Directorate of Distance Education

UNIVERSITY OF JAMMU

JAMMU

SELF LEARNING MATERIAL

B.COM SEM.-IV

CORPORATE LAWS **UNIT : I-IV**
COURSE CODE-BCG-403 **LESSON NO. : 1-12**

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CORPORATE LAW

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UNIVERSITY OF JAMMU

B.COM. FOURTH SEMESTER

CORPORATE LAWS

C.No. 403

Max Marks = 100

Internal assessment = 20

External exam. = 80

OBJECTIVE: The basic objective of this course is to provide the knowledge of concepts of corporate laws to the students.

UNIT-I: INTRODUCTION TO CORPORATE LAW

Meaning and features of a company**;** stages in Formation of company, Types of companies, Difference between private and public company, Conversion of private company into public company, special privileges of a private company; concept of lifting of corporate veil.

UNIT-II: DOCUMENTS

Memorandum of Association – meaning contents and procedure for alteration of memorandum of association, Doctrine of Ultra Vires, Articles of Association – Meaning, contents and its alteration, Doctrine of indoor management Prospectus - meaning and contents.

UNIT-III: APPOINTMENT OF DIRECTORS

Appointment of directors; qualifications, powers, duties and liabilities of directors; legal provisions relating to remuneration.

UNIT-IV: MEETINGS & WINDING UP OF A COMPANY

Meaning, essentials of a valid meeting; legal provision pertaining to statutory meeting, annual general meeting and extra ordinary general meeting; resolution – meaning, legal provision pertaining to ordinary, special and resolution requiring special notice; Winding up of a company –Meaning and modes of Winding company.

SKILL DEVELOPMENT (GUIDELINES FOR CLASS ROOM TEACHING AND INTERNAL ASSESSMENT)

- Enable students to understand various provision of law with the help of case studies.
- Create deep understanding of all concepts specified in the syllabus.

BOOKS RECOMMENDED

1	Chawla and Garg	:	Company Law, Kalyani Publisher, New Delhi
2	Kapoor ,N.D	:	Elements of Mercantile Law, Sultan Chand Publications.
3	Gogna.,P.P.S..	:	A Text Book of Company Law ,Sultan Chand Publications
4	Singh, Harpal	:	Indian Company Law, Galgotia Publishing Company
5	Kapoor ,N.D	:	A Book of Company Law, Sultan Chand Publications
6	Bagrial, A.K	:	Company Law, Vikas Publishing House, New Delhi

NOTE FOR PAPER SETTER

Equal weightage shall be given to all the units of the syllabus. The external

Paper shall be of the two sections viz, A & B of three hours duration.

Section-A: This section shall contain four short answer questions selecting one from each unit. Each question shall carry 5 marks .A candidate shall be required to attempt all the four questions. Total weightage to this section shall be of 20 marks.

Section-B: This section shall contain eight long answer questions of 15 marks each. Two questions with internal choice shall be set from each unit. A candidate shall have to attempt any four questions selecting one from each unit. Total weightage to this section shall be of 60 marks.

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MODEL QUESTION PAPER

CORPORATE LAWS

Max Marks: -80

Time allowed: 3 hrs

Section –A (Marks 20)

Attempt all the questions. Each question carries five marks.

1. State the privileges of a private company?
2. Explain doctrine of indoor management.
3. Who can be the director of a company?
4. Explain the concept of winding up of public company?

Section –B (Marks 60)

Attempt any four questions selecting one question from each unit. Each question carries 15 marks.

1. Define a company. What are the special features of a company?

   OR

   Discuss the various stages in the formation of the company?

2. Define prospectus. Give its contents?

   OR

   Distinguish between Memorandum of association & Articles of Association of a company.

3. Explain the liabilities of a director in a company?

OR

Explain the legal provisions relating to the appointment of a director?

4. Define Meeting. Explain in detail legal provision pertaining to holding of Annual General Meeting.

OR

Describe the various modes by which a company is wound up.

INTRODUCTION TO CORPORATE LAW

Structure

1.1 INTRODUCTION

Corporate law, as the name suggests, is law of the corporates. The dictionary meaning of the word "corporate" is "unified into one body; collective". The word corporate also been defined to mean "of or relating to a corporation". A corporation is a group of individuals, created by law or under the authority of law, having a continuous existence independent of the existence of its members, and powers and liabilities distinct from those of its members. 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. Thus,corporate law can be understood to signify the law which pertains to corporations. The most prominent manifestation of a corporation is a company.

1.2 OBJECTIVES

After going through this lesson, you will be able to understand

- meaning, concept,characteristics, types of company and historical development of companies law in India
- to understand distinction between different types of companies,company and partnership firm and company and limited liability partnership (LLP).
- to discuss their legal basis, special provisions and privileges for some classes of companies
- procedures for formation of a company as to one person companies and companies with charitable objects, etc.
- concept of lifting / piercing of corporate veil

1.3 MEANING OF COMPANY

In common parlance, a company means an association of persons united for a common object. It has no strictly technical or legal meaning. Accordingly, the term is used to represent associations formed to carry on some business for profit or to promote art, science, education, or some charitable purpose.Such association may be incorporated according to law whereupon it becomes a body corporate or what is usually called a corporation with a perpetual succession and a common seal. 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. It is, for this reason, sometimes called artificial legal person. As a legal person, a corporate is separate and distinct from its members and is capable of enjoying many of the rights and incurring many of the liabilities of a natural person. A company is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

1.3.1 Definition of Company

Section 3 (1) (i) of the Companies Act, 1956, defined a company as "a company formed and registered under this Act or an existing company". Section 3(1) (ii) of the said Act stated that

"An existing company means a company formed and registered under any of the previous companies laws". The Companies Act, 1956, has since been followed by the Companies Act, 2013, and Section 2 (20) of the Companies Act, 2013, provides that company means "a company incorporated under this Act or under any previous company law". However, an association formed not for profit also acquires a corporate character and falls within the meaning of a company by reason of a licence issued under Section 8(1) of the Act.

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 to which each member is entitled is his "share". The shares are always transferable although the right to transfer them may be restricted."

In **Halsbury's Laws of England**, the term 'company' has been defined as *"a collection of many individuals united into one body under a special domination having perpetual succession under an artificial form and vested by the policy of law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the designs of its institution, or the power upon it, either at the time of its creation or at any subsequent period of its existence."*

In **common law,** *a company is a legal person or legal entity separate from, and capable of surviving beyond the lives of its members.*

Chief Justice Marshall of the Supreme Court of USA in the case of Trustees of Darmouth College V. Woodward, (1819) 17 U.S. 518, defined a company as *"a person, artificial, invisible, intangible and existing only in the eyes of the law. Being a mere creation of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as accidental to its very existence."*

According to **Haney**, *"Joint Stock Company is a voluntary association ofindividuals for profit, having a capital divided into transferable shares. The ownershipof which is the condition of membership."*

From the above definitions,it can be concluded that a company is a registered association of individuals which is an artificial legal person with a perpetual succession having its own distinct corporate and legal personality which is separate from its members. A brief description of the various attributes is given here to explain the nature and characteristics of the company as a corporate body.

1.3.2 NATURE / FEATURES / CHARACTERISTICS OF COMPANY

Since a company is the creation of law, it is not a human being, it is an artificial juridical person i.e. created by law. The law imbibes the company with many rights, obligations,

powers and duties prescribed by law, and therefore company is also called a 'person'. Being the creation of law, it possesses only the powers conferred upon it by its Memorandum of Association which is the charter of the company. Within the limits of powers conferred by the Memorandum of Association, it can do all acts as a natural person may do.

The main features / characteristics of a company are:

I. <u>Independent corporate personality</u>

The most exceptional feature of a company is its independent corporate existence. A company under law is a person. It is distinct legal *persona* existing independent of its members. By incorporation under the Companies Act, the company is vested with a corporate personality which is distinct from the members who compose it. It is because of incorporation that the owner of the business ceases to trade in his own person. The company carries on the business, the liabilities are the company's liabilities and the former owner is under no liability for anything the company does, although as principal shareholder, he is able to take full advantage of the profits which the company makes.

A company incorporated under the Act is vested with a corporate personality so it bears its own name, acts under name, has a seal of its own and its assets are separate and distinct from those of its members. The enterprise upon incorporation acquires its own entity capable of functioning as an incorporated individual. It becomes impersonalized. 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 members are its owners however 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 with 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.

A well-known illustration of this principle is the decision of House of Lords in ***Salomon v. Salomon and Co. Ltd., (1897) A.C. 22***.

