. –
(1) When a company issues any capital, no certificate of any share or shares in the company shall be issued except :
(i) in pursuance of a resolution passed by the Board ; and
(ii) on surrender to the company of its letter of allotment or of its fractional coupons of requisite value, save in cases of issues against letters of acceptance or of renunciation, or in cases of issue of bonus shares : Provided that if the letter of allotment is lost or destroyed, the Board may impose such reasonable terms, if any, as to evidence and indemnity and the payment of out of pocket expenses incurred by the company in investigating evidence, as the Board thinks fit.

(2) No certificate of any share or shares shall be issued either in exchange for those which are sub-divided or consolidated or in replacement of those which are defaced, torn or old decrepit, worn-out, or where the cases in the reverse for recording transfers have been duly utilized, unless the certificate in lieu of which it is issued is surrendered to the company : Provided that the company may charge such fee, if any, not exceeding Rs. 2 per certificate issued on splitting or consolidation of share certificates or in replacement of share certificates that are defaced or torn, as the Board thinks fit.

(3) No duplicate share, certificate shall be issued in lieu of those that are lost or destroyed without the prior consent of the Board or without payment of such fees, if any, not exceeding Rs. 2 and on such reasonable terms if any, as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence as the Board thinks fit.
(4) The companies listed with OTC Exchange of India, a company registered under section 25 of the Companies Act, 1956, may issue a jumbo share certificate in favour of Custodian and issue counter receipts to every allottee with respect to their holding.

Form of Certificates.-
(1) Every certificate shall specify the name (s) of the person (s) in whose favour the certificate is issued, the shares to which it relates and the amount paid up thereon
(2) When any certificate is issued in any of the circumstances specified in Rule 4, sub-rule (2), it shall state on the face of it and against the stub or counterfoil to the effect that it is " Issued in lieu of share certificate No . ... Subdivided/replaced/on consolidation of shares."

(3) When any certificate is issued in any of the circumstances specified in Rule 4, sub-rule (3), it shall state on the face of it and against the stub or counterfoil to the effect that it is a "duplicate issued in lieu of share certificate No. ...." Further, the word "duplicate" shall be stamped or punched in bold letters across the face of the share certificate.

Sealing and Signing of Certificate.- Every share certificate shall be issued under the seal of the company, which shall be affixed in the presence of

(1)two directors or persons acting on behalf of the directors under a duly registered power-of-attorney ; and
(2) the secretary or some other person appointed by the Board for the purpose. The two directors or their attorneys and the secretary or other person shall sign the share certificate. Provided that, if the composition of the Board permits of it, at least one of the aforesaid two directors shall be a person other than a managing or whole-time director.

Records of Certificates issued.-
(1) Particulars of every share certificate issued in accordance with rule 4, sub-rule (1) shall be entered in the Register of Members maintained in the form set out in the appendix annexed hereto or in a form as near thereto as circumstances admit, against the name (s) of person (s) to whom it has been issued indicating the date of issue.

(2) Particulars of every share certificate issued in accordance with rule 4, sub-rules (2) and (3) shall be entered in a Register of Renewed and Duplicate Certificate indicating against the name(s) of the person(s) to whom the certificate is issued, the number and date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members by suitable cross-references in the "Remarks" column.

(3) All entries made in the Register of Members or the Register of Renewed and Duplicate Certificate shall be authenticated by the secretary on such other person as may be appointed by the Board for purposes of sealing and signing the share certificate under the provisions of rule 6

Printing of forms.- All blank forms to be used for issue of share certificate shall be printed and the printing shall be done only on the authority of a resolution of the Board. The blank form shall be consecutively machine-numbered and the forms and the blocks, engravings, facsimiles and hues relating to the printing of such form shall be kept in the custody of the secretary or such other person as the Board may appoint for the purpose and the secretary or other person aforesaid shall be responsible for rendering an account of these forms to the Board

Transfer of Shares :

Transfer and Transmission of Securities According to Section 56(1) of the Act, a company shall not register a transfer of securities of the company unless a proper instrument of transfer duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or transferee within a period of 60 days (irrespective ofhe nature of the company, whether listed or unlisted) from the date of execution along with the certificate relating to the securities, or if no such certificate is in existence, then along with the related certificate or letter of allotment of securities.

In case of loss of the instrument, the company may register the transfer on terms as to indemnity as the Board may think fit. Such instrument of transfer of securities held in physical form shall be in Form No. SH.4. Where a company not having share capital, the instrument of transfer should also be in Form No. SH.4 and other conditions be complied.

However, nothing in section 56(1) shall prejudice any power of the company to register, on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted [Section 56(2)].

Registration of partly paid up shares - Notice to the transferee According to section 56(3), where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice in Form No. SH.5 to the transferee and the transferee gives ‘no objection’ to the transfer within 2 weeks from the receipt of the notice.

Time Limit for Delivery of certificates According to section 56(4), every company, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities transferred or transmitted within a period of one month from the date of receipt by the company of the instrument of transfer or the intimation of transmission.

Transfer of securities by legal representative Section 56(5) of the Act provides that in case of death of holder of any security, the transfer of such security by the legal representative of the deceased shall be valid-

• Even though the legal representative is not the holder of such security;
• As if the legal representatives were the holder of such security. Penalties According to 56(6), where any default is made in complying with the provisions of subsections (1) to (5) of Section 56, the company and every officer of the company who is in default shall be liable to a penalty of Rs. 50, 000. Transfer of shares by depository with an intent to defraud, is liable under Section 447 for fraud As per section 56(7), without prejudice to any liability under the Depositories Act, 1996, where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under section 447 for fraud.

PROCEDURE FOR TRANSFER AND TRANSMISSION OF SHARES:

An instrument of transfer of securities held in physical form shall be in Form No.SH.4 and every instrument of transfer with the date of its execution specified thereon shall be delivered to the company within 60 days from the date of such execution along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

The transmission request form in case of transmission of securities are submitted with the death certificate of the securities holder, original share certificate and registered will, if any/letter of probate/succession certificate as evidencing the proof of legal ownership of the deceased securities holder.

The proper value of share transfer stamps on the basis of consideration, is affixed on the transfer deed (25 paise for every 100 rupees of the value of the share or part thereof). The stamp affixed on the transfer deed is cancelled at the time or before signing of the transfer deed. No stamp duty shall be required to be paid in case of transmission of share.

The signatures of the transferor and the transferee in the share transfer deed must be witnessed by a person giving his signature, name and address. The transferee as well as transferor are required to furnish a copy of their PAN card to the listed entity for registration of transfer of securities. Complete formalities regarding calling of board meeting in the following manner: Prepare notice of the board meeting along with draft resolution to be passed in the board meeting.

Send notice of the board meeting to all the directors at least 7 days before the date of board meeting or in such a manner as prescribed. Convene board meeting and pass the following board resolution: o Acceptance of transfer/transmission of securities or recording the reasons for refusal of transfer/transmission of securities, if refused.
Authorising a director/company secretary to make necessary entries in the respective registers. o Issuing securities certificates after transfer/transmission in the name of transferee or take appropriate action to inform the depository about such transfer/transmission.

As per SEBI (LODR) Regulations, 2015, the board of directors of a listed entity may delegate the power of transfer of securities to a committee or to compliance officer or to the registrar to an issue and/or share transfer agent. Provided that the board of directors and/or the delegated authority shall attend to the formalities pertaining to transfer of securities at least once in a fortnight.

Further, the delegated authority shall report on transfer of securities to the board of directors in each meeting. Complete Formalities regarding minutes of the board meeting as per section 118 of the Companies Act, 2013.

EXCEPTIONS TO THE PROVISIONS OF THE COMPANIES ACT, 2013

The provisions of section 56(1), in so far as it requires a proper instrument of transfer, to be duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee, shall not apply with respect to bonds issued by a Government company, provided that an intimation by the transferee specifying his name, address and occupation, if any, has been delivered to the company along with the certificate relating to the bond; and if no such certificate is in existence, along with the letter of allotment of the bond.

The provisions of section 56(1) shall not apply to a Government Company in respect of securities held by nominees of the Government. The instrument of transfer may not be in the prescribed form in the following cases:- Shares transferred by a direct or nominee on behalf of an other body corporate under section 187 of the Companies Act, 2013;

Shares transferred by a director or nominee on behalf of a corporation owned or controlled by the Central or State Government; o Shares transferred by way of deposit as a security for repayment of any loan or advance, if they are made with any of the following:-
(a) State Bank of India; or
(b) Any scheduled bank; or
(c) Any other banking company; or
(d) Financial Institution; or
(e) Central Government; or
(f) State Government; or
(g) Any corporation owned or controlled by the Central or State Government; or
(h) Trustees who have filed the declarations.

Demateralization of shares:

Ever since the introduction of Demat accounts and electronic share trading in India, the possession of physical share certificates has been declining steadily. In fact, the Securities and Exchange Board of India (SEBI) has mandated that companies issue shares only in the dematerialized form and not as physical share certificates.

You're now probably wondering, ‘what is dematerialization?’, aren’t you? This is an important concept to know about, especially if you want to trade in the lucrative stock market today effectively. As all functions of trading and holding securities go online with proficient portals and apps, you should be savvy about concepts, so you know how to use the trading and investment world to your full advantage. All investors trade and invest with the aim of profit-making, so it is best to keep yourself aware of all elements concerning trading and investing in equity. Keep reading to know everything about the concept of share dematerialization.

What is dematerialization?

The process by which the physical share certificates of a company are converted to an electronic form is what is commonly known as the dematerialization of shares. These dematerialized shares are then held in an online Demat account that you open with a depository. In the current context of stock trading, share dematerialization is mandatory in order to be able to sell or transfer your shares to another account.

Previously, shares were held in physical formats, proving a challenge to maintain over time. Paper gets frayed, and since the world has gone online in most aspects of life, why not the investment arena and share markets too? Dematerialization has made investing easy, and you can easily open a Demat account with a bank or a good brokerage. Moreover, as all accounts are electronic, Demat accounts are linked to bank accounts and trading accounts to make trading transactions (the purchase and sale of shares) smooth and seamless. Since investing in stocks is done mainly when lucrative opportunities present themselves, Demat accounts serve the purpose of quick actions with joint trading accounts and bank accounts.

Advantages of dematerialization of shares
Now that you know the answer to the question 'what is dematerialization?,' let's take a quick look at some of the benefits of share dematerialization.

1. Enhanced safety:

Since dematerialization entails the conversion of physical shares into electronic ones, you don't have to worry about damage, mutilation, loss, or theft of your share certificates. You get to safely store all your shares in one single Demat account that can be accessed from almost anywhere in the world.

2. Increased security:

When physical share certificates were still in use, there were many instances of forgery, fraud, and duplication. However, with dematerialized shares, none of these incidents is possible.

3. Facilitation of instant transfer:

With physical share certificates, transferring shares from one person to another would typically take days on end. But thanks to share dematerialization, share transfer is now exceptionally easy and almost instant.

4. Quick and Easy Transactions:

The whole process of opening Demat accounts for shareholding has made the lives of investors and traders alike very simple and convenient. From holding shares securely in one place and getting a consolidated statement of all the securities you hold to online trading made convenient through Demat accounts, investing is simple. Today, everyone from college students to senior citizens is into share investing through a straightforward Demat account linked with a trading account. You can operate both these online and from anywhere, even if you are on a holiday. With the ease of trading with a Demat account comes huge opportunities to make the most of price changes in the stock market and, subsequently, good returns.

The process of dematerialization of securities
- The share dematerialization process is quite simple and easy to understand. Also, it takes just a few days to complete. Here's a brief explanation about the process of dematerialization of shares.

- First, you're required to open a Demat account with a depository via a depository participant (DP). Generally, the stockbroker with whom you have a trading account also doubles as a DP.

- Once you've opened a Demat account, you'll have to submit a duly-filled Dematerialization Request Form (DRF) to your DP, along with the physical share certificates that you own.

- If you own shares of multiple companies, then you'll have to submit a duly-filled DRF for each company along with the relevant share certificates.

- Upon receiving the DRF, your DP will scrutinize both the form as well as the securities to ensure that everything is in order.

- Once the DP is satisfied with your request, you will receive a Dematerialization Request Number (DRN) as an acknowledgment.

- The DP then forwards your request to the Registrar and Share Transfer Agent (RTA) of the company.

- Once the RTA of the company accepts your dematerialization request, the physical share certificates are converted to the electronic mode and are subsequently destroyed.

- And finally, the now dematerialized shares are credited to your Demat account, which you can subsequently either sell or transfer to other accounts.

Conclusion
As you can see from the above explanation, sharing dematerialization is uncomplicated and requires only a few minutes of your time. Dematerialization of shares has simplified the entire process of share trading, which was previously quite cumbersome. It has ushered in a new era of electronic share trading and has contributed immensely towards the growth and popularity of share trading amongst the public.

2.3 Shareholders and members of the company :

Clause (55) Member “Member”, in relation to a company, means—

(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
(ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
(iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository. (Effective from 12.09.2013)

Meaning of ‘Member’ Member in relation to a company means —

(1)the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
(2) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
(3) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository; As per the definition, a person can’t be treated as member of the company unless his name is entered in the Register of members of the company. The term ‘member’ is different from that of ‘shareholder’.

A shareholder can be shareholder by acquiring shares but will not be member till his name entered in the Register of Members of the company. This definition is relaxed in case of section 244 where even a shareholder is treated as a 'member'. In case of a company limited by guarantee and not having share capital the person who provides the guarantee will become its member as soon as his name is entered in the Register of Members.

Position of registered owner of the shares vis-à-vis beneficial owner A person whose name is entered in the Register of Member shall be treated as member irrespective of whether he holds the beneficial interest or not. The holder of beneficial owner (under section 89) is not recognised as a member.

Subscriber to the shares A person who agrees to subscribe memorandum of association the company shall be treated as a member of the company, once the company is registered. His name shall also be entered in the register of members. As held in U.P. Oil Mills Co. Ltd. v. Jamna Prasad [[1933] Comp. Cas. 256 (All.)],
"Words 'shall be deemed to have agreed to become members of the company' as occurring in section 30 of the 1913 Act/ section 41 of the 1956 Act [corresponding to section 2(55) of the 2013 Act] mean that the subscribers of the memorandum of a company are to be treated as having become members of the company by the fact of the subscription; by merely subscribing to the memorandum of association a person becomes member of the company."

Agreement in writing and entry in register In Balakrishna Gupta v. Swadeshi Polytex Limited [[1985] 58 Comp Cas 563], Supreme Court has held that unless a person agrees in writing to become member of the company and unless his name is entered in the Register of Members he cannot be considered as Member of the Company.
No oral application will be valid. "The privileges of a member of a company can be exercised only by that person whose name is entered in the register of members". In Sree Ayyanar Spinning & weaving mills Limited v. Rajendran V.V.V. [1973 43 CompCas 225 Mad], it was held that there cannot be oral application and an application in writing has to be submitted for becoming member of the Company.

Membership by transfer In case of a person who acquired shares by acquiring from other person, he will not become the member till the transfer of shares is registered by the company and his name is entered in the register of members of the company.

Membership by transmission In Indian Chemical Products Limited v. State of Orissa [1966 SCR 380] it was held that in case of a transmission of shares unless intimation of transmission is submitted in writing which constitutes an agreement in writing the legal heir cannot be admitted as member of the Company.

Partnership firm as a member As per Departments Circular No. 4/72 dated 09.03.1972, a firm not being a person cannot be registered as a member of the Company. Such firm can be a member of section 8 company.

In the case of partners, a firm as such cannot be registered as a member, but the partners in their individual names may be registered as joint holders of the shares. If any change occurs in the partnership and the shares are to continue to remain as assets of the firm, a transfer of the shares may be effected by means of a regular instrument of transfer.

Company as a member of another company A company being an artificial person and a body corporate, can acquire shares in other company provided it is authorised by its memorandum or articles of association of the company. However, a company cannot buy its own shares.

Minor as member As per the departments clarification vide Circular No. 1968/5614 dated 26.02.1964, it was stated that the minor is not capable of entering into a contract for acquisition of shares. But he can hold shares in the name of the guardian. Further, a minor may inherit the shares.

LLP as a member of the company Unlike a partnership firm, LLP is a body corporate as provided in section 3 of the Limited Liability Partnership Act, 2008. Hence, it can become a member of the company and hold shares in its name.