One Salomon was a boot and shoe manufacturer. His business was in sound condition and there was substantial surplus of assets over liabilities. He incorporated a company named Salomon& Co. Ltd., for the purpose of taking over and carrying on his business. The seven subscribers to the memorandum were Salomon, his wife, his daughter, and four sons and they remained the only members of the company. Salomon and two of his sons constituted the board of directors of the company. The business was transferred to the company for £40,000. In payment, Salomon took 20,000 shares of £1 each and debentures worth£10,000. These debentures certified that the company owed Salomon £10,000 and created a charge on company's assets. One share was given to each remaining member of his family. The company went into liquidation within a year. On winding up, the state of affairs was broadly something like this:

Assets- £6,000;

Liabilities – Salomon as debenture holder - £10,000; and unsecured creditors - £7,000.

Thus after paying off the debenture-holder (Salomon), nothing would be left for the unsecured creditors.

The unsecured trade creditors claimed the whole of the company's assets, on the ground that, though incorporated under the Act, the company never had an independent existence; it was infact Salomon under another name; he was the Managing Director, the other directors being his sons and under his control. His vast preponderance of shares made him absolute master. The business was solely his, conducted solely for and by him, and the company was a mere sham and fraud. The secured creditors further contended 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. But it was held that Salomon& Co. Ltd. was a real company fulfilling all the legal requirements. It must be treated as a company, as an entity consisting of certain corporators, but a distinct and independent corporation.

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."*

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.

The decision of the ***Calcutta High Court in Re. Kondoli Tea Co. Ltd., (1886) ILR 13 Cal. 43***, recognised the principle of separate legal entity even much earlier than the decision in Salomon v. Salomon & Co. Ltd. case. Certain persons transferred a Tea Estate to a company and claimed exemptions from ad valorem duty on the ground that since they themselves were also the shareholders in the company, it was nothing but a transfer from them in one name to themselves under another name. While rejecting this Calcutta High Court observed: "The company

was a separate person, a separate body altogether from the shareholders and the transfer was as much a conveyance, a transfer of the property, as if the shareholders had been totally different persons."

II. Limited liability

"The privilege of limited liability for business debts is one of the principal advantages of doing business under the corporate form of organization. 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 ₹ 500/- (or 50% of the value) as part payment at the time of allotment, he cannot be called upon to pay more than ₹ 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:

(i) 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)(Section 7(7) of Companies Act 2013] .

(ii) 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 the carrying 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 of Companies Act 2013] .

(iii) When the company is incorporated as an Unlimited Company under Section 3(2)(c) of the Companies Act 2013.

(iv) Under Section 35(3) of Companies Act 2013, 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.

(v) As per section 75(1) of Companies Act 2013, 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;

(vi) Section 224(5) of Companies Act 2013 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.

III. Perpetual Succession

As stated in Section 9 of Companies Act 2013 (Section 34 (2) of Companies Act, 1956), an incorporated company has perpetual succession. Perpetual succession means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and it remains the same entity, despite total change in the membership. A company's life is determined by the terms of its Memorandum of Association. It may be perpetual, or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association. Perpetual succession, therefore, means that themembership of a company may keep changing from time to time, but that shall not affect its continuity.

The membership of an incorporated company may change either because one shareholder has sold/transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act. Thus, perpetual succession denotes the ability of a company to maintain its existence by the succession of new individuals who step into the shoes of those who cease to be members of the company.

Professor L.C.B. Gower rightly mentions, *"Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived — not even a hydrogen bomb could have destroyed it"*.

IV. Separate Property

Another characteristic of company is that it is capable of owning, enjoying and disposing of property in its own name. It is a consequence of the fact that the company is a legal person. The property of the company will not be considered as the joint property of members constituting the company, although the capital and assets of the company are contributed by the members. The leading case on the point is ***Macaura v. Northern Assurance Co. Ltd. [1925] AC 619 HL***. M was the holder of nearly all the shares except one of a timber company. He insured the company's timber in his own name. The timber was destroyed in fire and M claimed the loss from the insurance company. It was held that insurance company was not liable to him. The Court pronounced that no share holder has any right to any item of property owned by the company, for he has no legal or equitable interest therein.

In case titled ***Bacha F. Gauzdar v. CIT, Bombay, AIR 1955, SC 74,*** the Supreme Court has held that the company is the real person in which all its property is vested and by which it is controlled, managed and disposed of.

V. Transferability of shares

The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. Section 44 of the Companies Act, 2013 enunciates the principle by providing that the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles. If the articles do not provide anything for the transfer of shares and the Regulations contained in Table "F" in Schedule I to the Companies Act, 2013, are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property. A member may sell his shares in the open market and realize the money

invested by him. This provides liquidity to a member (as he can freely sell his shares) and ensures stability to the company (as the member is not withdrawing his money from the company). The Stock Exchanges provide adequate facilities for the sale and purchase of shares. Further, as of now, in most of the listed companies, the shares are also transferable through Electronic mode i.e. through Depository Participants in dematerialized form instead of physical transfers. However there are restrictions with respect to transferability of shares of a Private Limited Company.

VI. Common Seal

Upon incorporation, a company becomes a legal entity with perpetual succession and a common seal. Since the company has no physical existence, it must act through its agents and all contracts entered into by its agents must be under the seal of the company. The Common Seal acts as the official signature of a company. The name of the company must be engraved on its common seal. A document not bearing common seal of the company, when the resolution passed by the Board, for its execution requires the common seal to be affixed is not authentic and shall have no legal force behind it. However, a person duly authorised to execute documents pursuant to a power of attorney granted in his favour under the common seal of the company may execute such documents and it is not necessary for the common seal to be affixed to such documents. The person, authorised to use the seal, should ensure that it is kept under his personal custody and is used very carefully because any deed, instrument or a document to which seal is improperly or fraudulently affixed will involve the company in legal action and litigation.

Common seal is no longer mandatory and afterthe amendments made in the year 2015 to the Companies Act 2013, common seal has been rendered optional.

VII. Capacity to sue and be sued

Company being a body corporate, can sue and be sued in its own name. To sue, means to institute legal proceedings against (a person) or to bring a suit in a court of law. All legal proceedings against the company are to be instituted in its name.

Similarly, the company may bring an action against anyone in its own name. A company's right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. A company has a right to seek damages where a defamatory material published about it, affects its business. A company, as a person distinct from its members, may even sue one of its own members.

VIII. Finances

The company is probably the only medium of organizing business which is given the privilege of raising capital by public subscriptions either by way of shares or debentures. Further, public financial institutions like banks etc. lend their resources more willingly to companies than to other forms of business organizations. The facility of borrowing and giving security by way of floating charge is also an executive privilege of companies.

IX. Professional Management

The corporate sector is capable of attracting the growing cadre of professional managers. Young management graduates willingly join companies because of the feeling that they would thereby belong to a managerial class. Their independent functioning as managers is assured because of the fact that there is no human employer and the shareholders exercise only a formative control. The shareholders members may derive profits without being burdened with the management of the company as they do not have effective and intimate control over its working and they elect their representatives as Directors on the Board of Directors of the company to conduct corporate functions through managerial personnelemployed by them. In other words, the company is administered and managed by its managerial personnel.

X. Contractual Rights

A company, being a legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A shareholder cannot enforce a contract made by his company; he is neither a party to the contract, nor be entitled to the benefit derived from of it, as a company is not a trustee for its shareholders. Likewise, a shareholder cannot be used on contracts made by his company. The

distinction between a company and its members is not confined to the rules of privity but permeates the whole law of contract. Therefore, the company as a legal person can take action to enforce its legal rights or be sued for breach of its legal duties. Its rights and duties are distinct from those of its constituent members.

XI. Termination of existence

A company, being an artificial juridical person, does not die a natural death. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up. However, to avoid winding up, sometimes companies adopt strategies like reorganization, reconstruction and amalgamation.

1.4 DOCTRINE OF LIFTING OF OR PIERCING THE CORPORATE VEIL

The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. The Court will break through the corporate shell and apply the principle/ doctrine of what is called as **"lifting of or piercing the corporate veil".** The Court will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company.

The corporate veil is lifted when in defence proceedings, such as for the evasion of tax, an entity relies on its corporate personality as a shield to cover its wrong doings. However, the shareholders cannot ask for the lifting of the veil for their purposes. This was held in ***Premlata Bhatia v. Union of India (2004) 58 CL 217 (Delhi)*** wherein the premises of a shop were allotted on a licence to the individual licencee. She set up a wholly owned private company and transferred the premises to that company without Government consent. She could not remove the illegality by saying that she and her company were virtually the same person.

1.4.1 Statutory Recognition of Lifting of Corporate Veil

The Companies Act, 2013 itself contains some provisions [Sections 7(7), 251(1) and 339] which lift the corporate veil to reach the real forces of action. Section 7(7) deals with

punishment for incorporation of company by furnishing false information; Section 251(1) deals with liability for making fraudulent application for removal of name of company from the register of companies and Section 339 deals with liability for fraudulent conduct of business during the course of winding up.

1.4.2 Lifting or Piercing of Corporate Veil under Judicial Interpretation

Ever since the decision in Salomon v. Salomon & Co. Ltd., (1897) A.C. 22, normally Courts are reluctant or at least very cautious to lift the veil of corporate personality to see the real persons behind it. Nevertheless, Courts have found it necessary to disregard the separate personality of a company in the following situations:

(a) **Prevention of Fraud or improper conduct:**

Where the corporate veil has been used for commission of fraud or improper conduct, Courts have lifted the veil and looked at the realities of the situation. In ***Jones v. Lipman, (1962) All E.R. 442,*** A agreed to sell certain land to B. Pending completion of formalities of the said deal, A sold and transferred the land to a company which he had incorporated with a nominal capital of £100 and of which he and a clerk were the only shareholders and directors. This was done in order to escape a decree for specific performance in a suit brought by B. The Court held that the company was the creature of A and a mask to avoid recognition and that in the eyes of equity A must complete the contract, since he had the full control of the limited company in which the property was vested, and was in a position to cause the contract in question to be fulfilled.

(b) **Where the company is a sham:**

The Courts also lift the veil where the company is a mere cloak or sham. The case of ***Gilford Motor Co. Ltd. V. Horne, (1933), Ch, 935 C.A.*** illustrates the point. In this case, Horne, a former employee of a company, was subject to a covenant not to solicit its customers. He formed a company to carry on a business which, if he had done personally, would have been a breach of the covenant. An injunction was granted both against him and the company to restrain them from carrying on the business. The company was described in this judgment as a 'device, a stratagem', and as "a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation."

(c) **Protection of public policy:**

Where the conduct conflicts with public policy, courts lifted the corporate veil for protecting the public policy. In ***Connors Bros. v. Connors (1940) 4 All E.R. 174,*** the principle was applied against the managing director who made use of his position contrary to public policy. In this case the House of Lords determined the character of the company as "enemy" company, since the persons who were de facto in control of its affairs, were residents of Germany, which was at war with England at that time. The alien company was not allowed to proceed with the action, as that would have meant giving money to the enemy, which was considered as monstrous and against "public policy".

(d) **Determination of character of a company whether it is enemy:**

A company may assume enemy character when persons in de facto control of its affairs are residents of an enemy country. In such a case, the court may examine the character of the persons in real control of the company, and declare the company to be an enemy company.

In ***Daimler Co. Ltd. v. Continental Tyre& Rubber Co., (1916) 2 A.C. 307***, a company was incorporated in England for the purpose of selling in England tyres made in Germany by a German company which held the bulk of the shares in the English company. The holders of the remaining shares, except one, and all the directors were Germans, residents in Germany. During the First World War, the English company commenced an action for recovery of trade debt. It was held that the company was an alien company and payment of debt to it would amount to trading with the enemy, and therefore the company was not allowed to proceed with the action. It was also held that a company will be regarded as having enemy character, if the persons having de facto control of its affairs are resident in an enemy country or, wherever they may be, are acting under instructions from or on behalf of the enemy.

(e) **Protection of revenue:**

The Courts may ignore the corporate entity of a company where it is used for tax evasion. Where it was found that the sole purpose for which the company was formed was to evade taxes the Court will ignore the concept of separate entity and make the individuals

concerned liable to pay the taxes which they would have paid but for the formation of the company.

In ***Re. Sir Dinshaw Manakjee Petit, A.I.R. 1927 Bombay 371***, the assesse was a wealthy man enjoying large dividend and interest income. He formed four private companies and agreed with each to hold a block of investment as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to him as a pretended loan. This way he divided his income in four parts in a bid to reduce his tax liability. But it was held "the company was formed by the assessee purely and simply as a means of avoiding super-tax and the company was nothing more than the assessee himself. It did no business, but was created simply as a legal entity to ostensibly receive the dividends and interests and to hand them over to the assessee as pretended loans". The Court decided to disregard the corporate entity as it was being used for tax evasion.

(f) **Avoidance of welfare legislation:**

Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance has necessarily to be the same and, therefore, where it was found that the sole purpose for the formation of the new company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction.

An illustration on point is the case titled ***The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar v. The Associated Rubber Industries Ltd., Bhavnagar and another, A.I.R. 1986 SC 1.*** The facts of the case were that a new company was created wholly by the principal company with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company i.e. only for the purpose of splitting the profits into two hands andthereby reducing the obligation to pay bonus. The Supreme Court of India held that the new company was formed as a device to reduce the gross profits of the principal company and thereby reduce the amount to be paid by way of bonus to workmen. The amount of dividends received by the new company should, therefore, be taken into account in assessing the gross profit of the principal company.

(g) **Failure to perform constitutional duties and functions by PSUs:**

Another instance of corporate veil arrived at by the Court arose in ***Kapila Hingorani v. State of Bihar, 2003(4) Scale 712.*** In this case, the petitioner had alleged that the State of Bihar had not paid salaries to its employees in PSUs etc. for long periods resulting in starvation deaths. But the respondent took the stand that most of the undertakings were incorporated under the provisions of the Companies Act, 1956, hence the rights etc. of the shareholders should be governed by the provisions of the Companies Act and the liabilities of the PSUs should not be passed on to the State Government by resorting to the doctrine of lifting the corporate veil. The Court observed that the State may not be liable in relation to the day-to-day functioning of the PSUs but its liability would arise on its failure to perform the constitutional duties and the functions of these undertakings. It is so because "life means something more than mere ordinal existence. The inhibition against deprivation of life extends to all those limits and faculties by which life is enjoyed".

(h) **Corporate façade only an agency instrumentality:**

Where a corporate facade is really only an agency instrumentality, corporate veil may be pierced. In ***Re. R.G. Films Ltd. (1953) 1 All E.R. 615***, an American company produced a film in India technically in the name of a British Company, 90% of whose capital was held by the President of the American company which financed the production of the film. Board of Trade refused to register the film as a British film which stated that English company acted merely as the nominee of the American corporation.

(i) **Company avoiding legal obligation:**

Where the use of a company is being used to avoid legal obligations, the courts may disregard the legal personality of the company and proceed on the assumption as if no company existed.

(j) **Company acting as agent or trustee of the shareholders:**

Where a company is acting as an agent for its shareholders, the shareholders will be liable for the acts of the company. It is a question of fact in each case whether the company is acting as an agent for its shareholders.

(k) **To defeat unjust or inequitable purpose:**

Where it is found that a company has abused its corporate personality for an unjust and inequitable purpose, the court would not hesitate to lift the corporate veil. Further, the corporate veil could be lifted when acts of a corporation are allegedly opposed to justice, convenience and interests of revenue or workmen or are against public interest. Thus, in appropriate cases, the Courts disregard the separate corporate personality and look behind the legal person or lift the corporate veil.

1.4.3 Historical Development of Corporate Law in India

Company legislation in India owes its origin to English Company Law. The companies Acts passed from time to time in India have been following the English Companies Act with certain modifications to suit Indian conditions. The first legislative enactment for "Registration of Joint Stock Companies" was passed in 1850 which was based on the English Companies Act 1844 (known as the Joint Stock Companies Act of 1844) which recognized the company as a distinct legal entity but did not grant to it the privilege of limited liability.

The principle of limited liability was first introduced in England by Limited Liability Act of 1855. The English Companies Act, 1856 (known as the Joint Stock Companies Act of 1856) replaced both Acts of 1844 and 1855. Under this Act of 1856, the company legislation assumed for the first time the form which has been broadly handed down almost too present day subject to various amendments. Under this any 7 or more persons could form themselves into an incorporated company, with or without limited liability, by signing Memorandum of Association and complying with requirements of the Act. Following this Act, the Joint Stock Companies Act of 1857 was passed in India which for the first time recognized the principle of limited liability in India.