Society as a member Department's Clarification dated 24.11.1962 has clarified that "a society registered under the Societies Registration Act, 1860 should not be deemed to be a 'body corporate' within the meaning of the aforesaid provisions [Refer to Section 2(7) (i) of the Companies Act, 1956 (currently refer section sub clause (i) of clause 11 of section 2 of the Act, although such a society can be treated as a 'person' having separate legal entity apart from the members constituting it and thereby capable of becoming a member of a company under section 41(2) of the Companies Act, 1956."

Joint members If more than one person jointly applies for and are allotted shares in a company, each one becomes a member as held in Narandas Munmohandas Ramji v. Indian Manufacturing Co. Ltd [(1953) 23 Com Cases 335] In the case of joint holders, they can insist on having their names registered in such order as they may require, and they may also require their holdings to be split into several joint holdings with their names in different orders, so that all of them may have a right to vote as first named holder in one or other of the joint holdings as held in Re, Saunders (TH.) & Co. [(1908) 1 Ch 415], and Burns v. Siemens Brothers Dynamo Works Ltd [(1919) 1 Ch 225]. Where a man purchased shares jointly with his wife's name, she became entitled on his death as a surviving joint owner to have the shares registered in her name as held in Deputy Commissioner v. M.D. Aikman [(1934) 4 Com Cases 218, 223 (Oudh)]. The Department has clarified vide Letter No. FI/24/SE/80, dated 05.09.1980 that there is no need of transfer deeds for transposition of names i.e. change in the order of names of joint shareholders provided such request is made by all shareholders jointly to the Company.

However, where the change in the order of names is required in respect of a part of the holding, execution of a transfer deed will be required. In the case of a private company, the private company, may refuse to split any holdings of shares if such splitting will cause an increase in the number of its members beyond the statutory maximum provided for a private company by section 3(1)(iii)(b). Nominee joint members. Where the shares of a company were registered in the joint name of the company and one of the directors, it was held that the director was a nominee of the company for that purpose. He could act jointly with the company and not individually.

He had no rights of his own in respect of the shares and was not entitled to bring proceedings on the basis of being one of the registered holders as held in Exchange Travel (Holdings) Ltd., Re [(1991) BCLC 728 (Ch D)].

HUF as member HUF is not a juristic person, although it is a person for purposes of the Income-tax Act, 1961. HUF is represented by its Karta. There is no legal bar on HUF to invest its money in shares and securities and the Companies Act does not prohibit membership of HUF. In case of an HUF, the shares can be registered in the name of 'A' as Karta of HUF as held in Vickers Systems International Limited v. Mahesh P. Keshwani [(1992) 13 Com Cases 317 (CLB)]

Difference between Members and Share Holders:

Members and shareholders are terms used by companies and organizations. Shareholders are individuals or entities who own stock in a company, while members belong to an organization or group. An organization's members are individuals or entities with memberships in the organization, while shareholders own shares of the company. Check out the difference between members and shareholders in a tabular format below:

Difference between Members and Shareholders

Members	ShareHolders
Owners of companies that are non-profits or cooperatives	Those who own a for-profit company
A vote on important matters like changes to the company's bylaws or major financial transactions will allow you to influence the company's management and decision-making.	Depending on the type of stock they own, they may or may not have a say in the management and decision-making of the company. Voting rights are typically granted to common stockholders, while preferred stockholders do not have them.
A membership fee may be required to support the organization's activities and operations.	The board of directors may require the company to pay dividends or a share of profits to shareholders, depending on their ownership level. Some benefits may be available, such as discounted products or services provided

MODES OF ACQUIRING MEMBERSHIP OF COMPANY:

As per Section 2(55) of the Companies Act, 2013, a person may acquire the membership of a company:

Subscribers to MOA:
by subscribing to the Memorandum of Association (deemed agreement); or
Entering an Agreement:

by agreeing in writing to become a member:

(i) Allotment: by making an application to the company for allotment of shares; or
(ii) Transfer: by executing an instrument of transfer of shares as transferee; or
(iii) Transmission: by consenting to the transfer of share of a deceased member in his name; or
(iv) Estoppel: by acquiescence or estoppel.

Beneficial Owner in Depository's Records: by holding shares of a company and whose name is entered as beneficial owner in the records of a depository (Under the Depositories Act, 1996). Entering the name in Register of Members: On his name being entered in the register of members of company.

(1)Subscribers to the Memorandum:

In the case of a subscriber, no application or allotment is necessary to become a member. By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member and he becomes ipso facto member on the incorporation of the company and is liable for the shares he has subscribed. A subscriber to the memorandum cannot rescind the contract for the purchase of shares even on the ground of fraud by the promoters.

Further, a subscriber to the memorandum must pay for his shares in cash even if the promoters have promised him the shares for services rendered in connection with the promotion of the company. Again, he must take the shares directly from the company, and not through transfer from other member(s).

When a person signs a memorandum for any number of shares he becomes absolutely bound to take those shares and no delay will relieve him from that liability unless he fulfills the obligation. His liability remains right up to the time when the company goes into liquidation and he is bound to bring the money for which he is liable to pay to the creditors of the company.

(a) Agreement in Writing:

(i) By an application and allotment A person who applies for shares becomes a member when shares are allotted to him, a notice of allotment is issued to him and his name is entered on the register of members. The general law of contract applies to this transaction. There is an offer to take shares and acceptance of this offer when the shares are allotted.

(ii) By transfer of shares Shares in a company are movable property as provided in Section 44 of the Act and are transferable in the manner as provided in the articles of the company and as provided in Section 56 of the Companies Act, 2013. A person can become a member by acquiring shares from an existing member and by having the transfer of shares registered in the books of the company, i.e. by getting his name entered in the register of members of the company.

(iii) By transmission of shares A person may become a member of a company by operation of law i.e. if he succeeds to the estate of a deceased member. Membership by this method is a legal consequence. On the death of a member, his executor or the person who is entitled under the law to succeed to his estate, gets the right to have the shares transmitted and registered in his name in the company's register of members. No instrument of transfer is necessary in this case. If the legal representative of deceased member desires to be registered as a member in place of the deceased member, the company shall do so or in the alternative he may request the company to transfer the shares in the name of another person of his choice. The Official Assignee or Official Receiver is likewise entitled to be a member in place of the shareholder, who has been adjudged insolvent.

(iv) By acquiescence or estoppels A person is deemed to be a member of a company if he allows his name, without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows himself to be held out as a member. In such a case, he is estopped from denying his membership. He can, however, escape his liability by taking prompt action for having his name removed from the register of members on permissible grounds

2.4 SHARE CAPITAL:

Meaning and Definition of 'CAPITAL' 'Capital' can be defined as the significant element for initiating and running the business for its day to day operations. As well the capital is required for funding its future prospects. Its meaning may vary from person to person. Capital can be termed as the money that can be used to make more money.

For a business or say a company can have the capital can be from two sources:

l Debt: That a company owes and required to be paid back.

2. Equity: The amount which investors put in the company in exchange to have ownership of the company and the same amount is not required to be paid. In relation to a company limited by shares, the word 'capital' means the share capital i.e., the capital in terms of rupees divided into specified number of shares of a fixed amount each.

Definition of Share: Under Section 2(84) of the Companies Act, 2013, "share" means a share in the share capital of a company and includes stock. Section 44 of the Companies Act, 2013 provides that a share or debentures or other interest of any member in a company is a movable property transferable in the manner provided by the articles of the company. According to Section 45 of the Companies Act, 2013 every share in a company having a share capital shall be distinguished by its distinctive number but this provision shall not apply to a share held by a person whose name is entered as holder of beneficial interest in such share in the records of a depository.

DEFINING THE CLASSES OF SHARE CAPITAL UNDER THE COMPANIES ACT 2013:

Share Capital can be classified in the following categories: These are classified on the basis of maximum amount, subscribed amount, called up, issued and paid up capital.

Pursuant to Section 43 of Companies Act, 2013, the share capital of a company limited by shares shall be of two kinds, namely: —

Equity share capital—

(v) with voting rights; or

(vi) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

Preference share capital.

Brief Analysis:

Equity share capital: It means all share capital which is not preference share capital. It consists of the following features:

1. Equity Shares have voting rights at all general meetings of the company. These votes have the affect of the controlling the management of the company.

2. Equity Shares have the right to share the profits of the company in the form of dividend and bonus shares. However, even equity shareholders cannot demand declaration of dividend by the company which is left to the discretion of the Board of Directors.

3. When the company is wound up, payment towards the equity share capital will be made to the respective shareholders only after payment of the claims of all the creditors and the preference share capital.

Preference share capital: It means that part of the issued share capital of the company which carries or would carry a preferential right with respect to

1. payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

2. repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company.

Cumulative and Non-Cumulative o Cumulative preference shares:
the dividends are accumulated and therefore paid before anything paid to equity shares.

Non-Cumulative preference shares: if company does not pay dividend in current year, claim of preference shareholder is lost to that extent.
Convertible and Non-Convertible :
Convertible preference shares possess an option or right whereby they can be converted into an ordinary equity share at some agreed terms and conditions.

Participating and Non-participating :

Participating preferences share has an additional benefit of participating in 'surplus profits or 'surplus assets' of the company apart from preferential dividend.

The Non-participating preference share are those which are not entitled to participate in the 'surplus profits' or surplus assets'' of the company.

They are entitled to only a fixed rate of dividend. Redeemable and Non-Redeemable o Redeemable preference share has a maturity date on which date the company will repay the capital amount to the preference shareholders. The paying back of capital is called redemption dividend. Preferences share shall be redeemed within a period not exceeding 20 years (however infrastructure companies can issue preferences shares redeemable within a period not exceeding 30 years). o Irredeemable Preference Share do not have any maturity date and are repayable only at the time of winding up of the company. However, as per section 55 of the Companies Act, 2013 no company can issue irredeemable preference shares.

BONUS SHARES Meaning:

A company may, if its Articles provide, capitalize its profits by issuing fully-paid bonus shares. The issue of bonus shares by a company is a common feature. The vesting of rights in bonus shares takes place when the shares are actually allotted; and not from any earlier date. Governing Provisions of Companies Act 2013:

Section 63 and Rule 14 of The Companies (Share Capital and Debentures) Rules, 2014 and SEBI Regulations if the company is listed are applicable. Benefits of Issuing Bonus Shares:

1. It is meant for capitalizing undistributed profits.

2. Fund flow is not affected adversely.

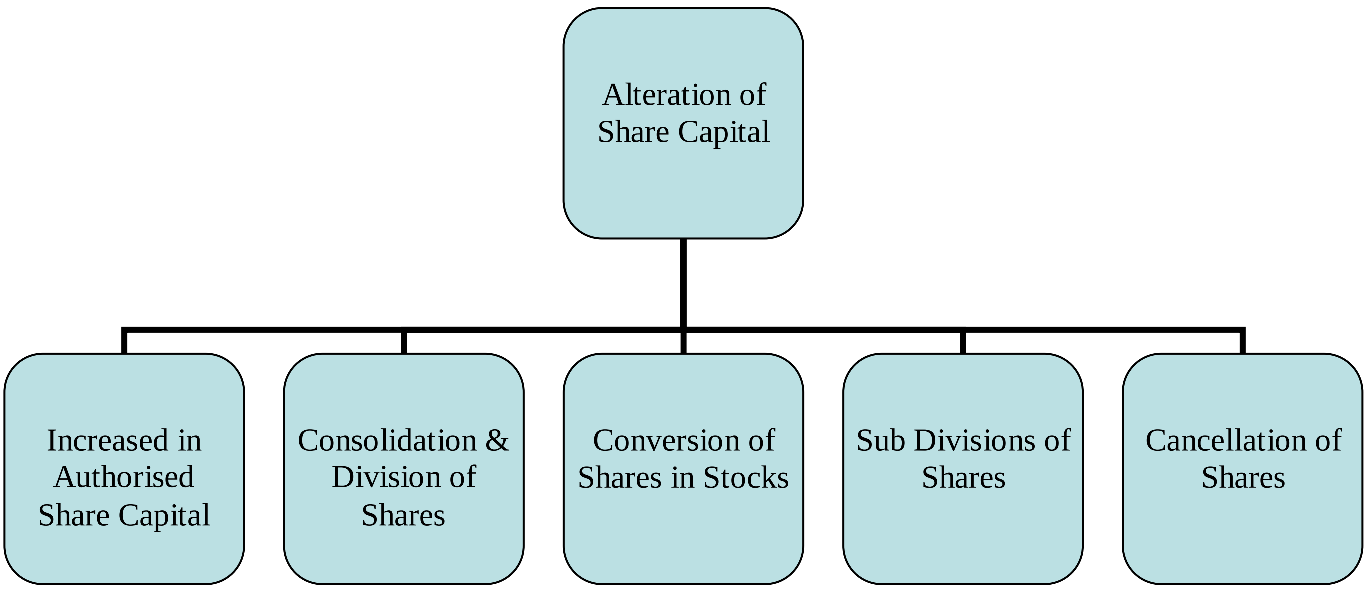
3. Market value of the company's shares comes down to their nominal value by issue of bonus shares.

4. Market value of the members' share holdings increases with the increase in number of shares in the company.

5. 'Bonus shares' is not an income. Hence, it is not a taxable income.

Alteration of Share Capital :

ALTERATION OF SHARE CAPITAL (SECTION 61) The company may for commercial reasons, alter its share capital. Section 61 of the Companies Act, 2013 provides that a limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to



Increase Authorised Capital:
(a)It includes to increase its authorised share capital by such amount, as it thinks expedient;

(b) Consolidation and division of shares: It includes to consolidate and divide, all or any of its existing shares into a larger denomination than of its existing shares e.g., by consolidating ten shares of Rs. 10/- each into one share of Rs. 100/- each. Proviso to Section 61(1)(b) states that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

(c) Conversion in stock: It includes to convert all or any of its fully paid-up shares into stock or reconvert that stock into fully paid-up shares of any denomination;

(d) Sub-division: It includes to sub-divide its existing shares or any of them, into shares of smaller amount than is fixed by the Memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced shall be the same as it was in the case of the share from which the reduced share is derived;

(e) Cancellation of Shares: It includes to cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken up or agreed to be taken by any person and diminish the amount of the share capital by the amount of the shares so cancelled.

BUY-BACK OF SECURITIES

What is Buy-Back?

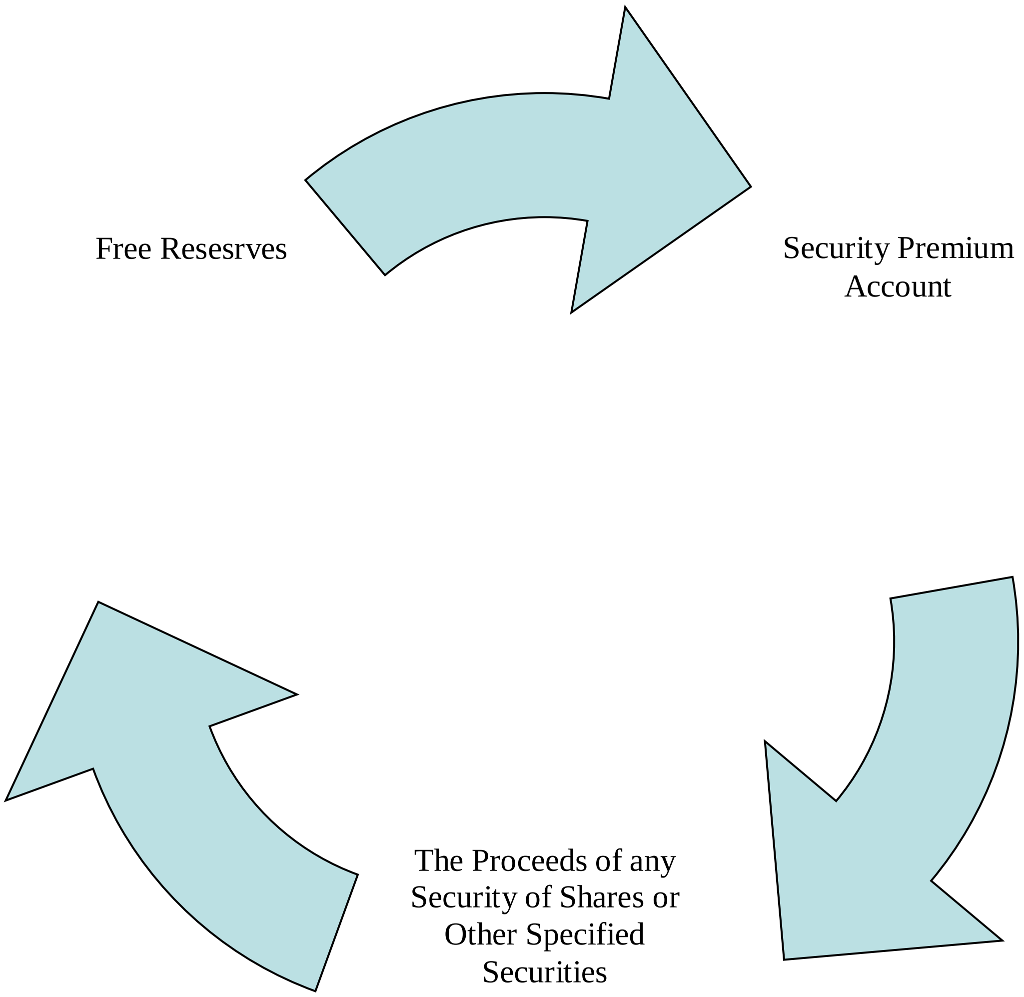
The term buy-back implies the act of purchasing its own shares/securities by a company. This facility enables the Company to go back to the holders of its own shares/securities and make an offer to purchase such shares/ securities from them. Governing Provisions of Companies Act, 2013

(1)Section 68-70: Rule 17 of Companies (Share Capital and Debentures) Rules, 2014.