Then came the Companies Act of 1866 which was based on the English Companies Act of 1862. The Companies Act of 1866 in India was recast in 1882 to bring the Indian Company law in conformity with the various amendments made to the English Companies Act of 1862.

Following the English Companies (Consolidation) Act, 1908, the Indian Companies Act of 1913 was passed, however as same did not take into account peculiar features of

Indian trade and commerce, the said Act was amended in 1914, 1915, 1920, 1926, 1930 and 1932. The Act was extensively amended in 1936 on the lines of English Companies Act of 1929. From 1937 to 1951, further amendments were made almost every year in the 1913 Act.

On recommendations of Bhabha Committee, Companies Act 1956 was passed, and same has now been replaced by the Companies Act 2013 on the basis of report of J.J. Irani Committee. The Act of 2013 has introduced new concepts supporting enhanced disclosure, accountability, better board governance, better facilitation of business and so on. It has also introduced concepts like one person company to Indian law of companies.The Companies Act 2013 at the time of its notification consisted of 470 sections and seven schedules.

1.5 COMPANY VIS-À-VIS OTHER FORMS OF BUSINESS

Though there are a number of similarities between a limited company and other forms of associations, there are a great number of dissimilarities as well. In both the cases individuals are the subjects, and trading is generally the object. In the following paragraphs, a limited company is distinguished from a partnership firm and also a limited liability partnership (LLP).

1.5.1 Distinction between Company and Partnership

The principal points of distinction between a company and a partnership firm are as follows:

(1) A company is a distinct legal person. A partnership firm is not distinct from the several persons who form the partnership.

(2) In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals who are its members.

(3) Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.

(4) Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business. A member of a company has no such power.

(5) A partner cannot contract with his firm, whereas a member of a company can.

(6) A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's share can ordinarily be transferred.

(7) Restrictions on a partner's authority contained in the partnership contract do not bind outsiders whereas such restrictions incorporated in the Articles are effective, because the public are bound to acquaint themselves with them.

(8) A partner's liability is always unlimited whereas that of shareholder may be limited either by shares or a guarantee.

(9) A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company, whereas the death or insolvency of a partner dissolves the firm, unless otherwise provided.

(10) A company may have any number of members except in the case of a private company which cannot have more than 200 members (excluding past and present employee members). In a public company there must not be less than seven persons in a private company not less than two. Further, a new concept of one person company has been introduced which may be incorporated with only one person.

(11) A company is required to have its accounts audited annually by a chartered accountant, whereas the accounts of a firm are audited at the discretion of the partners.

(12) A company, being a creation of law, can only be dissolved as laid down by law. A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement among the partners.

1.5.2 Distinction between Company and Limited Liability Partnership (LLP)

LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. LLP can continue its existence irrespective of

changes in partners. It is capable of entering into contracts and holding property in its own name. LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.

Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. The LLP, however, is not relieved of the liability for its other obligations as a separate entity.

Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.

LLP is a body corporate and a legal entity separate from its partners, having perpetual succession. LLP form is a form of business model which: (i) is organized and operates on the basis of an agreement, (ii) provides flexibility without imposing detailed legal and procedural requirements and (iii) enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner.

A basic difference between an LLP and a company lies in that the internal governance structure of a company is regulated by statute (i.e. Companies Act) whereas for an LLP it would be by a contractual agreement between partners.

The management-ownership divide inherent in a company is not there in a limited liability partnership. LLP have more flexibility as compared to a company. LLP have lesser compliance requirements as compared to a company.

1.6 TYPES OF COMPANIES

Having understood the concept of a company, the next step is to understand various types of companies. Companies may be classified on the basis of their incorporation, number of members, size, basis of control and motive. On the basis of incorporation the companies may be classified into Charter Companies, Statutory Companies and Registered Companies. On the basis of liability, it may be Companies limited by shares/guarantee and unlimited liability companies. Further, on the basis of number of members, they may be

classified into One Person Company, private company and public company. On the basis of size, they may be divided into small companies and other companies. On the basis of control, they may be classified into holding company, subsidiary company and associate company. Besides, companies may be Government companies, foreign companies, holding/ subsidiary companies etc. The different types of companies have been defined based on various parameters like ownership, mode of incorporation etc.

1.6.1 Classification of Companies by Mode of Incorporation

Depending on the mode of incorporation, there are three classes of joint stock companies.

A. Chartered Companies: These are incorporated under a special charter by a monarch. The East India Company and The Bank of England are examples of chartered incorporated in England. The powers and nature of business of a chartered company are defined by the charter which incorporates it. A chartered company has wide powers. It can deal with its property and bind itself to any contracts that any ordinary person can. In case the company deviates from its business as prescribed by the charted, the Sovereign can annul the latter and close the company. Such companies do not exist in India.

B. Statutory Companies: These companies are incorporated by a Special Act passed by the Central or State legislature. Reserve Bank of India, State Bank of India, Industrial Finance Corporation, Unit Trust of India, State Trading Corporation and Life Insurance Corporation are some of the examples of statutory companies. Such companies do not have any memorandum or articles of association. They derive their powers from the Acts constituting them and enjoy certain powers that companies incorporated under the Companies Act have. Alternations in the powers of such companies can be brought about by legislative amendments. These companies are generally formed to meet social needs and not for the purpose of earning profits.

C. Registered or incorporated companies: These are formed under the Companies Act, 2013, or under the Companies Act passed earlier to this. Such companies come into existence only when they are registered under the Act and a certificate of incorporation has been issued by the Registrar of Companies. This is the most popular mode of incorporating a company. As per section 3(2) of Companies Act, 2013, a company formed under this Act may be either (a) a company limited by shares; or (b) a company limited by

guarantee or (c) an unlimited company. Therefore, registered companies may furtherbe divided into three categories of the following.

i) Companies limited by Shares: These types of companies have a share capital and the liability of each member or the company is limited by the Memorandum to the extent of face value of share subscribed by him. In other words, during the existence of the company or in the event of winding up, a member can be called upon to pay the amount remaining unpaid on the shares subscribed by him. Such a company is called company limited by shares. A company limited by shares may be a public company or a private company. These are the most popular types of companies.

ii) Companies Limited by Guarantee: These types of companies may or may not have a share capital. Each member promises to pay a fixed sum of money specified in the Memorandum in the event of liquidation of the company for payment of the debts and liabilities of the company. This amount promised by him is called 'Guarantee'. The Articles of Association of the company state the number of member with which the company is to be registered. Such a company is called a company limited by guarantee. Such companies depend for their existence on entrance and subscription fees. They may or may not have a share capital. The liability of the member is limited to the extent of the guarantee and the face value of the shares subscribed by them, if the company has a share capital. If it has a share capital, it may be a public company or a private company.

The amount of guarantee of each member is in the nature of reserve capital. This amount cannot be called upon except in the event of winding up of a company. Non-trading or non-profit companies formed to promote culture, art, science, religion, commerce, charity, sports etc. are generally formed as companies limited by guarantee.

iii) Unlimited Companies: Section of Companies Act, 2013, gives choice to the promoters to form a company with or without limited liability. A company not having any limit on the liability of its members is called an 'unlimited company'. An unlimited company may or may not have a share capital. If it has a share capital it may be a public company or a private company. If the company has a share capital, the article shall state the amount of share capital with which the company is to be registered. The articles of an unlimited company shall state the number of member with which the company is to be registered.

1.6.2 Classification on the basis of number of members

Traditionally, on the basis of number of members, a company may be:

(1) Private Company, and

(2) Public Company

The Companies Act, 2013, however, in addition to the above two forms of companies also provides for one person company which shall be formed as a private company. Thus, the three basic types of companies which may be registered under the Act are:

(a) Private Companies;

(b) Public Companies; and

(c) One Person Company (to be formed as Private Limited).

A. <u>Private Company</u>

As per Section 2(68) of the Companies Act, 2013, "Private Company" means a company having a minimum paid-up share capital of one lakh rupees or such higher 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 definition, be treated as a single member;

Provided further that the following persons shall not be included in the number of members:—

(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, and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

As per provison to Section 14 (1), if 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, such company shall, as from the date of such alteration, cease to be a private company. The words 'Private Limited' must be added at the end of its name by a private limited company.

As per section 3 (1), a private company may be formed for any lawful purpose by two or more persons, by subscribing their names to a memorandum and complying with the requirements of this Act in respect of registration. Section 149(1) further lays down that a private company shall have a minimum number of two directors. The only two members may also be the two directors of the private company.