(2) For Listed Companies: SEBI Regulations are also applicable.

Sources

According to Section 68(1) of the Companies Act, 2013 a company may purchase its own shares or other specified securities (hereinafter referred to as “buy-back”) out of:



However, no buy-back of any kind of shares or other specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities. Thus, the company must have at the time of buy-back, sufficient balance in any one or more of these accounts to accommodate the total value of the buy-

Conditions for Buy Back

2. Authorisation by AOA: The primary requirement is that the articles of association of the company should authorise buy-back. In case, such a provision is not available, it would be necessary to alter the articles of association to authorise buy-back. Buy-back can be made with the approval of the Board of Directors at a Board meeting and/or by a special resolution passed by shareholders in a general meeting, depending on the quantum of buy-back. In case of a listed company, approval of shareholders shall be obtained only by postal ballot.
3. Approval: Board of Directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company and authorize such buy-back by means of a resolution passed at the meeting. Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company, in respect of any financial year.
4. Quantum: The buy-back is twenty-five per cent. or less of the aggregate of paid-up capital and free reserves of the company. In respect of buy-back of equity shares in any financial year the reserve of 25% shall be construed with respect to its paid-up equity capital in that financial year.
5. Debt Equity Ratio after Buy Back The ratio of the aggregate of secured and unsecured debts owed by the company after buy-back is not more than twice the paid-up capital and its free reserves. However, the Central Government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies.
6. Fully paid up shares: all the shares or other specified securities for buy-back are fully paid-up.
7. Time Gap between two Buy Back: No offer of buy back under this sub-section shall be made within a period of one year reckoned from the date of the closure of the preceding offer of buy-back, if any.
8. Completion of Buy Back: Every buy-back shall be completed within a period of one year from the date of passing of the special resolution, or as the case may be, the resolution passed by the Board.
9. Methods of Buy Back: The buy-back may be— (a) from the existing shareholders or security holders on a proportionate basis; (b) from the open market; (c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.
10. Extinguishment of shares: When a company buys-back its own shares or other specified securities, it shall extinguish and physically destroy the shares or securities so bought back within seven days of the last date of completion of buy-back.
11. Prohibition of further issue of shares: Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make a further issue of the same kind of shares or other securities including allotment of new shares under clause (a) of sub-section (1) of section 62 or other specified securities within a period of six months except by way of a bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

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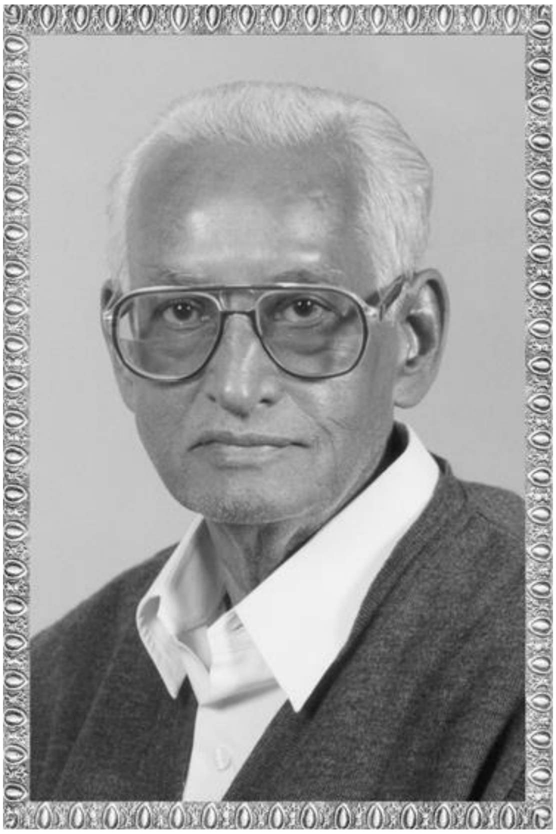

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Unit 3: DIRECTORS, DIVIDENDS, AUDIT,ACCOUNTS, OPPRESSIONS & MISMANAGMENT

UNIT NO.	TOPIC NAME
3.1	DIRECTORS: POSITION, APPOINTMENT, QUALIFICATION, VACATION OF OFFICE, REMOVAL, RESIGNATION, POWERS AND DUTIES OF DIRECTORS, MANAGING DIRECTOR
3.2	DIVIDENDS : AUDITS AND ACCOUNTS, DEBENTURES, FIXED AND FLOATING CHARGES, KINDS OF DEBENTURES
3.3	PREVENTION OF OPERATION AND MISMANAGMENT

3.1 DIRECTORS : POSITION, APPOINTMENT, QUALIFICATION , VACATION OF OFFICE, REMOVAL ,RESIGNATION, POWERS AND DUTIES , MANAGING DIRECTOR

With the aim of promoting a healthy working environment, companies are now strictly adhering to the norms of corporate governance, wherever possible. To foster a healthy corporate legal environment, company law plays a crucial role. From regulating the provisions relating to the structure of the company to the management, conduct, and affairs of the company, the company law deals with everything.

One must understand that even though, in law, a company is a separate legal entity and is termed as a juristic person, it is just an artificial person and has its existence only in contemplation of law. A company cannot act on its own. It requires some driving force or human agency that can carry out the business and other affairs of the company.

From the above discussion, it is clear that a company or a corporation, though a legal entity, does not have a physical or material existence. In order to exercise the functions, duties, rights, and obligations and to have knowledge and intent, the presence of a natural person to handle its affairs is significant. A corporation, not being a natural person, lacks these attributes, and so it acts through a natural person. The affairs of the company or the corporation are delegated to the directors, who in turn act as agents and perform the required functions for the company or the corporation.

Director

In simple terms, the ‘director’ is the supreme executive authority in the company, who is entrusted with the management and control of the company’s affairs. Generally, a company has a team of directors, which are ultimately responsible for the entire management of the company’s state of affairs. These teams of directors are collectively known as the ‘Board of Directors’. In ideal corporate governance practice, it is the team of directors that ensures the protection of the stakeholders of the company and of other members of the company.

This institution of the formulation of a team of members, known as directors, was based on the foundation that a company must have a team of faithful, trustable, and respectable members who work for the betterment of the company. They are appointed to work for the company’s best interests.

It is pertinent to mention here that the directors do not work in an individual capacity, unless specifically said so, in any board resolution meeting. It means that all the directors have to work collectively. The work done by any director in its individual capacity is not binding on the company.

The term 'director' is defined under Section 2(34) of the Companies Act, 2013 (hereinafter referred to as the 2013 Act). It states that a 'director', "means a director appointed to the board of a company." The definition provided under the 2013 Act is not an exhaustive one. This section corresponds to Section 2(13) of the Companies Act, 1956. It defines a director as "any person occupying the position of director by whatever name called".

According to Section 5(2) of the Small Coins (Offences) Act, 1971 (repealed), the term 'director' in relation to a firm is said to be the partner of the firm. Whereas, if the term is used in relation to a society or association, it connotes the person who has been conferred with the management and control of the affairs of that particular society or association under the concerned rules.

In the case of Agrawal Trading Corpn. v. Collector of Customs (1972), it was held by the Apex Court that the meaning of the term 'director' in relation to a firm connotes to the partner of that firm.

In conclusion, the term director connotes a person who has been elected or appointed in accordance with the law and who has been conferred with the task or function of managing and directing the affairs of a company. Directors are often regarded as the brains of a company. They hold a pivotal position in a company's structure as they make important decisions for the company in board meetings or in special committee meetings organised for certain particular purposes. Also, it is noteworthy that a director has to work in compliance with the provisions of the 2013 Act.

Position of directors : a legal perspective

As discussed above, directors are the key managerial personnel of a company. By far, it is very clear that a company, be it private or public, is required to appoint a director. They are entrusted with the entire management of the affairs of the company, and the same is done in accordance with prevailing laws. The role played by the directors in the corporate governance of a company is very significant and crucial.

The term ‘director’ has been defined under Section 2(34) of the 2013 Act; however, the definition fails to provide clarity pertaining to the exact meaning of the term, duties, responsibilities, functions, etc. the director is supposed to perform.

Defining and explaining the position that a director holds is a complex and herculean task. The reasoning is that it varies according to the context and circumstances. There are no precise words that can explain the position that directors hold in any corporate enterprise. However, attempts have been made by various courts to explain the position that a director holds. Let’s take a look at a few important case laws wherein this subject has been dealt with.

In the case of Imperial Hydropathic Hotel Co. Blackpool v. Hampson (1883), the Court of Appeal opined that the position that a director holds in a corporate body is very versatile. Depending upon the circumstances and context, a director can be regarded as a trustee, an agent, or a managing partner. It is pertinent to note that these terms are entirely indicative of the various legal capacities that a director may hold in relation to a company.

While explaining the legal position a director holds, Justice Jessel M. R. In Re Forest of Dean Coal Mining Ltd. Co. (1872), opined that “it does not matter much what you call them, so long as you understand what their true position is, which is that they are merely commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it.”

Section 152(1) of the 2013 Act provides that, in default and as per the contents of the Articles of the Association of a company, the ones who are the subscribers of the Memorandum of Association (provided they are individuals and not an association, enterprise, etc.) shall be termed as directors. However, this shall only be applicable until the directors are duly appointed according to the prevalent provisions and procedures provided in the Companies Act.

Thus, from the above discussion, it is clear that the directors may sometimes act as an agent of a company, whereas sometimes they act as trustees or managing partners. But one clear thing is that they are indispensable organs of the company, responsible for the management of affairs of the company.

A brief explanation of the various legal positions that a director may hold is as under;

Director as an agent

Put simply, a company is an artificial person, and thus it cannot function and work on its own. Thus, a company needs someone to work for it and manage its affairs. So in this sense, the director acts as the agent of the company for which they work. Hence, pursuant to this proposition, the relationship between the director and the company is governed by the principles of the law of agency.

The fact that directors also act as the agents of the company was also recognised by the Scottish Court of Session in the case of Ferguson v. Wilson (1904). The court acknowledged the fact that a corporation or a company, being an artificial person, cannot act on its own, and hence the directors act as the agents of the company and manage the affairs of the company. While considering this duty that a director is entrusted with, the court opined that the relationship between a director and company is akin to the relationship that exists between a principal and agent.

It is pertinent to note that, just as a director does not act as the trustee of the shareholders but that of a company, similarly, the directors are not the agents of individual members but of the institution as a whole.

The High Court of Delhi, in the case of Indian Overseas Bank v. RM Marketing (2001), held that if a director has not given surety for a loan taken by the company in his personal capacity, he cannot be solely held liable merely because he holds the directorship.

Director as trustee

It is pertinent to note that the directors are the trustees of the money of the company, which they are duty-bound to handle as they act as agents in the transactions that are carried out on behalf of the company. As the directors are entirely in control of the company’s funds in the official capacity, which they are obligated to utilise and administer for the benefit and profit of the company, in this sense, they can be regarded as the trustees of the company.

In a strictly literal interpretation, the directors have not been deemed trustees per se; however, they are regarded as trustees of the company’s properties, which have been entrusted to their hands. A similar proposition was laid down by the High Court of Madras in the case of Ramaswamy Iyer v. Brahamayya & Co. (1965). In the aforesaid case, the court held that directors can be held liable as trustees if they misuse the power conferred upon them or if they disregard the power of applying the company’s funds. The court further went on to say that even after the death of the accused director, the cause of action remains with the legal representatives of the director.

Director as a managing partner

As the terms suggest, managing partner in a literal sense connotes the person who is responsible for or who manages the day-to-day running of a company, enterprise, etc. Further, as we have discussed, a director, before everything else, is the person responsible for the management of the affairs of the company. Thus, his role as a managing partner needs no explanation.

Furthermore, the shareholders' will and their needs are entirely taken care of by the directors of the company. They act as the agents of the shareholders' and pursue their objectives. Also, one must note that a director possesses extensive powers and exercises many proprietary functions. The Article of the Association as well as the Memorandum of Association bestow on the board of directors the ultimate authority to formulate policies and decisions for the welfare of the company in accordance with the law.

Directors as an organ of the company

The transformation and evolution of the roles and responsibilities of modern-day corporate entities, with time, have led to the emergence of a new theory called the 'organic theory of corporate life'. In terms of this theory, certain officials of the company are treated as the organs of the company. As per this theory, the company is held liable for the actions of these organs in a manner similar to the one where a natural person is held accountable for the actions of his limbs.

Put simply, in the modern era, the directors are much more than just agents or trustees; they are often regarded as the organs of the company. Almost the entire work of the corporate entities and companies is conducted by the directors and their managerial personnel.

They are conferred with enormous powers through the regulations embodied in the Articles of Association. The courts in various judgements have opined that the directors function like the brain of the company, and it is through the directors that the company acts. The same observation was laid down by the Hon'ble Apex Court in the case of the State Trading Corporation of India Ltd. and ors v. Commercial Tax Officer, Visakhapatnam and ors. (1963).

Appointment of directors

The crucial role that the directors play in the management of the affairs of the companies is unquestionable. Thus, the persons appointed to the post of director hold desirable qualities and integrity. The 2013 Act has an ample body of provisions that deal with the appointment of various directors in a very elaborate manner.

According to Section 149 of the 2013 Act, every company is required to have a Board of Directors. The board shall have individuals as directors. Further, it provides the minimum number of directors that a company is required to have, i.e., for a public company, the minimum number is three, and for a private company, the minimum number is two. In the case of a one-person company, the minimum number is one. Furthermore, the provision also provides for a maximum number of directors, i.e., fifteen.

The proviso clause provides that a company can also appoint more than fifteen directors by passing a special resolution. Also, having one woman director is an essential requirement.

Section 149(3) mandates the presence of at least one director who stays in India for a total of 182 days during the financial year. Whereas, sub-section 4 provides that every listed company is to have at least one-third of the total independent directors. For public companies, the Central Government may prescribe a limit on the minimum number of independent directors.

Section 152 provides for the appointment of directors. Let’s have a brief overview of how different classes of directors are appointed.

Appointment of the first directors

Generally, the first directors are appointed by the subscribers of the Memorandum of Association (Section 152(1) of the 2013 Act). In case the appointments are not done in the aforementioned way, the individual subscribers and signatories of the MOA become the directors. Further, it is important to note that the first directors only hold the office until the new ones are appointed in the first annual general meeting.

It is pertinent to note that no person shall be capable of being appointed as a director of a public company (that has a share capital) unless he fulfils the below-mentioned points:

Allotment of a Director Identification Number (DIN) as per the provisions of Section 154 of the 2013 Act.

The First Director has signed and filed a consent in writing for the appointment with the Registrar of Companies (ROC). Provided this must be done within thirty days of the appointment of the director.

He has signed the memorandum for his qualification shares, if any.

A written undertaking to the ROC if he has taken any qualification shares from the company. He must also pay for that qualification share. Further, an affidavit is also required to this effect, specifying that shares have been registered in his name.

In cases of independent directors appointed in the general meeting, it is mandatory that an explanatory statement by the board be provided for such an appointment. The statement must mention that the director fulfils the requirements as per the 2013 Act.

Section 162: Voting on the appointment of director

It is important to note that the appointment of every director in a public company or its subsidiary and the passing of an ordinary resolution in this context in the general meeting are mandatory. According to Section 162 of the 2013 Act, it is mandatory that each candidate must be voted individually. Thus, if two or more directors are appointed by a single resolution, then it will be invalid and void in the eyes of the law. However, if in the meeting it has been unanimously decided, more than one director can be appointed by a single resolution. Further, if such an appointment is made, it is necessary that first a resolution is passed which authorises such an appointment.

One must note that this provision does not apply to private companies that are not subsidiaries of public companies.

Appointment by proportional representation

The basic or traditional method for appointment is an election by a simple majority of the shareholders. However, it has been observed that this method of appointment frequently fails to appoint even a single director on the board. Thus, Section 163 of the Companies 2013 Act allows the minority to place their representative and enables minority shareholders to appoint directors through the method of proportional representation. The very purpose of enumerating this provision of voting through proportional representation is to amplify the method of minority voting.

This method can be followed by different methods, namely, a single transferable vote, voting by way of cumulative voting or any other means. This system of appointment by way of proportional representation is also called a ‘cumulative voting system’. Put simply, this provision allows companies to appoint directors through the method of proportional representation. One must note that this method can only be adopted if the Articles of Association (AOA) provide for it.

Disqualifications

Section 164 of the 2013 Act provides for the eligibility criteria for the directors of the company. Under the following circumstances, a person will not be eligible for the appointment of director if,

(1)He is of unsound mind and has been declared as a person of unsound mind by the competent court.

(2)He is an un discharged insolvent.

(3)A person who has applied to be adjudicated as an insolvent or whose application for adjudicating him as an insolvent is pending.

(4)A person charged for any offence, whether involving moral turpitude or otherwise and has been sentenced for that offence to imprisonment for not less than 6 months, and a maximum of 5 years has not been passed after that imprisonment.

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company.

(5)If he has been disqualified by any tribunal for the concerned position.

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company.

(6)A person who has been convicted of the offence dealing with related party transactions under Section 188 at any time during the last preceding five years.

(7)The concerned person has not made any calls relating to the shares of the company he holds.

(8)If he has not complied with the provisions of Section 152(3) and Section 165(1) of the 2013 Act.

(9)Further, if the person who has been previously appointed as a director has not a filed financial statement and paid returns for up to 3 financial years, continuously failed to repay the accepted deposits, payment of interest, or pay any declared dividend, he or she shall not be eligible to be re-appointed as director in any other company for a period of 5 years.

Apart from this, a private company may provide in its Articles of Association for any disqualifications along with the ones provided in the aforementioned provision.

VACATION OF OFFCIE OF DIREDTORS :

(1) The office of a director shall become vacant in case—

(a) he incurs any of the disqualifications specified in section 164;

(b) he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;

(c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

(d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;

(e) he becomes disqualified by an order of a court or the Tribunal ;

(f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)—

(i) for thirty days from the date of conviction or order of disqualification;

(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.

Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

(g) he is removed in pursuance of the provisions of this Act;

(h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary company , associate company , ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both five lakh rupees.

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(4) A private company may, by its articles , provide any other ground for the vacation of the office of a director in addition to those specified in sub-section

Removal of Director:

Removal of director

Section 169 of the 2013 Act, provides for the removal of the director. As per the said provision, a director can be removed from his office by any of the two below-mentioned authorities;

Company

Tribunal

Removal by company

Section 169(1) of the 2013 Act provides that a person can be removed from his directorship prior to the expiration of the term of his office by passing an ordinary resolution. However, the aforesaid section does not apply to the below-mentioned circumstances.

If the director is appointed by the tribunal in pursuance of Section 242.

If the company has adopted the system of electing two-thirds of its directors by the method of proportional representation.

In order to remove a person from his directorship, furnishing him with a special notice is mandatory. In the aforesaid notice, an intimation regarding the intention to remove the director must be there. Further, it should be served at least 14 days prior to such a meeting.

As soon as the company receives such notice, a copy of such notice is furnished to the director concerned. Then the concerned director has the right to make a presentation against the resolution at the general meeting. If a director makes a representation, then its copy needs to be circulated among the members.

Removal by the Tribunal

Clause (h) of Section 242(2) confers the power to remove a managing director, manager, or any other director of the company. When an application is made to the tribunal for relief from oppression or mismanagement, it may terminate any agreement of the company that has been made with a director. When the appointment of a director is terminated, he cannot serve the managerial position of any company for five years without leave of the Tribunal.

Powers of Directors :

Generally, the powers conferred upon the directors are expressly or otherwise outlined in the Articles of Association of the company. Once these powers mentioned in articles are delegated and vested in the Board of Directors, only they can exercise them. It is pertinent to note that the shareholders cannot order or direct the board as to how the powers are to be exercised. Provided, the board exercises these powers within the prescribed scope.

General powers vested under Section 179

Section 179 of the 2013 Act provides that the Board of Directors will be entrusted with all the powers conferred upon them by the company. The board is entitled to exercise all the powers that the company has authorised. However, it is pertinent to note that these powers are subject to certain restrictions.

The powers of directors are co-extensive with the powers of the company itself. The director, once appointed, has almost total power over the operations of the company.

There are two limitations on the exercise of the power of directors, which are as follows:

The board of directors is not competent to do the acts that the shareholders are required to do in general meetings.

The powers of directors are to be exercised in accordance with the memorandum and articles.

The individual directors have powers only as prescribed by memorandum and articles.

The intervention of shareholders in exceptional cases

In the following exceptional situations, the general meeting is competent to act on matters delegated to the board:

When directors have acted malafide.

When directors have due to some valid reason become incompetent to act.

The shareholders can intervene when directors are unwilling to act or there is a situation of deadlock.

The general meetings of shareholders have the residuary powers of a company.

Powers to be exercised with general meeting approval

Section 180 of the 2013 Act mentions certain powers that can be exercised by the Board only when they are approved in the general meeting:

To sell, lease, or otherwise dispose of the whole or any part of the company’s undertakings.

To invest otherwise in trust securities.

To borrow money for the purpose of the company

To give time or refrain the director from repayment of any debt.

When the director has breached the restrictions imposed under the sections, the title of lessee or purchaser is affected unless he has acted in good faith along with due care and diligence. This section does not apply to companies whose ordinary business involves the sale of property or putting a property on lease.

Power to constitute an audit committee

Section 177 of the 2013 Act provides power to the board of directors to formulate an audit committee. It is to be noted that the committee should be constituted of at least three directors, including independent directors. Further, it is mandatory that the committee should have independent directors in the majority. The chairperson and members of the audit committee should be persons with the ability to read and understand the financial statements.

The audit committee is required to act in accordance with the terms of reference specified by the board in writing.

Power to constitute nomination and remuneration committees and stakeholder relationship committee

The Board of Directors can constitute the Nomination and Remuneration Committee and Stakeholder Relationship Committee under Section 178 of the 2013 Act. The Nomination and Remuneration Committee should consist of three or more non-executive directors out of which one-half are required to be independent directors.

The Board can also constitute the Stakeholders Relationship Committee, where the board of directors consists of more than one thousand shareholders, debenture holders, or any other security holders. The grievances of the shareholders are required to be considered and resolved by this committee.

Power to make a contribution to charitable or other funds

The Board of Directors of the company is empowered under Section 181 to contribute to bona fide charitable and other funds. The prior permission of the company in a general meeting is required when the aggregate amount of contribution, in any case, exceeds 5% of the average net profit of the company for the immediately preceding financial years.

Power to make a political contribution

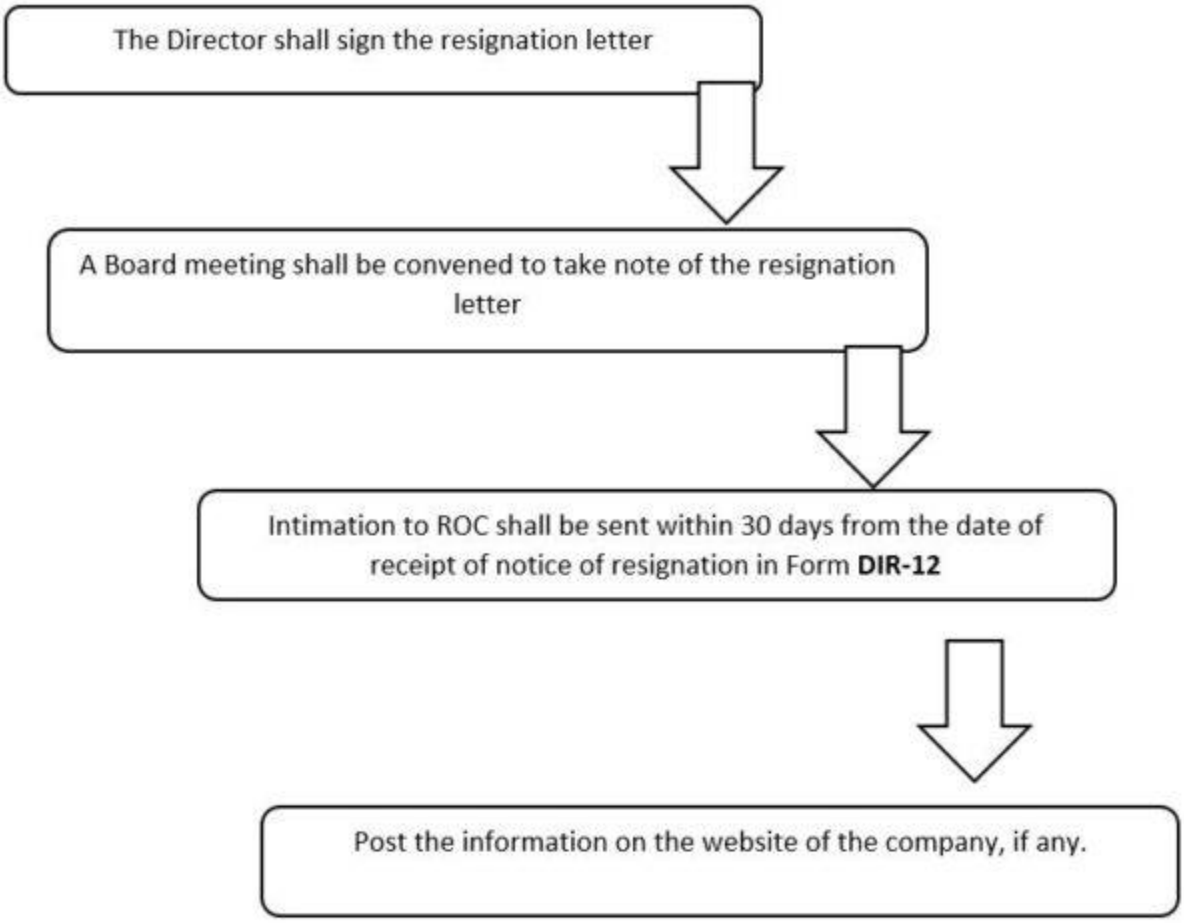
Under Section 182 of the 2013 Act, the companies can make a political contribution. The company making a political contribution should not be other than a government company or a company that has been in existence for less than three years.

Also, the amount of contribution should not exceed 7.5% of the company's net profit in the three immediately preceding financial years. The contribution needs to be sanctioned by a resolution passed by the Board of Directors.

Power to contribute to the national defence fund

The Board of Directors is empowered to make contributions to the national defence Fund or any other fund approved by the Central Government for the purpose of National Defence under Section 183 of the 2013 Act. The amount of contribution can be the amount as much as the company thinks fit. This total amount of contribution made is mandated to be revealed in the profit and loss statement during the financial year to which it pertains.

Resignation of Director:



Resignation by the director

The provision for resignation by the director is provided under Section 168 of the 2013 Act. A director of a company may resign from the position of directorship as per the norms or rules or in the manner provided in the Articles of Association of the company. In case the articles do not contain any rules or provisions in this respect, then the director may give his resignation after providing a notice for the same to the board and the company. Further, the company, after taking notice of the resignation, is required to inform the Registrar of Companies in the manner and within the time as prescribed. The report of such resignation by the director should also be placed forward in the general meeting of the company.

As per the proviso to Section 168(1) of the 2013 Act, the director may also forward a copy of his resignation within thirty days to the registrar, along with mentioning the reasons for the same. Further, as per Section 168(2), the resignation shall be effective as soon as the company receives the intimation of the same by the notice or on any specific date as provided in the notice. Section 168(3) of the 2013

Act provides that if all the directors vacate their offices under Section 167, then, for the time being, the promoters or the Central Government, in the absence of any promoter, shall appoint the required number of directors, who shall hold office till the directors are appointed by the company in a general meeting.

In the case of Mother Care (India) Pvt. Ltd. v. Ramaswamy P. Aiyar (2003), the Karnataka High Court held that the resignation of a director would be effective even if he was the only director in the office.

It is important to note that even after resignation, the director can be held liable for any wrong associated with him or that has been done in his personal capacity during the period in which he served as the director.

MANAGING DIRECTOR:

Every Company must have Directors and they will be called the Board of Directors (BOD). But all the directors cannot engage in the management of the company due to different reasons. For smooth running of the company they elect one person to manage all the affairs of the company. And the person can be a Manager or a Managing Director but not both at a time.

A Managing Director is a person who is a Whole-Time Director of the company, appointed by the board of Directors to manage the affairs of the company. He/she is one of the Board of Directors (BOD), and he/she must be an individual, that is the Managing director must be a person and not a firm or an organization

There is a difference between a Manager and a Managing Director of the company. It is clear that a Managing Director should be a Director in the 1st place. A Manager need not be a director, he/she is just an employee of the company. There are certain other differences like the number of persons that can be appointed, contract of engagement and disqualifications applicability. The Manager Director of a company will have a contract with company and the Manager does not require such.

The Managing Director plays a duel role. He/she is the authority of the company as director who attends Board meetings and as a Manager, he/she performs the managerial functions of the company also.

The appointment of a Managing Director is not mandatory for a company.

• But if a Managing Director is appointed:

- He/ She will be a bridge between the Board and the management actions of the company.
- He/ She will know the company's policies better and will execute them with the correct strategic plans and in a rightful manner.

- Maximum Number of Managing Director that a company can appoint at a time is 2 and not more than that. But in case of a Manager it is only one.

Appointment of Managing Director:-

Any individual who is a member of the Board of Directors (BOD).

The law does not specify the qualifications of a person to be a Managing Director. But it does state some disqualification for a person not being a Managing Director. Which are as below:

- A person who was declared as an insolvent during the appointment or at any time in the past,
- A person who is not a resident of India
- A person who has been convicted by court of offense and sentenced for a period more than 6 months
- A person who suspends or suspended any payment to a creditor at any time in the past
- The person should not be below 21 years and above 70 years old.

  But a Person who is above 70 years can be appointed as a Managing Director with a special resolution and approval from the Central Govt, which will be given with proper reason for the appointment of such person.

How a person can be appointed as a Managing Director?

Any Member in the Board can suggest any other Director to be the Managing Director of the company.

- The Managing Director of a company can be appointed in the General Meeting of the company or at a Board Meeting if the same is approved in the company's MOA.

- If the appointment is done in Board Meeting by the Board of Directors, then the same should be approved in the next General Meeting of the company, if not an Extra-ordinary General meeting is to be conducted and the same should be approved.

  If the person is appointed in the Board Meeting and the same is not approved in the General Meeting the actions done by the Managing directors from the date of appointment to the date of general meeting will be valid unless there is any public interest being effected or fraud involved.

Term of Managing Director:-

- A person can be appointed as a Managing Director not for a period more than 5 years at the appointment.

  However, it can be extended after the completion of the term.

  And the re-appointment of the same person cannot be done earlier than 1 year before the expiry of his term.

Registration of the Appointment of Managing Director:-

• The appointment of a Managing Director should be registered with Registrar of companies in the prescribed Form within 60 days of the appointment.

- MGT-14 u/s 117(3)(c) of the companies act, 2013 within 30 days of the appointment;
- DIR-12 u/s 170(2) of the companies act, 2013 within 30 days of the appointment;
- MR-1 u/s 196(4) of the companies act, 2013 within 30 days of the appointment;

3.2 Dividends , Adults and accounts , debentures, fixed and floating charges, kinds of debentures, protection of minority rights.

Dividends :

Dividend has been defined in Section 123 of the company act, 2013. Rule 12 of the companies rules provides the provision for the declaration of Dividend.