Characteristics or Features of a Private Company

The main features of a private company are as follows:

i) A private company restricts the right of transfer of its shares. The shares of a private company are not as freely transferable as those of public companies. The articles generally state that whenever a shareholder of a Private Company wants to transfer his shares, he must first offer them to the existing members of the existing members of the company. The price of the shares is determined by the directors. It is done so as to preserve the family nature of the company's shareholders.

ii) It limits the number of its members to two hundred excluding members who are employees or ex-employees who were and continue to be the member. Where two or more persons hold share jointly they are treated as a single member. The minimum number of members to form a private companyis two (except in case of one member company).

iii) A private company cannot invite the public to subscribe for its capital or shares of debentures. It has to make its own private arrangement.

B. Public Company

By virtue of Section 2(71), a public company means a company which:

(a) is not a private company;

(b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up 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.

In other words, a private company which is a subsidiary of a company which is not a private company is also a public company.

As per section 3 (1) (a), a public company may be formed for any lawful purpose by seven or more persons, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration. A public company may be said to be an association consisting of not less than 7 members, which is registered under the Act. In principle, any member of the public who is willing to pay the price may acquire shares in or debentures of it. The securities of a public company may be quoted on a Stock Exchange. The number of members is not limited to two hundred. It may be noted that in case of a public company, the articles do not contain the restrictions provided in Sections 2(68) of the Act. As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable. However, any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

C. Classification of private company into one Person Company and small company

Under the Companies Act, 2013, a private company can further be classified into:

(i) One Person Company; and

(ii) Small Company.

(i) One Person Company

The Companies Act, 2013 classifies companies on the basis of their number of members into One Person Company, private company and public company. As stated above, a private company requires a minimum of 2 members. In other words, a One Person Company is a kind of private company having only one member. As per section 2(62) of the Companies Act, 2013, "One Person Company" means a company which has only one person as a member.

The concept of One Person Company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, access to market, limited liability, and legal protection available to companies. Prior to the new Companies Act, 2013 coming into effect, at least two shareholders were required to start a company. But now the concept of One Person Company (OPC) would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery. Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now the OPC would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure, Further, the amount of compliance by a one person company is much lesser in terms of filing returns, balance sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

Section 3(1) (c) of Companies Act 2013 lays down that a company may be formed for any lawful purpose by one person, where the company to be formed is to be One Person Company that is to say, a private company. In other words, one person company is a kind of private company. A One person company shall have a minimum of one director. Therefore, a One Person Company will be registered as a private company with one member and one director. By virtue of section 3(2), an OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company.

Rule 3 of Companies (Incorporation) Rules, 2014 provides that-

(1) Only a natural person who is an Indian citizen and resident in India-

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company.

The term "resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding one calendar year.

(2) No person shall be eligible to incorporate more than a One Person Company or become nominee in more than one such company.

(3) Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days.

(4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.

(5) Such Company cannot be incorporated or converted into a company under section 8 of the Act.

(6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporates.

(7) No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of One Person Company, except threshold limit (paid up share capital) is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

(ii) <u>Small Company</u>

Small company is a new form of private company under the Companies Act, 2013. A classification of a private company into a small company is based on its size i.e. paid up capital and turnover. In other words, such companies are small sized private companies.

As per section 2(85) "small company" means a company, other than a public company—

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this definition shall apply to—

(a) a holding company or a subsidiary company;

(b) a company registered under section 8; or

(c) a company or body corporate governed by any special Act

1.6.3 Classification on the basis of control

On the basis of control, a company may be classified into:

1. Holding companies, and

2. Subsidiary Company

1. **Holding Company [Sec. 2(46)]:** A company is known as the holding company of another company if it has control over the other company. According to Sec 2(46), holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies. A company may become a holding company of another company in either of the following three ways:-

a) by holding more than fifty per cent of the normal value of issued equity capital of the company; or

b) by holding more than fifty per cent of its voting rights; or

c) by securing to itself the right to appoint, the majority of the directors of the other company, directly or indirectly.

The other company in such a case is known as a "Subsidiary company". Though the two companies remain separate legal entities, yet the affairs of both the companies are managed and controlled by the holding company. A holding company may have any number of subsidiaries. The annual accounts of the holding company are required to disclose full information about the subsidiaries.

2. **Subsidiary Company. [Sec. 2 (87)]:** Section 2 (87) provides that 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 share capital either at its own or together with one or more of its subsidiary companies:

For the above purpose –

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;

1.6.4. Classification on the basis of ownership of companies

On the basis of ownership, a company may be:

(a) Government Company;

(b) Non-government Company

(a) Government company [Section 2 (45) of Companies Act 2013]

A Company of which not less than 51% of the paid up capital is held by the Central Government of by State Government or Government singly or jointly is known as a Government Company. It includes a company subsidiary to a government company. The share capital of a government company may be wholly or partly owned by the government, but it would not make it the agent of the government. The auditors of the government company are appointed by the government on the advice of the Comptroller and Auditor General of India. The Annual Report along with the auditor's report are placed before both the House of the Parliament. Some of the examples of government companies are - Mahanagar Telephone Corporation Ltd., National Thermal Power Corporation Ltd., State Trading Corporation Ltd., Hydroelectric Power Corporation Ltd., Bharat Heavy Electrical Ltd., Hindustan Machine Tools Ltd. etc.

(b) Non-government Company

All other companies, except the Government Companies, are called non-government companies. They do not satisfy the characteristics of a government company as given above.

1.6.5. Classification on the basis of Nationality of the Company

On the basis of Nationality, a company may be a-

(a) Indian Company;

(b) Foreign company

(a) Indian Companies

These companies are registered in India under the Companies Act, 2013, and have their registered office in India. Nationality of the members in their case is immaterial.

(b) Foreign Companies

As per section 2(42) of Companies Act, 2013, "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;

Rules applicable to foreign companies:

Sections 379 to 393 of the Act deal with such companies.

1. **Documents:** Section 380 of the Act lays down that every foreign company which establishes a place of business in India must, within 30 days of the establishment of such place of business, file with the Registrar of Companies for registration:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation there of in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(h) any other information as may be prescribed.

2. **Exhibition of name:** Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents as required under Section 382.

3. **Accounts:** Section 381 requires a Foreign Company to maintain books of Account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.

4. **Winding Up:** Section 376 of the Companies Act, 2013 provides further that when a foreign company which has been carrying on business in India, ceases to carry on such business in India, it may be wound up as an unregistered company under Sections 375 to 378 of the Act, even though the company has been dissolved or ceased to exist under the laws of the country in which it was incorporated.

5. **Applicability of provisions of Companies Act, 2013:** As regards the applicability of the provisions of the Companies Act, 2013 to foreign companies the following provisions of section 384 are to be noted:

(i) **Debentures -** The provisions of section 71 relating to Debentures shall apply mutatis mutandis to a foreign company.

(ii) **Filing of annual Returns-** The provisions of Section 92 regarding (filing of annual returns) shall, subject to such exceptions, modifications or adaptations as may be made therein by the rules made under the Act, apply to a foreign company as they apply to a company incorporated in India.

(iii) **Accounts & Audit etc.-** The provisions of Section 128 relating to the (to the extent of requiring it to maintain as its principal place of business in India books of account with respect to moneys received and spent, sales and purchase made and assets and liabilities, in the course of or in relation to its business in India), Section 209A (inspection of accounts), Section 233A (Special audit), Section 233B (audit of cost accounts), Section 234-246 (investigations), so far as may be, apply only to the Indian business of a foreign company having an established place of business in India as they apply to a company incorporated in India.

(iv) **Registration of Charges-** The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.

(v) **Inspection, Inquiry and Investigation**-The provisions of Chapter XIV (Inspection, Inquiry and Investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India. As per Section 386(c), having a share transfer office or share registration office will constitute a place of business.

Section 379 provides that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference of a foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

In addition to above, some other types of companies are:

1.6.6. Associate company

As per Section 2(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 to section 2(6) provides that "significant influence" means control of at least twenty per cent of total share capital, or of business decisions under an agreement.

To add more governance and transparency in the working of the company, the concept of associate company has been introduced. It will provide a more rational and objective framework of associate relationship between the companies.

Further, as per section 2 (76), Related party includes 'Associate Company'. Hence, contract with Associate Company will require disclosure/approval/entry in statutory register as is applicable to contract with a related party.

1.6.7. Investment Company

As per explanation (a) to section 186, "Investment Company" means a company whose principal business is the acquisition of shares, debentures or other securities. An investment company is a company, the principal business of which consists in acquiring, holding and dealing in shares and securities. The word 'investment', no doubt, suggests only the acquisition and holding of shares and securities and thereby earning income by way of interest or dividend etc. But investment companies in actual practice earn their income not only through the acquisition and holding but also by dealing in shares and securities i.e. to buy with a view to sell later on at higher prices and to sell with a view to buy later on at lower prices.

1.6.8. Dormant Company

The Companies Act, 2013 has recognized a new set of companies called as dormant companies. As per section 455 (1) where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application

to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

Explanation appended to section 455(1) says that for the purposes of this section,—

(i) "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

(ii) "significant accounting transaction" means any transaction other than—

(a) payment of fees by a company to the Registrar;

(b) payments made by it to fulfil the requirements of this Act or any other law;

(c) allotment of shares to fulfil the requirements of this Act; and

(d) payments for maintenance of its office and records.

As per section 455(2), the Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect. Section 455(3) provides that the Registrar shall maintain a register of dormant companies in such form as may be prescribed. According to section 455(4), in case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies. Further a dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed [Section 455 (5)]. The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section. [Section 455(6)]

Privileges of a Dormant Company

The privileges and exemptions enjoyed by a dormant company or its advantages over other companies are as follows:

1. Financial statement: Under Section 2(40), the financial statement, with respect to a dormant company, may not include the cash flow statement;

2. Meetings of Board of directors: Under Section 173 (5), it is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days.

1.7 DIFFERENCE BETWEEN PRIVATE AND PUBLIC COMPANY

The following points highlight the distinction between private and a public company:

1. Minimum Capital: A private company must have a minimum paid up capital of ₹1,00,000/- whereas a public company must have a minimum paid up capital of ₹ 5,00,000/-.

2. Minimum number: The minimum number of persons required to form a public company is 7. It is 2 in case of a private company (except in case of one Member Company).

3. Maximum number: There is no restriction on maximum number of members in a public company, whereas the maximum number cannot exceed 200 in a private company.

4. Number of directors: A public company must have at least 3 directors whereas a private company must have at least 2 directors.

5. Restriction on appointment of directors: In the case of a public company, the directors must file with the Register a consent to act as directors or sign an undertaking for their qualification shares. The directors or a private company need not do so.

6. Restriction on invitation to subscribe for shares: A public company invite the general public to subscribe for shares. A public company invites the general public to subscribe for the shares or the debentures of the company. A private company by its Articles prohibits invitation to public to subscribe for its shares.

7. Name of the Company: In a private company, the words "Private Limited" shall be added at the end of its name.

8. Public subscription: A private company cannot invite the public to purchase its shares or debentures. A public company may do so.

9. Issue of prospectus: Unlike a public company a private company is not expected to issue a prospectus or file a statement in lieu of prospectus with the Registrar before allotting shares.

10. Transferability of Shares: In a public company, the shares are freely transferable. In a private company the right to transfer shares is restricted by Articles.

11. Special Privileges: A private company enjoys some special privileges. A public company enjoys no such privileges.

12. Quorum: If the Articles of a company do not provide for a larger quorum, 5 members personally present in the case of a public company if number of members is not more than one thousand; 15 members upto 5000 members and 30 members if number of members is more than 5000, are quorum for a meeting of the company. It is 2 in the case of a private company.

13. Managerial remuneration: Total managerial remuneration in a public company cannot exceed 11 per cent of the net profits. No such restriction applies to a private company which is not a subsidiary of a public company.

14. Commencement of business: A private company may commence its business immediately after obtaining a certificate of incorporation. A public company cannot commence its business until it is granted a "Certificate of Commencement of business".

1.8 SPECIAL PRIVILEGES OF A PRIVATE COMPANY

The Companies Act, 2013, confers certain privileges on private companies which are not subsidiaries of public companies. Such companies are also exempted from complying with quite a few provisions of the Act. The basic rationale behind this is that since private limited companies are restrained from inviting capital and deposits from the public, not much public interest is involved in their affairs as compared to public limited companies. Private limited companies lose the privileges and exemptions the moment they cease to be private companies. These privileges can be studied as follows:

a) Special privileges of private companies

The following are special privileges of private companies:

1. **Number of members:** A private company may be formed with only two persons as member.

2. Allotment of minimum subscription: It may commence allotment of shares even before the minimum subscription is subscribed for or paid.

3. Prospectus or statement in lieu of prospectus: It is not required to either issue a prospectus to the public of file statement in lieu of a prospectus.

4. Issue of new shares: When a public company issues new shares, after the expiry of 2 years from its formation or at any time after the expiry of one year from the date of first allotment of shares, whichever is earlier, a public company has first to offer these shares to the existing equity shareholder *pro rata*. However the members in general meeting may, by a special resolution, decide otherwise. There is no such provision in case of private companies. Restrictions imposed on public companies regarding further issue of capital do not apply on private companies.

5. Kinds of shares: A private company may issue share capital of any kind, and with such voting rights, as it may think fit.

6. Commencement of business: A private company can commence its business after obtaining a certificate of incorporation. A certificate of commencement of business is not required. A public company on the other hand first requires a certificate of commencement of business before it can commence its business.

7. Index of members: A private company need not keep an index of members.

8. Statutory meeting and statutory report: A private company need not hold statutory meeting or file a statutory report with Registrar.

9. Quorum: Unless the articles provide for a larger number, only two persons personally present shall form the quorum in case of a private company, while at least five member personally present form the quorum in case of a public company.

10. Rules regarding directors: The rules regarding directors are less stringent for a private company. For example, it is not necessary for a private company to file consent of

a director to act as such with the Registrar. Similarly, the company may provide additional grounds for disqualification of directors and their vacation of office.

11. Demand for poll: In case of a public company, poll can be demanded by persons having not less than one-tenth of the total voting power in respect of the resolution or holding shares on which an aggregate sum of not less than Rupees Five Lakh or such higher amount as may be prescribed, has been paid-up. Such stipulation regarding paid up shareholding is not required in case of a private limited company.

12. Number of directors: A private company need not have more than two directors, while a public company must have at least three directors.

b) Special Obligations of a Private Company

In addition to the restrictions imposed on Private Companies as contained in Section 2(68) of the Companies Act, a private company owes certain special obligations as compared to a public company, which are as follows:

A private company, while filing its annual return with the Registrar of Companies as required by Section 92, must also send with this return, a certificate stating that:

(i) The company has not, since the date of the closure of the last financial year with reference to which the last return was submitted or in the case of a first return since the date of the incorporation of the company, issued any invitation to the public to subscribe for any securities of the company;

(ii) Where the annual return discloses the fact that the number of members, except in case of a one person company, of the company exceeds two hundred, the excess consists wholly of persons who under second proviso to clause (ii) of sub-section (68) of section 2 (i.e. the person who is or were in the employment of the Co.) of the Act are not to be included in reckoning the number of two hundred;

(iii) The Company continued to be a Private Company during the financial year.

1.9 CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY

Under the Companies' Act, 1956, a private company shall become a public company in following cases:

i) By default: When it fails to comply with the essential requirements of a private company provided under Section 3 (1) (iii) Default in complying with the said three provisions shall disentitle a private company to enjoy certain privileges (Sec. 43).

ii) A private company which is a subsidiary of another public company shall be deemed to be a public company.

iii) By provisions of law - Section 43-A: Under Section 43-A

a) Where not less than 25% of the paid-up share capital of a private company is held by one or more bodies" corporate such a private company shall become a public company from the data in which such 25% is held by body corporate [Sec. 43-A (1)]

b) Where the average annual turnover of a private company is not less than Rs. 10 crores during the relevant period, such a private company shall become a public company after the expiry of the period of three months from the last day of the relevant period when the accounts show the said average annual turnover [Sec. 43 A (1 A)].

c) When a private company holds not less than 25% of the paid up share capital of a public company the private company shall become a public company from the date on which the private company holds such 25% [Sec. 43A (IB)].

d) Where a private company accepts, after an invitation is made by an advertisement of receiving deposits from the public other than its members, directors or their relatives, such private company shall become a public company [Sec. 43A (IC)].

iv) By Conversion: When the private company converts itself into a public company by altering its Articles in such a manner that they no longer include essential requirements of a private company under Section 3 (1) (iii). On the data of such alternations, it shall cease to be private company. It shall comply with the procedure of converting itself into a public company [Sec. 44].