Meaning of Dividend :

Section 2(35) of the Companies Act, 2013, defines the term "dividend" as any distribution of profits by a company to its shareholders, whether in cash or in kind. It includes bonus shares, but does not include the distribution of assets on liquidation of a company.

Section 123 of the Companies Act, 2013, lays down the provisions for the declaration and payment of dividends. According to this section, a company may declare and pay dividends only out of the profits of the company for that year or any previous year(s) after providing for depreciation or out of the profits of the company for any previous year(s) after providing for depreciation and after setting aside an amount for reserves as may be prescribed.

(1) No dividend shall be declared or paid by a company for any financial year except—

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both or; both

Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or

(b) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves transferred by the company to the free reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves .

Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.

(2) For the purposes of clause (a) of sub-section (1), depreciation shall be provided in accordance with the provisions of Schedule II.

(3) The Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared:

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

(3) The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.

(4) The amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.

(5) No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash:

Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company:

Provided further that any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of the dividend.

(6) A company which fails to comply with the provisions of sections 73 and 74 shall not, so long as such failure continues, declare any dividend on its equity shares.
Further, the company may declare interim dividends during any financial year or at any time before the finalization of the accounts of that year. However, such interim dividends can be paid only out of the surplus in the profit and loss account and the reserves of the company.

Forms The declaration and payment of dividends require compliance with various forms under the Companies Act, 2013. Some of the important forms are:

1. Form MGT-14: This form is used for filing the resolution passed by the board of directors for the declaration of dividends with the Registrar of Companies.

2. Form SH-9: This form is used for the issue of duplicate dividend warrants to the shareholders in case the original warrant is lost, stolen, or destroyed.

3. Form MGT-15: This form is used for the filing of the resolution passed by the board of directors for the declaration of interim dividends with the Registrar of Companies. Explanations related to Dividend under Companies Act, 2013

The following explanations provide a deeper understanding of dividends under the Companies Act, 2013:

1. Declaration of Dividends: The declaration of dividends is a decision taken by the board of directors of a company. The board must pass a resolution to declare dividends, and the resolution must be filed with the Registrar of Companies in Form MGT-14. The declaration of dividends must be made out of the

profits of the company for that year or any previous year(s) after providing for depreciation or out of the profits of the company for any previous year(s) after providing for depreciation and after setting aside an amount for reserves as may be prescribed.

2. Interim Dividends: Interim dividends are declared and paid during any financial year or at any time before the finalization of the accounts of that year. However, such dividends can be paid only out of the surplus in the profit and loss account and the reserves of the company.

3. Unpaid Dividends: In case of unpaid dividends, the amount of the dividend must be transferred to a special account within 30 days of the expiry of the due date for payment of the dividend. The unpaid dividend account must be managed by a designated person and must be transferred to the Investor Education and Protection Fund (IEPF) after seven years.

Case Laws related to Dividend under Companies Act, 2013 :

The following case laws provide a better understanding of the legal provisions relating to dividends under the Companies Act, 2013:

1. In the case of Tata Consultancy Services Limited v. State of Maharashtra and Others, the Bombay High Court held that a company cannot be compelled to declare dividends. The court held that the power to declare dividends rests with the board of directors, and shareholders cannot compel the company to declare dividends.

2. In the case of Srichand P. Hinduja and Another v. Hinduja Foundries Limited and Others, the Supreme Court of India held that interim dividends can be declared and paid by a company during any financial year or at any time before the finalization of the accounts of that year. The court held that the payment of interim dividends must be made out of the surplus in the profit and loss account and the reserves of the company.

Audit :

The Companies Act, 2013 is the principal legislation governing the incorporation and management of companies in India. The Act has introduced various provisions related to audit that are aimed at ensuring transparency, accountability, and corporate governance in companies. Under the Act, there are different forms of audit that companies are required to undertake, depending on their size, nature of operations, and other factors.
Statutory Audit Definition of Statutory Audit and Purpose:

A statutory audit is an external audit of a company’s financial statements, conducted by a qualified auditor. The purpose of a statutory audit is to provide assurance to the stakeholders of a company that its financial statements are accurate and reliable. Statutory Audit Applicability and Threshold Limit Under the Companies Act 2013 Every company is required to appoint a statutory auditor to audit its financial statements.

However, the threshold limit for appointing a statutory auditor varies based on the type and size of the company. Appointment of Auditors for Statutory Audit A company is required to appoint a qualified auditor as its statutory auditor.

The auditor must be independent, and not have any direct or indirect financial interest in the company. The appointment of the auditor must be approved by the shareholders of the company. Statutory Audit Report and Compliance The statutory auditor is required to prepare an audit report that provides an opinion on the accuracy and reliability of the company's financial statements.

The audit report must be submitted to the shareholders of the company, along with the financial statements. Companies are required to comply with the audit report's findings and rectify any errors or discrepancies that are identified.

Internal Audit Internal Audit Definition and Purpose Internal audit is a process by which a company's internal controls, accounting procedures, and financial statements are reviewed by an independent auditor. The purpose of internal audit is to identify and evaluate the company's internal control systems and make recommendations for improvements.

Internal Audit Applicability and Threshold Limit Under the Companies Act 2013 Every company that meets the threshold limit of paid-up share capital of Rs. 50 crore or more, or turnover of Rs. 250 crore or more, is required to have an internal audit system.

Appointment of Internal Auditors:

A company can either appoint an independent internal auditor or set up an internal audit department. The internal auditor or department must be independent of the company's management and must report directly to the audit committee. Internal Audit Report and Compliance The internal auditor is required to prepare an audit report that provides an opinion on the adequacy and effectiveness of the company's internal control systems.

The audit report must be submitted to the audit committee of the company, along with recommendations for improvements. Companies are required to comply with the audit report's findings and implement the recommendations made by the internal auditor.

Cost Audit Definition and Purpose:
Cost audit is a process by which a company's cost accounting records and cost statements are audited by a qualified cost accountant. The purpose of cost audit is to ensure that the company's cost accounting records and statements are accurate and in compliance with the Cost Accounting Standards (CAS) issued by the Institute of Cost Accountants of India (ICAI).

Cost Audit Applicability and Threshold Limit Under the Companies Act 2013, every company engaged in the production, processing, manufacturing, or mining of goods or services is required to conduct a cost audit.

The threshold limit for conducting a cost audit varies based on the following In respect of companies in the Regulated sectors as contained in Table A of Rule 3 of the Companies (Cost Records and Audit) Rules, 2014 shall get its cost records audited if the Overall annual turnover of the company from all its products and services during the immediately preceding financial year is 50 crore or more and Aggregate turnover of the individual products or service for which cost records are required to be maintained under Rule 3 is 25 crore or more.

In respect of companies in the Non-regulated sector as contained in Table B of Rule 3 of the Companies (Cost Records and Audit) Rules, 2014 shall get its cost records audited if the Overall annual turnover of the company from all its products and services during the immediately preceding financial year is 100 crore or more and Aggregate turnover of the individual products or service or services for which cost records are required to be maintained under Rule 3 is 35 crore or more.

Secretarial Audit Definition and Purpose :

Secretarial audit is a process by which a company's compliance with various laws and regulations is reviewed by a qualified company secretary. The purpose of secretarial audit is to ensure that the company is complying with all the applicable laws and regulations.

Applicability of Secretarial Audit and Threshold Limit Under the Companies Act 2013 Every company that meets the threshold limit of paid-up share capital of Rs. 50 crore or more, or turnover of Rs. 250 crore or more, is required to conduct a secretarial audit.

Section 143 of the companies act , 2013: Powers of auditor and auditing standards

(1) Every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place and shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor and amongst other matters inquire into the following matters, namely:—

(a) whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its member;

(b) whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company;

(c) where the company not being an investment company or a banking company , whether so much of the assets of the company as consist of shares , debenture and other securities have been sold at a price less than that at which they were purchased by the company;

(d) whether loans and advances made by the company have been shown as deposits;

(e) whether personal expenses have been charged to revenue account;

(f) where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading:

Provided that the auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries its subsidiaries and associate companies insofar as it relates to the consolidation of its financial statement with that of its subsidiaries its subsidiaries and associate companies .

(2) The auditor shall make a report to the members of the company on the accounts examined by him and on every financial statement or other document which are required by or under this Act to be laid before the company in general meeting and the report shall after taking into account the provisions of this Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act or any rules made there under or under any order made under sub-section (11) and to the best of his information and knowledge, the said accounts, financial statement or other document give a true and fair view of the state of the company's affairs as at the end of its financial year and such other matters as may be prescribed.

(3) The auditor's report shall also state—

(a) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit;

(b) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(c) whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report;

(d) whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;

(e) whether, in his opinion, the financial statements comply with the accounting standards;

(f) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;

(g) whether any director is disqualified from being appointed as a director under sub-section (2) of section 164;

(h) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;

(i) whether the company has adequate internal financial controls system internal financial controls with reference to financial statements in place and the operating effectiveness of such controls;

(j) such other matters as may be prescribed.

(4) Where any of the matters required to be included in the audit report under this section is answered in the negative or with a qualification, the report shall state the reasons therefor.

(5) In the case of a Government company, the Comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of section 139 and direct such auditor the manner in which the accounts of the Government company are required to be audited and In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor-General of India shall appoint the auditor under sub-section (5) or sub-section (7) of section 139 and direct such auditor the manner in which the accounts of the company are required to be audited an thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company.

(6) The Comptroller and Auditor-General of India shall within sixty days from the date of receipt of the audit report under sub-section (5) have a right to—

(a) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorise in this behalf; and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General of India may direct; and

(b) comment upon or supplement such audit report:

Provided that any comments given by the Comptroller and Auditor-General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under sub section (1) of section 136 and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

(7) Without prejudice to the provisions of this Chapter, the Comptroller and Auditor-General of India may, in case of any company covered under sub-section (2) of section 123, if he so deems necessary, by an order, cause test audit to be conducted of the accounts of such company. The provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971 (56 of 1971), shall apply to the report of such test audit.

(8) Where a company has a branch office, the accounts of that office shall be audited either by the auditor appointed for the company (hereafter in this section referred to as the company's auditor) under this Act or by any other person qualified for appointment as an auditor of the company under this Act and appointed as such under section 139, or where the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by the company's auditor or by an accountant or by other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country and the duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be such as may be prescribed :

Provided that the branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

(9) Every auditor shall comply with the auditing standards.

(10) The Central Government may, after consultation with the National Advisory Committee on Accounting and Auditing Standards, by notification, lay down auditing standards:

Provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

(11) The Central Government may, after consultation with the Advisory Committee, by general or special order, direct, in respect of such class or description of companies, as may be specified in the order, that the auditor's report shall also include a statement on such matters as may be specified therein.

Provided that until the National Financial Reporting Authority is constituted under section 132, the Central Government may hold consultation required under this sub-section with the Committee chaired by an officer of the rank of Joint Secretary or equivalent in the Ministry of corporate Affairs and the committee shall have the representatives from the Institute of Chartered Accountants of India and Industry Chambers and also special invitees from the National Advisory Committee on Accounting Standards and the office of the Comptroller and Auditor General. (Effective from 10th April,2015)

(12) Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

(12) Notwithstanding anything contained in this section, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time and in such manner as may be prescribed:

Provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such manner as may be prescribed:

Provided further that the companies, whose auditors have reported frauds under this subsection to the audit committee or the Board but not reported to the Central Government, shall disclose the details about such frauds in the Board's report in such manner as may be prescribed.

(13) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section

(12) if it is done in good faith.

(14) The provisions of this section shall mutatis mutandis apply to—

(a) the cost accountant in practice cost accountant conducting cost audit under section 148; or

(b) the conducting secretarial audit under section 204.

(15) If any auditor, cost accountant, or company secretary in practice does not comply with the provisions of sub-section (12), he shall,—

(a) in case of a listed company, be liable to a penalty of five lakh rupees; and

(b) in case of any other company, be liable to a penalty of one lakh rupees.

(15) If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

Debentures :

Securities are issued by companies to acquire capital from investors. A security is a negotiable instrument issued by a company or a government which has a certain monetary value to acquire capital from the persons who invest in it. There are three types of securities in company law – a) equity securities which give the equity share value as a security to the person who is investing; b) derivatives securities which give value through another financial instrument or promise or contract and, c) the debt securities which gives the creditor a value through an instrument which comes with a charge on the assets provided as a collateral or security.

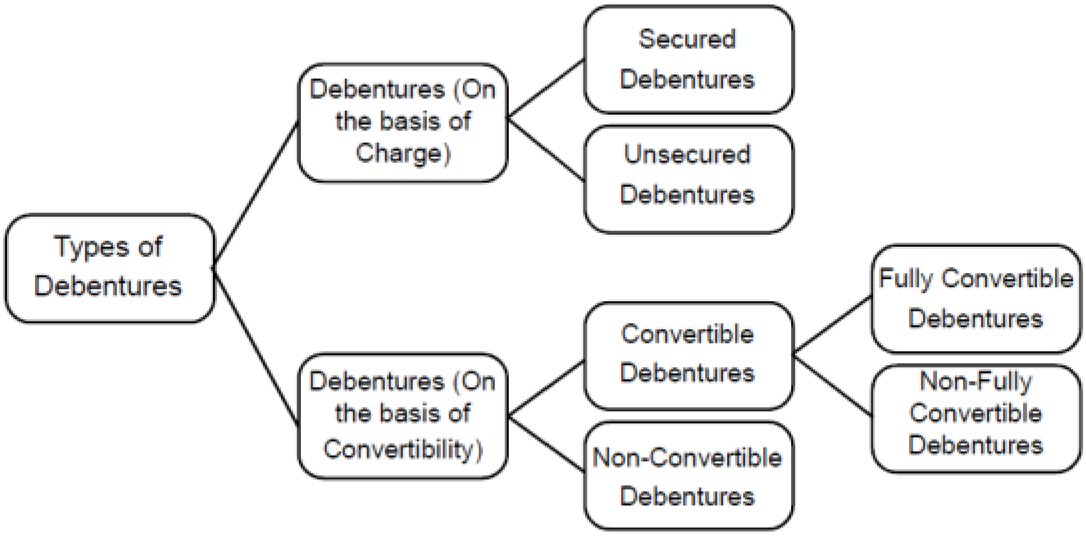
Debentures are a type of debt securities issued by a company and are one of the best ways for a company to acquire capital without diluting its ownership or equity values. Debenture has its own features with respect to both the companies and the debenture-holders. It is good for the company as it helps the company to acquire capital without diluting any of its ownership, and it is also good for the debenture-holders as they are secured through their right to charge. A more detailed analysis of debentures is given below in the article.

Meaning of debentures according to Companies Act, 2013

A debenture is a type of debt instrument which is issued by a company to raise capital. Debenture is a long-term debt instrument which may be in the form of a bond or a loan which is secured by the charge upon the assets which have been provided as securities. Debentures have a fixed rate of interest and other characteristics which are described in detail later in the article.

According to Section 2(30) of the Companies Act, 2013 – the term “debenture” includes debenture stock, bonds, or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. The definition in the Companies Act, 2013 does not mandate the creation of a charge. So, a debenture can be issued without creating a charge on the company’s assets. For example, unsecured debentures are issued without creating a charge, where the company is not required to provide any property or asset as a security for the debt amount acquired by issuing the debentures.

Types of debentures



Debentures are several types and each has its own features and characteristics. The different types of debentures are listed below.

Debentures based on security

Debentures based on tenure

Debentures based on conversion

Debentures based on registration

Debenture based on security

Usually, the debenture-holder has less or no risk for the amount he has lent to the company to get the debentures since he has securities to charge, upon the default of payment by the company. The debentures based on security are of two types – secured and unsecured debentures.

Secured debentures

Secured debentures are also known as mortgage debentures. They are a type of debenture that are secured by a charge either fixed, or floating, on a company's assets. The holder of this type of debenture has the right to recover the principal amount and the interest from the assets which have been given as securities.

Unsecured debentures

In this type of debenture, the companies are not required to pledge any of their properties or assets as collateral for the debt amount. Since the unsecured debentures do not require any assets to be used as a security, the lender usually is at high risk of losing his principal amount in case the company defaults. This type of debenture has a high rate of interest.

Debentures based on tenure

Redemption of the debenture occurs when on the maturity date, the company pays back the principal amount along with the interest and releases its properties or assets from the charge given to the debenture-holder. It is divided into two types – redeemable and irredeemable debentures.

Redeemable debentures

Most of the debentures are redeemable, meaning on the expiry of the maturity date, the debenture is redeemed by the company by paying back the principal amount with interest to the debenture-holder and releasing its assets from charge.

Perpetual or Irredeemable debentures

If a debenture does not contain any clause as to the payment of the principal amount by the company and redeeming the debenture, then it is known as a perpetual or irredeemable debenture. This type of debentures, unlike redeemable debentures, does not cease on the maturity date.

Debentures based on conversion

The company has the right to convert the debentures into equity shares. There are two types of conversion of debentures – convertible and non-convertible debentures.

Convertible debentures

The company issuing debentures has the right to convert these types of debentures into equity shares. So the debenture-holder who was just a creditor to the company becomes a member of the company and enjoys ownership of the company to the extent to which he has the equity shares of the company.

Non-convertible debentures

This type of debenture cannot be converted into equity shares of the company. So the debentures will always be redeemed and will never have the characteristics of equity shares of the company.

Debentures based on registration

As most of the important deeds and instruments of a company are usually registered in the company, debentures are no exception. There are two types – registered and unregistered debentures.

Registered debentures

If debentures are issued by the company, the company is required to maintain a register of its debenture-holders as Section 88 of the Companies Act, 2013 provides that every company shall register the holders of its debentures. Both, the debenture certificate and the company's register, shall have the name of the debenture holder.

Unregistered or Bearer debentures

The company can avoid the registration of the debenture-holders if it issues the debentures to the bearer. Such types of debentures are transferable, like negotiable instruments, by way of simple delivery and are also called debentures payable to the bearer.

Fixed and floating Charges :

When a limited company borrows money from a bank or other financial institution, it is not unusual for the lender to ask for security for the debt.

If your business has given lenders fixed and/or floating charges against some assets in your business or a floating charge over all assets, the first point to note is that the lender in question will be a secured creditor. There is a major difference between secured and unsecured creditors if your business becomes insolvent, with secured creditors having far stronger rights.

A second important implication linked to fixed and/or floating charge holders being secured creditors is that, in many cases, the documents you have signed will give the lender enhanced rights to take action against some assets of your business. even if the business is not legally insolvent at that point. So, a technical default can give fixed and/or floating charge holders the ability to act in a way which could mean your business cannot continue.

If you are starting to have financial problems and know that you have fixed or floating charges (a floating charge is often also known as a debenture) getting good, experienced advice may mean the difference between losing control of it or not. We are experienced in advising business owners in this situation and there is often room to negotiate or find ways to reduce concerns of charge holders so that they do not enforce their rights.

What is a Fixed Charge?

If a debt is subject to a fixed charge, the borrowing will be secured against a substantial and identifiable physical asset such as land, property, vehicles, plant and machinery. If the business is unable to keep to the terms of the finance agreement, the lender as a creditor will take charge of the asset and look to sell it in order to recoup the money it is owed.

What is a Fixed Charge Over Assets?

When a lender has a fixed charge, it has strong legal rights over the asset the charge applies to. If the business wants to sell, transfer or dispose of the asset charged, it will have to get permission from the lender first or pay off the remaining debt.

It’s also important to note that a fixed charge gives the lender a higher position in the queue of creditoirs than a floating charge.

Examples of financial arrangements that are commonly subject to a fixed charge – also known as secured – include:

- Mortgages
- Leases
- Bank loans

What is a Floating Charge?

A floating charge applies to assets with a quantity and value that can change periodically, such as stock, debtors and moveable plant and machinery .

It gives the business much more freedom than a fixed charge because the business can sell, transfer or dispose of those assets without seeking approval from the lender or having to repay the debt first.

From the lender's point of view, a floating charge leaves it more exposed than a fixed charge because the value of the assets can and will change over time.

However, it's not possible to attach a fixed charge to every company asset, which is why floating charges are used.

What is the Difference Between a Fixed and Floating Charge?

There are a number of major differences to be aware of:

A fixed charge applies to a specific identifiable asset, while a floating charge is dynamic in nature and generally applies to the whole of the company's property.

An asset covered by a fixed charge cannot be sold or transferred unless the charge holder agrees. A floating charge can be sold, transferred or disposed of until a point when it crystallises and becomes fixed.

A fixed charge is always given preference over a floating charge in insolvency.

Protection of minority rights of share holders:

In a healthy democratic society, it is very important to pay equal attention to the rights and interests of the minority along with those of the majority. In the same way, for a healthy corporate administration and overall growth of a company, it is essential to address the rights and interests of minority shareholders to avoid exploitation in the hands of majority shareholders. The minority shareholders are those who hold less than 50% shares in the company and thus may have their voice unheard or ignored during the major decisions taken by the majority shareholders. In the existing Companies Act of 2013, there are lots of provisions enacted to safeguard the interests of minority shareholders. In modern times, it has become inevitable to protect the interests of minority shareholders; however, such was not the case from the inception of the corporate era.

The Foss vs. Harbottle case

The principle forming the foundation on which the rights of minority shareholders happen to be framed is derived from the famous case of *Foss vs. Harbottle (1843)*. The case was decided by the House of Lords in 1843. The board of directors is elected by the majority of shareholders in the general body meeting to run the affairs of the company; in fact, the majority had the upper hand in every decision and the minority got no voice in any of the company's decisions and received stepmotherly treatment. Upon an appeal by the minority stakeholders against this oppression, it was held that the court should not interfere in the internal matters of the company unless there is a grave violation of the principle of natural justice with concern to the minority shareholders.

In this way, the case had become a landmark judgement in protecting the rights of the majority in company affairs. However, the exceptions to the rule let down in *Foss vs. Harbottle* have emerged as a lifesaver for the rights of minorities.

Exception 1- Ultra Vires act

If any act done by the company management is beyond its powers, that is, *ultra vires*, the minority has a right to take action against such an act.

Exception 2- Fraud on majority

If the majority suppresses the rights of minorities by passing a resolution to commit any fraud in company affairs, then the rights of minorities must be protected.

Exception 3- Prevention of oppression and mismanagement

The ultimate rule of corporate functioning is that the majority decision prevails; however, there can be serious violations and the operation of the rights and interests of minority shareholders. The progress of a company lies in the fact that there should be a perfect balance between the rights of minority shareholders and the powers of major shareholders and almost zero mismanagement of company administration.

If there is any oppression or mismanagement, the rights of minorities can be protected by making an appeal to the Central Government, the Company Law Tribunal, or the court of law.

These agencies have vested powers to prevent operation and mismanagement through the appointment of directors as per the statute.

Exception 4- Wrong doers in control

When the majority of shareholders have taken over the control of management by violating the provisions of the Memorandum of Association and Articles of Association to fulfil their malicious intention, which is likely to harm the growth of the company and the overall interests of the stakeholders.

Exception 5- Individual membership rights

Every shareholder can enforce his individual rights against the company, for example, the right to vote and the right to contest the election of directors.

3.3 Prevention of Oppressions and Mismanagement :

Oppression

Oppression is the exercise of authority or power in a burdensome, cruel, or unjust manner. It can also be defined as an act or instance of oppressing, the state of being oppressed, and the feeling of being heavily burdened, mentally or physically, by troubles, adverse conditions, and anxiety.

The Supreme Court in Daleant Carrington Investment (P) Ltd. v. P.K. Prathapan, held that increase of share capital of a company for the sole purpose of gaining control of the company, where the majority shareholder is reduced to minority , would amount to oppression. The director holds a fiduciary position and could not on his own issue shares to himself. In such cases the oppressor would not be given an opportunity to buy put the oppressed.

Prevention of oppression

Section 397(1) of the Companies Act provides that any member of a company who complains that the affair of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members may apply to the Tribunal for an order thus to protect his /her statutory rights.

Sub-section (2) of Section 397 lays down the circumstances under which the tribunal may grant relief under Section 397, if it is of opinion that :-

(a)the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members ; and

(b) to wind up the company would be unfairly and prejudicial to such member or members , but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound.

The tribunal with the view to end the matters complained of, may make such order as it thinks fit.

Who can apply

Section 397 of the Companies Act states the members of a company shall have the right to apply under Section 397 or 398 of the Companies Act. According to Section 399 where the company is with the share capital, the application must be signed by at least 100 members of the company or by one tenth of the total number of its members, whichever is less, or by any member, or members holding one-tenth of the issued share capital of the company. Where the company is without share capital, the application has to be signed by one-fifth of the total number of its members. A single member cannot present a petition under section 397 of the Companies Act. The legal representative of a deceased member whose name is again on the register of members is entitled to petition under Section 397 and 398 of the Companies Act.

Under Section 399(4) of the Companies Act, the Central Government if the circumstances exist authorizes any member or members of the company to apply to the tribunal and the requirement cited above, may be waived. The consent of the requisite no. of members is required at the time of filing the application and if some of the members withdraw their consent, it would in no way make any effect in the application. The other members can very well continue with the proceedings.

Conditions for Granting Reliefs

To obtain relief under section 397 the following conditions should be satisfied:-

1. There must be "oppression"- The Punjab and Haryana High Court in Mohan Lal Chandmall v. Punjab Co. Ltd has held that an attempt to deprive a member of his ordinary membership rights amounts to "oppression". Imposing of more new and risky objects upon unwilling minority shareholders may in some circumstances amount to "oppression".However, minor acts of mismanagement cannot be regarded as "oppression". The Court will not allow that the remedy under Section 397 becomes a vexatious source of litigation. But an unreasonable refusal to accept a transfer of shares held as sufficient ground to pass an order under Section 397 of the Companies Act,

1956.Thus to constitute oppression there must be unfair abuse of the powers and impairments of the confidence on the part of the majority of shareholders.

2. Facts must justify winding up- It is well settled that the remedy of winding up is an extreme remedy. No relief of winding up can be granted on the ground that the directors of the company have misappropriated the company's fund, as such act of the directors does not fall in the category of oppression or mismanagement.To obtain remedy under Section 397 of the Companies Act, the petitioner must show the existence of facts which would justify the winding up order on just and equitable ground.

3. The oppression must be continued in nature – It is settled position that a single act of oppression or mismanagement is sufficient to invoke Section 397 or 398 of the Companies Act. No relief under either of the section can be granted if the act complained of is a solitary action of the majority. Hence, an isolated action of oppression is not sufficient to obtain relief under Section 397 or 398 of the Act. Thus to prove oppression continuation of the past acts relating to the present acts is the relevant factor , otherwise a single act of oppression is not capable to yield relief.

4. The petitioners must show fairness in their conduct-It is settled legal principle that the person who seeks remedy must come with clean hands. The members complaining must show fairness in their conduct. For ex-Mere declaration of low dividend which does not affect the value of the shares of the petitioner ,was neither oppression nor mismanagement in the eyes of law.

5. Oppression and mismanagement should be specifically pleaded- It is settled law that , in case of oppression a member has to specifically plead on five facts:-

a) what is the alleged act of oppression ;

b) who committed the act of oppression;

c) how it is oppressive;

d) whether it is in the affairs of the company;

e) and whether the company is a party to the commission of the act of oppression.

Prevention of Mismanagement

The present Company Act does provide the definition of the expression 'mismanagement'. When the affairs of the company are being conducted in a manner prejudicial to the interest of the company or its members or against the public interest, it amounts to mismanagement.

Section 398(1) of the Companies act provides that any members of a company who complain:-

that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or a material change has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; may apply to the Company Law Board for an order of relief provided such members have a right so to apply as given below.

If, on any such application, the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Right to Complain mismanagement-

1. The following members of a company shall have the right to apply as above:-

a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

2. Where any share or shares are held by two or more persons jointly, they shall be counted only as one number.

3. Where any members of a company, are entitled to make an application, any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

4. The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the Company Law Board, notwithstanding that the above requirements for application are not fulfilled.

5.The Central Government may, before authorizing any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the Court dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

6. If the managing director or any other director, or the manager, of a company or any other person, who has not been impleaded as a respondent to any application applies to be added as a respondent thereto, the Company Law Board may, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

Notice to be given to Central Government of application

The Company Law Board must give notice of every application made to it as above to the Central government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order.

Right of Central Government to apply

The Central Government may itself apply to the Company law Board for an order, or because an application to be made to the Company Law Board for such an order by any person authorized be it in this behalf.

Powers of Tribunal

Under Section 402 of the Companies Act ,1956 the powers of the Tribunal under Sections 397 and 398 are very wide .These are :-

1. the regulation of the conduct of the company's affairs in future;

2. the purchase of the shares or interests of any members of the company by other members thereof or by the company;

3. in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

4.the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other namely:-

a) the managing director;

b) any other director;

c) the manager;

Upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case ;the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned; the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference. Any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

Effect of alteration of memorandum or articles of company by order:

Where an order makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any permitted in the order, to make without the leave of the Company Law Board, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles. The alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act.A certified copy of every order altering or giving leave to alter, a company's memorandum or articles, must within thirty days after the making thereof, be filed by the company with the Registrar who shall registrar the same.If default is made in complying with the above provisions, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

Consequences of termination or modification of certain agreements:

Where an order terminates, sets aside or modifies an agreement:-

the order shall not give rise to any claim whatever against the company by any person for damages or for compensation for loss of office or in any respect, either in pursuance of the agreement or otherwise; no managing or other director or manager whose agreement is so terminated or set aside, shall for a period of five years from the date of the order terminating the agreement, without the leave of the Company Law Board, be appointed, or act, as the managing or other director or manager of the company.

Any person who knowingly acts as a managing or other director or manager of a company in contravention of the above provision, every director of the company, who is knowingly a party to such contravention shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

The Company Law Board will not grant leave for appointment as managing director or director or manager of the company unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given an opportunity of being heard in the matter.

Powers of Central Government to prevent oppression or mismanagement:

The Central Government may appoint such number of persons as the Company Law Board may, by order in writing, specify as being necessary to effectively safeguard the interests of the Company or its shareholders or public interests, to act as directors thereof for such period not exceeding 3 years on any one occasion as it deems fit if the Company Law Board:-

On a reference being made to it by the Central Government ; or on an application of not less than one hundred members of the company or of members of the company holding not less than one-tenth of the total voting power therein, is satisfied, after such inquiry as it deems fit to make, that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or to public interest.

However, in lieu of passing order as aforesaid, the Company Law Board may, if the company has not availed itself of the option given to it of proportional representation to minority shareholders on the Board of the company, direct the company to amend its articles in the manner provided section 265 and make fresh appointments of directors in pursuance of the articles as so amended within such time as may be specified in that behalf by the Company Law Board.

In case the Central Government passes such an order it may, if thinks fit, direct that until new directors are appointed in pursuance of the order aforesaid, not more than two members of the company specified by the Company law Board shall hold office as additional directors of the company. The Central Government shall appoint such additional directors on such directions.

The person appointed as a director by the Central Government in accordance with the above provisions, need not hold any qualification shares or need to retire by rotation. However, his office as director may be terminated at any time by the Central Government and another person appointed in his place. No change in the constitution of the Board of Directors can take place after an additional director is appointed by the Central Government in accordance with these provisions unless approved by the Company Law Board. The Central Government in such cases may also issue such directions to the company as it may consider necessary or appropriate in regard to its affairs.

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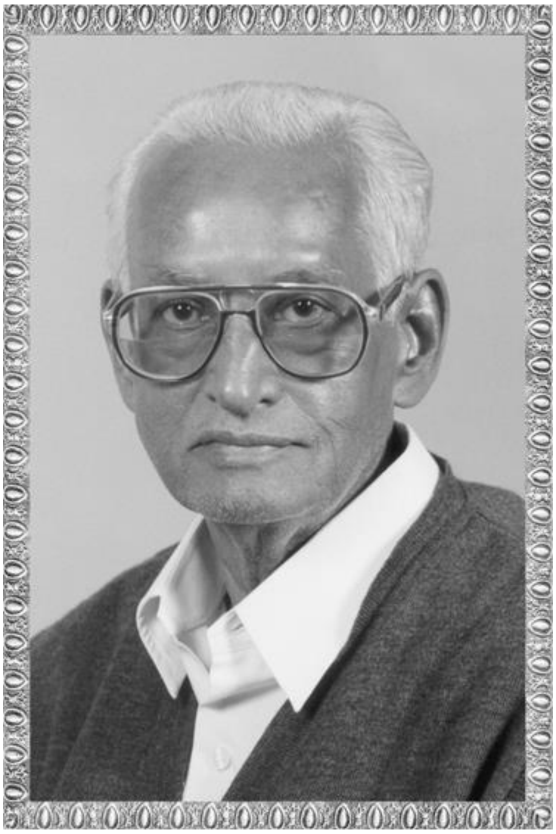

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UNIT -4- PROVISION FOR RECONSTRUCTION, AMALGAMATION & WINDINGUP OF COMPANY

SR. NO.	TOPIC NAME
4.1	RECONSTRUCTION AND AMALGAMATION OF COMPANY
4.2	TYPES OF WINDING UP: WINDING UP BY COURT; REASONS, GROUNDS, WHO CAN APPLY? PROCEDURE, POWERS OF LIQUIDATOR, POWERS OF COURT
4.3	VOLUNTARY WINDING UP
4.4	CORPORATE LIABILITY: CIVIL AND CRIMINAL

4.1 RECONSTRUCTION AND AMALGAMATION OF COMPANY :

With the increasing magnitude of the companies business and the commercial activities, there had also been an increase in the diversities of the people who deal with them. Occasions of clashes and conflicts frequently arise which needs to be resolved amicably. And to resolve such conflicts the companies generally have to resort to arbitration or compromises to settle such clashes.