The Articles of Association of such a public company may continue to have the three restrictions and may continue to have two directors and less than seven members. Within 3 months of such a conversion, Registrar of Companies shall be intimated. The Registrar shall delete the word 'Private' before the words 'Limited' in the name of the company and shall also make necessary alternations in the certificate of incorporation.

Position under Companies Act, 2013:

Conversion of Companies already registered [Section-18]: Section 18 of the Companies Act, 2013 allows an existing Company to convert itself as a Company of other class by altering its memorandum and articles of association in the manner prescribed in the Companies Act 2013. Section 13 provides for alteration of Memorandum of Association whereas Section 14 provides for alteration of Articles of Association.

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:

Where such a conversion is required to be done, the Registrar shall on an application made by the company, after satisfying himself that the provisions of the Act applicable for registration of companies have been complied with, close the formerregistration of the company and after registering the documents referred to above, i.e. the altered memorandum and articles of association, issue a certificate of incorporation in the same manner as its first registration.

If a private company so alters its Articles that they do not contain the provisions which make it a private company, it shall cease to be a private company as on date of alteration. It shall then file with the Registrar, within 15 days, either a prospectus or a statement in lieu of prospectus. When this is done, the company becomes a public company.

A private company which becomes a public company shall also:

(1) file a copy of resolution altering the Articles within 15 days of passing thereof, with the Registrar;

(2) take steps to raise its membership to atleast 7 if it is below that number on the date of conversion, and also increase the number of its directors to more than 2 if it is below that number;

(3) alter the regulations contained in the articles which are inconsistent with those of a public company;

Conversion by operation of law: Deemed Public Companies [Section 2 (71) of Companies Act, 2013]: By virtue of proviso of Section 2(71) of the Companies Act, 2013 a private company is, for the purposes of the Act, deemed to be a public company, if it is subsidiary of public Company. Section 2 (71) defines a public company, and the proviso in said definition provides as under:

"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";

As such, a private company shall be deemed to be a public company if and as and when it becomes a subsidiary of a Public Company even if continues to be a private company in its articles.

Date of becoming a Deemed Public Company: The private company becomes deemed public company immediately upon, becoming subsidiary of public Company. In 2006, in case of **Hillcrest Realty Sdn. Bhdv.Hotel Queen Road (P.) Ltd.2**, the Company Law Board, Delhi Bench held at para 36 that "all the provisions in the Articles to maintain the basic characteristics of a private company in terms of section 3(1) (iii) *(of Companies Act 1956)* will continue to govern the affairs of the company even though it is a subsidiary of a public company". It was held by the Delhi CLB Bench that the basic characteristics of a private company in terms of section 3(1)(iii) do not get altered just because it is a subsidiary of a public company in view of fiction in terms of section 3(1)(iv)(c) that it is a public company. It was further held by the Bench that it may be a public company in terms of other provisions of the Act but not with reference to its basic characteristics.

All the provisions of Public Company applicable on deemed public Company except following below given restriction as mentioned in Article of Association of Company:

i) Restricts the right to Transfer its shares;

ii) Limits the number of its Members to Two Hundred;

iii) Prohibits any Invitation to The Public to subscribe for any securities of the company;

Along with provisions applicable on public Company it has to comply with the restriction mentioned above.

Further, a private company which becomes a public company by virtue of being a subsidiary of a public company:

(i) May retain the restrictions in its articles as applicable to a private company and therefore, constitutionally, be a private company;

(ii) May retain its name as a private company;

(iii) Since, due to its parentage, the company acquires a public interest status, such company cannot be entitled to the privileges of a private company;

(iv) Maximum number of members can't exceed 200.

Effects of becoming a Deemed Public Company:

As mentioned above, due to its nature, private companies enjoy several relaxations and several sections exempt private companies from the regulatory regime of the Act unless such private companies are the subsidiaries of public companies. Thus, all the Provision applicable on public Companies under the Act, except those mentioned above, will be applicable on Deemed Public Companies.

1.9.1 Associations not for Profit

As per Section 4(1), the memorandum of a company shall state the name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company. However, Section 8(1) permits the registration, under a license granted by the Central Government, of associations not for profit with limited liability without being required to use the word "Limited' or the

words 'Private Limited" after their names. This is of great value to companies not engaged in business like bodies pursuing charitable, educational or other purposes of great utility.

The Central Government may grant such a license if:

(i) it is intended to form a company for promoting commerce, art, science, sports, education, research, social welfare, religion, charity protection of environment or any such other object; and

(ii) the company prohibits payment of any dividend to its members but intends to apply its profits or other income in promotion of its objects.

Further under section 8(5) where it is proved to the satisfaction of the Central Government that a limited company registered under this Act or under any previous company law has been formed with any of the objects specified above and with the restrictions and prohibitions as mentioned aforesaid, it may, by license, allow the company to be registered under this section subject to such conditions as the Central Government deems fit and to change its name by omitting the word "Limited", or as the case may be, the words "Private Limited" from its name and there upon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company. The company is registered without paying any stamp duty on its Memorandum and Articles.

On registration, the Association enjoys all the privileges of a limited company, and is subject to all its obligations, except, those in respect of which exemption by a notification is granted by the Central Government. A license may be granted by the Central Government under Section 8 of the Act on such conditions and subject to such regulations as it thinks fit and those conditions and regulations shall be binding on the body to which the license is granted. The Central Government may direct that such conditions and regulations shall be inserted in the Memorandum, or in the Articles, or partly in the one and partly in the other.

A Company, which has been granted license under Section 8 cannot alter the provisions of its Memorandum or Articles except with the previous approval of the Central Government. A firm may be a member of the company registered under this section. A company registered under section 8 may convert itself into company of any other kind only after complying with such conditions as may be prescribed. An association registered under the Act,

which has been granted a license under Sub-section (1) Section 8 is subject to all the obligations under the Act, except in some cases where the Central Government has issued some notifications directing exemption, to such licensed companies from various provisions of the Act, as specified in those notifications. It covers aspects such as shorter notice of general meetings, publication of name under section 12 etc.

The Central Government may by order at any time revoke the license whereupon the word "Limited' or "Private Limited' as the case may be, shall have to be used as part of its name and the company will lose the exemptions that might have been granted by the Central Government. However, the Central Government can do so only after providing such association an opportunity to be heard and the aggrieved association can challenge the order of the Central Government under Article 226 of the Constitution. Further a copy of every such order has to be filed with the Registrar. It is permissible for the Central Government to grant exemption to a class or classes of companies from one or more of the provisions of the Act under Sub-section (1) of Section 462.

1.10 STAGES IN FORMATION OF A COMPANY / INCORPORATION OF COMPANIES (SECTION 7 OF COMPANIES ACT, 2013)

A company comes into existence when a number of persons come together with a view to exploit some business opportunity. These persons are called "Promoters". under the Companies Act, 2013, any seven or more persons (two or more in case of private company) may form an incorporated company for a lawful purpose by subscribing their name to the memorandum of association and complying with the requirements of the Act in respect of registration. The purpose for which a company is going to be incorporated must be lawful, i.e. not forbidden to law or contrary to public policy. The expression subscribing their names to the memorandum of association means putting their signatures to the memorandum. It means an agreement between the persons to associate themselves into a body corporate.

Before a company is formed, certain preliminary decisions are necessary, i.e. whether it should be a private company or a public company, what capital it should have etc. All these decisions are taken by certain persons known as "promoters". They do all the necessary work incidental to formation of a company.

A company may be formed for any lawful purpose by—

(a) seven or more persons, where the company to be formed is to be a public company;

(b) two or more persons, where the company to be formed is to be a private company; or

(c) one person, where the company to be formed is to be One Person Company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act.

Following are the various stages / steps involved in incorporation (formation) of a company:

1.10.1 Application for Availability of Name of company

A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

(a) the name of the proposed company; or

(b) the name to which the company proposes to change its name.

The name stated in the memorandum of association shall not be identical with or resemble too nearly to the name of an existing company registered under the Companies Act, 2013 or any previous company law; or 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.

Further, unless the previous approval of the Central Government has been obtained, 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 may be prescribed.

Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 60 days from the date of the application.

1.10.2 Preparation of Memorandum and Articles of Association

The Memorandum of Association is the charter of a company. It is a document, which amongst other things, defines the area within which the company can operate. According to section 4 (1) of the Companies Act, 2013, the memorandum of a company shall state—

(a) the name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company;

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

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

(d) the liability of members of the company, whether limited or unlimited, and also state—

(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—

(i) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and 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 One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

The articles of a company shall contain the regulations for management of the company.