Further, value creation, diversification, and for increasing the financial capacity of the companies or for survival, one company may have to join hands with another company either by way of amalgamation or by the takeover. So the companies act provides for the provisions relating to various methods for the reorganization of a company. Thus is becoming vital to discern the provisions of the Companies Act in relation to Mergers and Acquisition, and the procedure thereof.

Scheme of mergers, acquisitions and arbitration under the company law

Mergers and Acquisition

Before 2013, Section 391 to 394 of The Companies Act, 1956 dealt with the Mergers and acquisitions of a company. But after 2013, due to some backdrops in the old legislation, these provisions were amended by virtue of sections 230-240 of The Companies Act 2013. So now these sections govern any type of arrangement or mergers and acquisitions. All of these sections were notified on 15th December 2016 except Section 234 which was notified on 13th April 2017. These provisions were amended to bring more transparency to the laws relating to M&A. The amendment empowered the Tribunal (NCLT) to sanction the entire process. The provisions under the Companies Act, 2013 deal with the substantive part only, while the procedural aspects relating to M&A are given under the Companies (Compromise, Arrangements, and Amalgamation) Rules, 2016.

Arbitration

Prior to 1960, Section 389 of the Companies Act empowered them to enter into arbitration as per the provisions of the Arbitration Act, 1940. But the Arbitration act did not provide for foreign arbitrations as a result of which the Indian Companies could not enter into an arbitration agreement with foreign companies. In order to remove this lacuna, the Companies Amendment Act, 1960 dropped section 389 from the companies act as a result of which the Indian companies were free to enter into arbitration agreements with foreign companies, provided that such agreements are allowed by the Memorandum.

Compromise and arrangement distinguished

The word compromise has nowhere been defined in the Companies Act. It basically connotes the settlement of a conflict by mutual consent and agreement or through a scheme of compromise. Thus, for a compromise, there has to be some dispute or conflict. On the other hand, the word arrangement has been defined under section 230(1) of the companies act. The arrangement has a wider connotation than compromise. The arrangement means re-organizing the right and liabilities of the shareholders of the company without the existence of some dispute. A company may enter into a compromise or arrangement to take itself out from the winding-up proceedings.

Situations under which a company may call for a scheme of compromise:

1. If in the normal course of business, it becomes impossible to pay all the creditors in full.
2. Subsidiaries/Units cannot work without incurring losses.
3. Where liquidation of the company may prove harsh for the creditors or members.

Situation under which a company may enter into arrangements:

1. For the issue of new shares.
2. For any variation in property.
3. Conversion of one class of share to another.
4. For reorganizing the share capital of the company.

Reconstruction

Reconstruction is a situation where a new company is formed and the assets of the old one are transferred to the newly formed company. Reconstruction is the key technique used for changing the capital structure of a firm. There are a number of reasons due to which a company may go for reconstruction. A few of them are:

1. By reconstruction, the company can simplify the capital structure.
2. It can eliminate all the past losses.
3. Helps in raising working capital, adjusting cumulated dividends.
4. May result in a reduction of fix charges.

A reconstruction of a company may be done internally or externally. In external reconstruction, the old company is dissolved and a new one is incorporated and the assets of the older one are transferred to the new one. Whereas in internal restructuring, the old company continues, only its capital structure is changed.

Procedure for compromise and arrangement under the company law

After the enactment of the Companies Act, 2013, the procedure for mergers, acquisitions, amalgamations and restructuring has been simplified by the new provisions. The Act of 2013 has removed all the backdrops of the older legislation and is aimed to bring more transparency. It allowed cross border mergers as well, increasing the horizons for the industries and making it easier for them to expand. In order to speed up the process and to bring more transparency the assistance of tribunal was invoked under the 2013 Act. So below is the stepwise procedure for the scheme of compromise and arrangement:

1. **Preliminary Stage (Preparation of Scheme**): This is the first stage, in which a detailed scheme is prepared by the members of the creditors. This scheme must contain all the matters that are of substantial interest, it must also explain or show how the scheme is going to affect the members, creditors and all the other companies. The scheme must also disclose the material interest of the director.

2. **Application to Tribunal:** Any member or a creditor of the company (in case the company is winding up, its liquidator) can make an application to the Tribunal i.e. to NCLT proposing the scheme of merger or acquisition between two or more companies. The tribunal can also make the application on a suo moto basis.
3. **Tribunal looks into the application:** Once an application proposing the scheme is made, the tribunal will take a look as to whether the application is within the ambit of Section 230-240. It is pertinent to note here that in this stage the tribunal is not concerned with the merits of the application, it will only look as to whether the application is within the ambit of the act or not. It will also see that the application is accompanied by an explanatory statement.
4. **Conveyance of Meeting:** Once the tribunal sees the application, it issues a notice for the conveyance of the meeting of the creditors and the members of the company within **21 days**. It must be noted that, if the scheme is not going to have any adverse effect on any party, then the tribunal can also avoid the call for the meeting. If the meeting is conveyed then the scheme must be approved by a majority of three fourth members present and voting.
5. **Presentation of the outcome of the Meeting before the Tribunal:** Once the scheme is approved by the members or creditors or the liquidator (in case of a winding company) in the meeting, the report of the meeting must be presented before the tribunal within **seven days** of the meeting. The report must show the confirmation of the scheme of compromise or arrangement.
6. **Commencement of Hearings:** After the submission of the report the tribunal shall fix a date for hearing. Such data must be notified in the newspaper through advertisement. Such advertisement must be notified before **10 days** of the hearing.
7. **Sanction of Cases:** The tribunal shall after hearing all the objections and concerns of all the parties, if it is deemed fair and reasonable to the tribunal then the tribunal may sanction the compromise or arrangement.
8. **Registration of the Scheme with Registrar:** Once the scheme is sanctioned by the Tribunal, a certified copy of the order shall be filed with the ROC (Registrar of Company) within **14 days** from such sanction order.

4.2 Types of Winding Up:

Winding Up of a Company means to bring an end to the life of the company. A distinct feature of a company is Perpetual Succession which means that the longevity of the company does not depend on its members or their financial status. Even if all the members of the company go bankrupt or all of them die, the company will not dissolve on its own unless it is made to dissolve on grounds which are laid out in the act. This article will go over how the operations of a Company are shut according to the provisions of the Companies Act.

Types of Winding Up

According to Section 425 of the Companies Act, 2013, there are 2 kinds of Winding Up. They are:

1. Compulsory Winding Up under the order of the Court
2. Voluntary Winding Up, which itself is of two kinds:

i. Members' Voluntary Winding Up
ii. Creditor's Voluntary Winding Up

Winding Up by Court

A company may be wound up at an order of the Court. This is also called Compulsory Winding Up. The cases in which a company may be wound up are given in Section 433. They are as follows:

Special Resolution

In the event that the organization has, by unique goals, settled that it be ended up by the court. The court is, be that as it may, not bound to request Winding Up essentially in light of the fact that the organization has so settled. The power is optional and may not be practised where twisting up would be against the general population or the organization's advantages.

Default in Holding Statutory Meeting

On the off chance that an organization has made a default in conveying the statutory report to the Registrar or in holding the statutory gathering, it might be requested to be Wound Up.

Failure to Commence Business or Suspension of Business

In the event that an organization does not initiate its business within a year from its joining or has suspended its business for an entire year, it might be requested to be twisted up. Here again, the power is optional and will be practised just when there is a reasonable sign that there is no aim to carry on business. In the event that the suspension is acceptably represented and has all the earmarks of being because of brief causes, the request might be declined.

Reduction in Membership

On the off chance that the quantity of individuals is decreased, on account of an open organization, underneath seven, and on account of a privately owned business, beneath two, the organization might be requested to be twisted up.

Inability to Pay Debts

An organization might be requested to be twisted up on the off chance that it is unfit to pay its obligations. Failure to pay obligations is clarified in Section 434. As indicated by this area, an organization will be esteemed to be unfit to pay its obligations in the accompanying three cases:

1. Statutory Notice

2. Decreed Debt
3. Commercial Insolvency

Just and equitable

The final ground on which the court can arrange the ending up of an organization is the point at which “the court is of the assessment that the organization ought to be twisted up.” This gives the court a wide optional capacity to request twisting up at whatever point it seems, by all accounts, to be attractive. The court may give due weight to the enthusiasm of the organization, its representatives, loan bosses and investors and overall population ought to likewise be considered. The conditions wherein the courts have in the past broken down organizations on this ground can be settled into general classifications as pursues:

Deadlock

Firstly, when there is a deadlock in the management of the company, it is just and equitable to order winding up. The well-known illustration is Yenidje Tobacco Co Ltd. The facts of the case are laid out as follows:

W and R who exchanged independently as cigarette makers consented to amalgamate their business and shaped a private limited organization of which they were investors and the main chiefs. They had an equivalent casting of ballot rights and, in this manner, the articles gave that any contest would be settled by discretion, however, one of them disagreed from the honour. Both at that point turned out to be hostile to the point that neither of them would address the other aside from through the secretary.

Therefore there was a finished stop and thus the organization was requested to be twisted up in spite of the fact that its business was thriving. It must be noticed that the ‘Fair and Equitable’ statement ought not to be conjured in situations where the main trouble is the distinction of view between the greater part directorate and those speaking to the minority.

Loss of Substratum

Also, it is simply and evenhanded to wrap up an organization when its fundamental article has neglected to appear or it has lost its substratum. A decent delineation is German Date Coffee Co. The realities of the case are spread out as pursues:

An organization was shaped to make espresso from dates under a patent which was to be conceded by the Government of Germany and furthermore for working different licenses of comparable kind. The German patent was never allowed and the organization set out upon different licenses. Yet, on the request of an investor, it was held that “the substratum of the organization had fizzled, and it was difficult to do the items for which it was framed; and, subsequently, it was simple and fair that the organization ought to be twisted up.

Losses

Thirdly, it is viewed as just and fair to wrap up an organization when it can't carry on business with the exception of at misfortunes. It will be unnecessary, in reality, for an organization to carry on business when there is no desire for accomplishing the object of exchanging at a benefit. Yet, simple anxiety with respect to certain investors that the benefits of the organization will be squandered and that misfortune rather than increase will result has been held to be no ground.

Oppression of Minority

It is simple and even-handed to wrap up an organization where the vital investors have embraced a forceful or onerous or pressing approach towards the minority. The choice of the Madras High Court in R. Sabapathi Rao v Sabapathi Press Ltd, is a representation in point. The court saw that where the executives of an organization had the option to practice an overwhelming effect on the administration of the organization and the overseeing chief had the option to outvote the minority of the investors and hold the benefits of the business between individuals from the family and there were a few objections that the investors did not get a duplicate of the asset report, nor was the inspector's report perused at the general gathering, profits were not consistently paid and the rate was lessening, that established adequate ground for twisting up.

Fraudulent Purpose

It is simple and fair to wrap up an organization on the off chance that it has been imagined and delivered in misrepresentation or for an illicit reason.

Incorporated or Quasi Partnership

It has been seen that there is little in like manner between the goliath organization and the family or the one individual organization. To apply the equivalent legitimate prerequisites to such various associations is profitable of bother and bad form. So as to maintain a strategic distance from such "burden and unfairness" the Act treats them distinctively in a few regards. In any case, even in issues in which the Act treats them alike, the courts have needed to recognize them.

Reasons for winding up by court :

Reasons for Winding Up A Company

Insufficient Funds or Cash Flow Problems

One of the most common reasons for winding up a company is insufficient funds or cash flow problems. If a company is unable to generate enough revenue to cover its operating expenses or make loan payments, it may be forced to shut down its operations. This can be due to a variety of factors, including economic downturns, poor financial management, or industry-specific challenges.

Changes in Market Conditions or Technological Advancements

Market conditions and technological advancements can also impact a company’s operations and financial performance. If a company is unable to adapt to changing market conditions or fails to keep up with technological advancements, it may find itself struggling to remain competitive. In some cases, a company may decide to wind up its operations rather than continuing to invest resources in a failing business model.

Legal or Regulatory Issues

Legal or regulatory issues can also lead to the winding up of a company. For example, if a company is found to be in violation of laws or regulations, it may be subject to fines or legal action. In some cases, the company may be unable to comply with legal or regulatory requirements, forcing it to shut down its operations.

Shareholder Disputes or Lack of Succession Planning

Shareholder disputes and lack of succession planning can also lead to the winding up of a company. If there is a disagreement between shareholders over the direction of the company or the distribution of profits, it can result in a deadlock that cannot be resolved. Additionally, if there is no clear plan for succession, the death or departure of key personnel can leave the company without a clear path forward.

Fraud or Mismanagement

Fraud or mismanagement can also lead to the winding up of a company. If a company is found to have engaged in fraudulent activities or if there is evidence of mismanagement, it may be subject to legal action or investigation. In some cases, the company may be forced to shut down its operations to avoid further liability.

Who can apply for winding up by court ?

(1) The Tribunal may order the winding up in accordance with the Companies Act, 1956 (1 of 1956) of any insurance company and the provisions of that Act shall, subject to the provisions of this Act, apply accordingly.]

[Explanation. --For the purpose of sections 53 to 61A, "Tribunal" means the National Company Law Tribunal constituted under sub-section (1) of section 408 of the Companies Act, 2013 (18 of 2013).]

(2) In addition to the grounds on which such an order may be based, the 3[Tribunal] may order the winding up of an insurance company--

(a) if with the sanction of the [Tribunal] previously obtained a petition in this behalf is presented by shareholders not less in number than one tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees; or

(b) if the [Authority], who is hereby authorised to do so, applies in this behalf of the [Tribunal] on any of the following grounds, namely: --

(ii) that the company having failed to comply with any requirement of this Act has continued such failure [or having contravened any provision of this Act has continued such contravention] for a period of three months after notice of such failure 6[or contravention] has been conveyed to the company by the [Authority],

(iii) that it appears from [any returns or statements] furnished under the provisions of this Act or from the results of any investigation made thereunder that the 8[company is, or is deemed to be insolvent], or

(iv) that the continuance of the company is prejudicial to the interest of the policy-holders [or to the public interest generally].

Procedure for winding up by court :

Process Of Winding Up Of A Company

Step 1: Filing Of The Winding-Up Petition

A winding-up petition is the first step. An interested party must file the same. The petition should have the grounds. Also, it must detail the company and winding-up order. Below are some interested parties who can file this petition.

Company trade creditors

Any contributors to the company

The company itself

An authorized person (or body) by the central or state government

The company registrar

The form WIN 1 or WIN 2 are used for this petition and is to be submitted in triplicate. An affidavit in WIN 3 form is necessary for the petition submission.

Step 2: Statement Of Affairs Of The Company

The petition in the process of winding up of a company includes an affairs statement. It includes details about company financials. The assets and liabilities are mentioned (often at liquidation value). It helps better understand how much the company owes. The format in the WIN 4 form details the statement of affairs submission as per Sections 272 (4) and 274 (1).

This statement must be in duplicate and have the latest information. It cannot be older than thirty days. An affidavit must accompany this statement as per the form WIN 5. The Company Rules (winding up) of 2020 and Rule 4 detail this process.

Step 3: Advertisement

The petition in the format of form WIN 6 must be advertised. It must be done before 14 days of the petition hearing. The advertisement has to be in English and the region's vernacular languages. This advertisement paper should have circulation in the company's state or UT.

This step allows informing the interested parties. They can make claims or provide any helpful information.

Step 4: Appointment Of Provisional Liquidator

The company liquidator plays an essential part. They oversee the sales, creditor claims, and distribution. The tribunal appoints the provisional liquidator for the company. It is after the petition submission. This appointment should be notified to the company. Section 273 (1)(c) details this process in form WIN 7. The liquidator will have varying responsibilities. It depends on the business and the process of winding up of a company. These responsibilities are detailed as per the form WIN 8.

Step 5: Send Notice To The Provisional Liquidator

The appointed liquidator must be informed of the duties. The notice should be sent to the official liquidator within seven days. It must be in the form WIN 9 format. Post or electronic methods are applicable for sending this notice copy. The registrar of companies must send this notice in Section 277 (1).

Step 6: Winding-Up Order

The winding-up order is sent to the liquidator in the form WIN 11 order. The form WIN 12 and 13 is used for sending the same to the company. The registrar is required to send these orders. Also, this order should contain the relevant details and variations. It should be signed as well as sealed. These orders must be sent out in seven days by the registrar.

Step 7: Custody Of Company Property

The Process of winding up of a company leads to the liquidator's responsibilities. They take custody of the company's property, like assets and documents. It also includes claims and company books. These books detail company transactions and financials. The liquidator is required to submit a report. This report shall contain company property details. It. It is due for submission within sixty days to the tribunal. It helps keep a record of the property. Also, the report can help revisit the process. It ensures that the liquidator acts impartial.

Step 8: Affairs Of The Company

When a company ends, its business affairs need to be sorted out. This includes money it owes, things it needs to do, and any deals it has in progress. The person in charge of ending the company, the liquidation.

Powers of Liquidator:

(1) Subject to directions by the Tribunal , if any, in this regard, the Company Liquidator , in a winding up of a company by the Tribunal, shall have the power—

(a) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate , or to sell the same in parcels;

(d) to sell the whole of the undertaking of the company as a going concern;

(e) to raise any money required on the security of the assets of the company;

(f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(g) to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;

(h) to inspect the records and returns of the company on the files of the Registrar or any other authority;

(i) to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(j) to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(k) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;

(l) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary,—

(i) for winding up of the company;

(ii) for distribution of assets;

(iii) in discharge of his duties and obligations and functions as Company Liquidator; and

(n) to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.

(2) The exercise of powers by the Company Liquidator under sub-section (1) shall be subject to the overall control of the Tribunal.

(3) Notwithstanding the provisions of sub-section (1), the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

Powers of Court :

1. Ordering the Winding Up of Company

When a company is unable to pay off its debts and obligations, a creditor or a shareholder can file a petition in the Court requesting the winding up of the company. The court can then order the winding up of the company if it is satisfied that the company is unable to pay its debts. The court can also order the winding up of a company if it is just and equitable to do so. For instance, if a dispute between the shareholders cannot be resolved, the Court orders the company to be wound up.

2. Appointment of a Liquidator

When a company is wound up, a liquidator is appointed to sell off the company's assets, pay off its debts, and distribute the remaining funds, if any, among the company's shareholders. The court has the power to appoint the liquidator, and it usually does so in court-ordered winding up. A liquidator is an independent person who is appointed to ensure that the winding-up process is carried out in a fair and efficient.

3. Reviewing the Conduct of the Directors

The court has the power to review the conduct of the directors of a company that is being wound up. The court can order the directors to repay any money that they have taken from the company that was not due to them. The court can also order the directors to pay compensation to the company or its creditors if their actions have caused the company to suffer losses.

4. Adjudicating on Claims

When a company is wound up, its creditors can make claims against the company for the money they are owed. The court has the power to adjudicate these claims and to determine the amount that the company owes to each creditor. The court can also determine the priority of the claims. For instance, secured creditors may have priority over unsecured creditors.

5. Distribution of Assets

Once the liquidator has sold off the company's assets and paid off its debts, the remaining funds, if any, are distributed among the company's shareholders. The Court has the power to determine the order in which the shareholders are paid. For example, preference shareholders may have priority over ordinary shareholders.

4.3 Voluntary Winding Up

A company may be wound up voluntarily in the following two ways, as discussed below:

By Ordinary Resolution

An organization might be twisted up willfully by passing an ordinary resolution when the period, assuming any, fixed for the span of the organization by the articles, has lapsed. Also, when the occasion, assuming any, has happened, on the event of which the articles give that the organization is to be broken down, the organization may, by passing a normal goal with that impact, start its willful twisting up.

By Special Resolution

A company may at any time pass a special resolution providing that the company be wound up voluntarily. Winding Up commences at the time when the resolution is passed. Within fourteen days of the passing of the resolution, the company shall give notice of the resolution by advertisement in the Official Gazette and also in some newspaper circulating in the district of the registered office of the company. The corporate state and powers of the company shall continue until the company is dissolved, but it shall stop its business, except so far as may be necessary for beneficial winding up.

As discussed earlier in the article, Voluntary Winding Up is of two kinds:

1. Members' Voluntary Winding Up;
2. Creditor's Voluntary Winding Up

If a Declaration of Solvency is made in accordance with the provisions of the Act, it will be a Members' Voluntary Winding Up and if it is not made, it becomes the Creditors' Voluntary Winding Up. The declaration has to be made by a majority of the directors at the meeting of the board and verified by an affidavit. They have to declare that they have made a full inquiry into the affairs of the company and have formed the opinion that the company has no debts or that it will be able to pay its debts in full within a certain period, not exceeding three years, from the commencement of winding up.

The declaration, to be effective, must be made within the five weeks immediately before the date of the resolution and should be delivered to the Registrar for registration before that date. It should also be accompanied by a copy of the report of the auditors on the profit and loss account and the balance sheet of the company prepared up to the date of the declaration and should embody a statement of the company’s assets and liabilities as at that date.

There is a penalty for making the declarations without having reasonable grounds for the opinion that the company will be able to pay its debts within the specified period. If the company fails to pay the debts within that period, it will be presumed that reasonable grounds for making the declaration did not exist. The liquidator should forthwith call a meeting of the creditors because the winding up has then to proceed as if it were Creditors’ Winding Up.

4.4 Corporate Liability : Civil and Criminal:

A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself.

Section 11 of Indian Penal Code, 1860 (the Code) define person. It reads *“the word person includes any Company or Association or a body of persons, whether incorporated or not.”* Further section 2 of the Code provides that *“Every person shall be liable to punishment under this Code.”* Thus, section 2 of the Code without any exception to body corporate, provides for punishment of every person which obviously includes a Company. Therefore, by reading of these two provision concept of corporate criminal liability can be derived, though it is not the sole legislation which provides for the punishment of corporate body, Companies Act, 2013, Income Tax Act, etc.

Corporations have now became an integral part of our society, and with development of corporations they have become significant actor in our economy, our society runs in the risk of getting victimized by these corporation, and therefore they should be deterred too. Imposition of punishment, upon offenders of any kind, can be understood by various rationale of criminal law jurisprudence, but deterrence is the rationale that is applicable to such economic entities as corporations. Corporations have their own identity, they have separate legal personality and they are different from their members, and this is sufficient to makes it possible to held them liable and censure them.

Criminal Liability is the quality or state of being legally obligated or accountable; legally responsible to another or to society which is enforceable by criminal punishment.And therefore, Corporate Criminal Liability means the extent to which a Corporation as a legal person can be held criminally liable for its acts and omissions and for those of the natural persons employed by it. This paper is intended to examine various nuances related to corporate criminal liability, and at the end to provide various recommendation which should be incorporated in in legislations.

Twin Model of Corporate Criminal Liability

A. Derivative Model

This model is individual centred model. It derives to attach the liability to the corporation only because an individual connected to the corporation incurred some liability for which the individual is to be punished, but since it is connected to the corporation the liability is put on the corporation to having that individual with it and letting it incurred some liability. Derivative model can be understood in two sub-categorises: a) Vicarious Liability; b) Identification Doctrine.

1. **Vicarious Liability**

The concept of vicarious liability is based on two latin maxims- *first*, *qui facit per alium facit per se*, it means that he who acts through another shall deemed to have acted on his own, and *second, respondeat superior* which means let the master answer. In *Bartonshill Coal Co. v. McGuire*, Lord Chelmsford LC said: *'every act which is done by an employee in the course of his duty is regarded as done by his employer's orders, and consequently is the same as if it were his employer's own act.'*

Vicarious liability generally applies to civil liability but Massachusetts court in *Commonwealth v. Beneficial Finance CO.*, held three corporations criminally liable for a conspiracy to bribe, the first company, for the acts of its employee, the second, for the act of its Director, and the third, for the acts of the Vice-President of a wholly owned subsidiary. The Court seemed to believe that corporate criminal liability was necessary since, a corporation is a legal fiction comprising only of individuals. US courts are not the only courts which have incorporated the concept of vicarious liability in the cases of criminal liability, but now this model has been rejected considering it to be unjust to condemn one person for the wrongful conduct of another.

1. **Identification Doctrine**

This doctrine is an English law doctrine which tries to identify certain key persons of a corporation who acts in its behalf, and whose conduct and state of mind can be attributed to that of the corporation. In case of *Salomon v. Salomon & Co.* House of Lords held that *corporate entity is separate from the persons who acts on its behalf*. The Courts in England had in various judgments like *DPP v. Kent & Sussex Contractors Ltd.*, *R v. ICR Haulage Ltd.,* ruled that the corporate entities could be subjected to criminal liability and the companies were held liable for crimes requiring intent. Judgment like these led to the promulgation of 'identification doctrine'.

B. Organizational Model

Unlike derivative model which focuses on individual, organizational model takes corporation into consideration. Offences require mental state (*mens rea*) to commit a crime along with physical act (*actus reus*), but the problem that arises while holding corporations criminally liable is how a corporation which is juristic person could possess requisite mental state to commit a crime.

Derivative model was one way to attribute mental state to corporation. Other way could be by proving that there existed an environment in the corporation which directed, tolerated, led-on, and even encouraged the non-compliance of specific law which made it offence. Moreover, physical act that too is required to complete the requirement of commission of an offence can be derived rather be proved from the act of its employees, officers, directors, etc. Thus, culture of a corporation is to be seen while determining its criminal liability.

Corporate culture may help for commission of an offence requiring mental state by- *firstly*, providing the environment or necessary encouragement that it was believed by the offender working in the corporation that it was perfectly alright to commit that offence, or corporation has psychologically supported the commission of offence; *secondly*, it is quite possible that the corporation created an environment which led to commission of crime. Both ways it was the corporation and its working culture that let the offence committed.

III. Deadlocks of Corporate Criminal Liability

A. Imprisonment

As has been discussed above that a company is recognized as a juristic person, and being a person it has to face the punishment that has been provided by the various acts. There are various provisions in Companies Act, 2013 itself which hold a company liable for its wrongdoing. However, there are provisions which provides mandatory imprisonment for a person including company, such as Section 447 of Companies Act, 2013 Act, Section 420 of The IPC, 276B of The Income Tax Act etc.

The Courts found themselves in dead end in these kind of situations where a company is charged under sections which provides for necessary imprisonment, as the company being a legal person cannot be imprisoned for its criminal acts, it can only be punished with fine and not otherwise. The Supreme Court has to face similar difficulty in case of *M.V. Javali vs. Mahajan Borewell & Co. and Others,* The Company was found guilty under Section 276B read with 278B of The Income Tax Act, which gives mandatory punishment of at least 3 months, but the Court found itself in a fix about how to imprison a company. J. Mukhrjee said that, "Even though in view of the above provisions of Section 278B, a company can be prosecuted and punished for an offence committed under Section 276B the sentence of imprisonment which has got to be imposed there under cannot be imposed, it being a juristic person and we are of the opinion that the only harmonious construction that can be given to Section 276B is that the mandatory sentence of imprisonment and fine is to be imposed where it can be imposed namely on persons coming under categories (ii) and (iii) above, but where it cannot be imposed, namely on a company, fine will be the only punishment."

Therefore, the solution as of now is that a person is juristic person then punishment relating to imprisonment would not apply to it instead he will be liable for fine. The court can do one thing though, if it cannot imprison a corporate body but it can charge greater amount of fine in such cases in comparison to what it charges to the person who are capable of being imprisoned for the same offence.

B. Mens rea

Another problem faced by the Judges was how to try a company for the offences where mens rea was an essential. How can a juristic person have a mental element to commit a crime? The trend was such that the company was only tried for cases where mens rea was not an essential and it was accepted that it cannot be tried for offences where mens rea is required.

In the case of *Motorola Inc. vs. Union of India* the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite mens rea, which was the essential ingredient of the offense. Thus, the corporation could not be prosecuted under section 420 of the IPC, but this idea of company not possessing mens rea came to an end Lord Denning's view in the case of *H.R. Bolton (engg.) Co. Ltd. vs. T.J. Graham* was accepted that "A company may in many ways be likened to a human body. They have a brain and a nerve centre, which controls what they do. They also have hands, which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is state of mind of company and it treated by law as such. So you will find that in case where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of company."

The concept of alter ego was evolved subsequently in India to tackle with the problem. The alter ego doctrine revolves around the concept of personification of the legal body. The Corporation is considered to be the alter ego of the individual. Therefore, the corporation can be rendered liable for the criminal act of the individual done in his scope of work. *Mens rea* of the individual is considered to be the mens rea of the corporation itself. In the case of The Assistant Commissioner, Assessment-II, Bangalore & Ors. vs. M/s. Velliappa Textiles Ltd. & Anr*, the Supreme Court has held that,* "Though, initially, it was supposed that Corporation could not be held liable criminally for offences where mens rea was requisite, the current judicial thinking appears to be that the mens rea of the person in-charge of the affairs of the Corporation, the alter ego, is liable to be extrapolated to the Corporation, enabling even an artificial person to be prosecuted for such an offence."

Thus, this doctrine of alter ego allowed the courts to frame corporate houses for the offences which had mens rea as an essential ingredient, and it is now less tiresome for the court to hold a corporation criminally liable.

Corporate Civil Liabilities under the companies act , 2013:

As we all know that the company is liable (I.e legally obligated) for the acts perpetrated by employees of the companies. A corporation doesn't possess a mind, body, soul, or brain of its own.

It has to perform through directors, employers, and other officers. A corporate company executes only those aspects which are incidental to the accomplishment of specific objectives which has been established under the law. The memorandum of associations and companies which are registered under the companies act 2013 contains certain purposes and objects.

so the companies cannot execute anything beyond the boundaries. If a corporation enforces any activity beyond its objective clause is ultra vires. Thus, the corporation follows neither its own will nor its own interest. Therefore, the directors of the company represent the interest of shareholders which means the interest of the corporation. Besides this, the law grants an artificial legal personality on a corporation that confers rights, obligations, and provisions. Following, The acts done by the corporation can be sued or can be sue, and also it owes criminal as well as civil liabilities. The civil liability imposed on the corporation through the vicarious and tortious liability. And consequently, the corporate civil liability imposed through the Companies Act, 2013. The liability of the corporation has been made under the statutory provisions and in the interest of justice and equity by the court.

Vicarious liability holds Employer liable for the unlawful negligent or purposeful tort actions of their employees, while they are functioning in the course of their employment. Only the person who commits the act would be liable. The corporation would be liable for the acts of the employees committed in the course of employment(I.e principal of agency). In addition, the Latin maxim of "Qui facet alium facet per se" (i.e he who acts through another does the act himself) further strengthens the principle of vicarious liability.

What is a corporate civil liability?

The Corporate Civil liability is the obligation to redeem for physical injury or tangible or intangible loss that may be caused to a third party by the company's belongings or staff, over the course of work finished. Under section 35 of the companies act 2013, if any person in the issuance of a prospectus which contains misstatements has given to the protection of the companies and then obtained any damage or loss, the director of the company at the time of the issuance of the prospectus, the promoter of the company and any person mentioned in prospects would be liable for compensation of any loss suffered.

And every person who

(a) is a director of the company at the time of the issue of the prospectus;

(b) has authorized himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately after an interval of time;

(c) is a promoter of the company;

(d) has authorized the issue of the prospectus; and

(e) is an expert referred to in sub-section (5) of section 26, shall without prejudice to any punishment to which any person may be liable under item 36, be liable to pay compensation to every person who has suffered such loss or damage.

(2) No person shall be liable under sub-section (1) if he proves—

(a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

(3) Notwithstanding anything contained in this section, where it is proved that a prospectus has been issued with the intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.