1.10.3 Filing of documents with Registrar of Companies

There shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the following documents and information for registration, namely:—

(a) Application for Incorporation of Companies:

An application for incorporation shall be filed with ROC in such form as may be prescribed.

(b) Memorandum and Articles of the company:

Memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed, shall also be filed;The memorandum and articles of association of the company shall be signed by each subscriber to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any. Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shallplace the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him. Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of association. Where the subscriber to the memorandum is a body corporate, the memorandum and

articles of association shall be signed by director, officer or employee of the body corporate duly authorized in this behalf by a resolution of the board of directors of the body corporate and where the subscriber is a Limited Liability Partnership, it shall be signed by a partner of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership:

Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

Where subscriber to the memorandum is a foreign national residing outside India, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized in such manner as may be prescribed.

(c) Declaration from the professional:

Section 7(1) ((b) of the Companies Act, 2013 requires filing of a declaration in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.

(d) Affidavit from the subscribers to the Memorandum:

Section 7(1)(c) of the Companies Act, 2013, requires the filing of an affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.

(e) Furnishing verification of Registered Office:

A company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The company can furnish to the registrar verification of registered office within 30 days of incorporation in the manner prescribed.

Where the location of the registered office is finalized prior to Incorporation of a company by the promoters, the promoters can also file along with the Memorandum and Articles, the verification of its registered office in the prescribed form.

(f) Particulars of subscribers:

Section 7(1)(e) of the Companies Act, 2013, requires the filing of the particulars of name, including surname or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity, as may be prescribed, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.

(g) Particulars of first directors along with their consent to act as directors:

Section 7(1)(f) requires filing of the particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the director identification number, residential address, nationality and such other particulars including proof of identity as may be prescribed. The particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company shall also be filed in such form and manner as may be prescribed.

No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number. Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN). Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number in the prescribed form. Any individual who intends to be a director of a company will have to mandatorily apply for DIN first. DIN has to be obtained by the directors of the company before commencing the procedure for incorporation of a company.

(h) Power of Attorney

With a view to fulfilling the various formalities that are required for incorporation of a company, the promoters may appoint an attorney empowering him to carry out the instructions/requirements stipulated by the Registrar. This requires execution of a Power of Attorney on a non-judicial stamp paper of a value prescribed in the respective State Stamp Laws.

1.10.4 Issue of Certificate of Incorporation by Registrar

The Registrar, on the basis of documents and information filed under Section 7 (1) of Companies Act, 2013, shall register all the documents and information referred to in that sub- section in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movableand immovable, tangible and intangible, to contract and to sue and be sued, by the said name. The subscribers would become the members of the company.

1.10.5 Conclusiveness of certification of incorporation

A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act. This is known as ***Rule in Peel's Case.*** The reason for the rule was expressed by Lord Cairns in Peel's case thus:

"When once the Memorandum is registered and the company holds out to the world as a company undertaking business, willing to receive shareholders and ready to contract engagements, then, it would be of the most disastrous consequences if after

all that has been done, any person was allowed to go back and enter into an examination of the circumstances attending the original registration and the regularity of the execution of the documents."

The Certificate of Incorporation is conclusive evidence that everything is in order as regards registration and that the company has come into existence from the earliest moment of the day of incorporation stated therein with rights and liabilities of a natural person, competent to enter into contracts. The validity of the registration cannot be questioned after the issue of the certificate.

In ***Jubilee Cotton Mills Ltd. Vs. Lewis, (1924), A.C. 958***, on 6th January, the necessary documents were delivered to the registrar for registration. Two days after, the registrar issued the certificate of incorporation but dated it 6th January instead of 8th, i.e. the day on which the certificate was issued. On 6th January, some shares were allotted to L, i.e. before the certificate of incorporation was issued. The question arose whether the allotment was void. It was held that the certificate of incorporation is conclusive evidence of all that it contains. In law, the company was formed on 6th January, and therefore the allotment of shares was valid.

In ***Moosa v. Ebrahim ILR (1913) 40 Cal. 1 (P.C.),*** the Memorandum of Association of a company was signed by two adults and by a guardian of the other 5 subscribers, who were minors. The Registrar, however, registered the company and issued under his hand a Certificate of Incorporation. It was contended that this Certificate of Incorporation should be declared void. Lord Macnaughten said: "Their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with; that there were no seven subscribers to the Memorandum and that the Registrar ought not to have granted the certificate. ***But the certificate is conclusive for all purpose. Thus, the certificate prevents anyone from alleging that the company does not exist***".

The certificate of incorporation has been held to be conclusive on following points:

1. That requirements of the Act in respect of registration of matters precedent and incidental thereto have been complied with;

2. That the association is a company authorized to be registered under the Act, and has been duly registered;

3. That the date borne by the certificate of incorporation is the date of birth of the company, i.e. the date on which the company came into existence.

It is for the purpose of incorporation only that the certificate was made conclusive by the legislature and the certificate cannot legalize the illegal object contained in the Memorandum. Where the object of a company is unlawful, it has been held that the certificate of registration is not conclusive for this purpose.

1.10.6 Allotment of Corporate Identity Number

On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

1.10.7 Documents of incorporation to be preserved

Section 7(4) of Companies Act, 2013, states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed till its dissolution.

1.11 PUNISHMENT FOR FURNISHING FALSE OR INCORRECT INFORMATION AT THE TIME OF INCORPORATION

The Companies Act, 2013, imposes severe punishment for incorporation of a company by furnishing false or incorrect information. The persons furnishing false or incorrect information shall be liable for following punishment:-

(i) If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be punishable for fraud under section 447.

(ii) Without prejudice to the above liability, where, at any time after the incorporation of a company, it is proved that the 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 promoters, the persons named as the first directors of the

company and the persons making declaration under section 7(1)(b) shall each be punishable for fraud under section 447.

1.12 POWERS OF THE NATIONAL COMPANY LAW TRIBUNAL (NCLT) IN CASE OF INCORPORATION OF A COMPANY BY FURNISHING FALSE OR INCORRECT INFORMATION

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 (NCLT) may, on an application made to it, on being satisfied that the situation so warrants:-

(a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or

(b) direct that liability of the members shall be unlimited; or

(c) direct removal of the name of the company from the register of companies; or

(d) pass an order for the winding up of the company; or

(e) pass such other orders as it may deem fit:

Provided that before making any order under this sub-section,—

(i) the company shall be given a reasonable opportunity of being heard in the matter; and

(ii) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

1.13 EFFECT OF REGISTRATION

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum,

capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.The subscribers would become the members of the company. Thus, when a company is registered and a certificate of incorporation issued by the Registrar, three important consequences follow:

1. The company becomes a distinct legal entity. Its life commences from the date mentioned in certificate of incorporation;

2. The company acquires a perpetual succession. The members may come and go, but the company goes on forever, unless it is wound up;

3. The company's property is not the property of its shareholders. The shareholders have a right to share in the profits of the company when realized and divided. Likewise, any liability of the company is not the liability of individual shareholder.

A private limited company can commence business immediately after its incorporation. A public company has to obtain certificate to commence business before it can commence business.

1.14 SUMMARY

This chapter highlights the basic concepts about the incorporation of a company, which may be defined as group of persons associated together to achieve some common objective. In the legal sense, a company is an association of both natural and artificial persons incorporated under the existing law of a country. The main characteristics of a company are corporate personality, limited liability, perpetual succession, separate property, transferability of shares, common seal, capacity to sue and be sued, contractual rights, limitation of action, separate management, termination of existence etc. A company formed and registered under the Companies Act has certain special features, which reveal the nature of a company. These characteristics are also called the advantages of a company because as compared with other business organizations, these are in fact, beneficial for a company. Although, company has a separate legal entity from the persons constituting it but where a fraudulent and dishonest use is made of the legal entity, the individuals concerned

will not be allowed to take shelter behind the corporate personality. The Court may break through the corporate shell and apply the principle of what is known as "lifting of or piercing the corporate veil".

From the point of view of incorporation, companies can be classified as chartered companies, statutory companies and registered companies. Companies can be categorized as unlimited companies, companies limited by guarantee and companies limited by shares. Companies can also be classified as public companies, private companies, one person companies, small companies, associations not for profit having license under Section 8 of the Act, Government companies, foreign companies, holding companies, subsidiary companies, associate companies, investment companies and Producer Companies. The Companies Act, 2013 confers certain privileges on private companies. Under formation of a company, the first few steps are to be taken by the promoters and these steps are to apply for availability of name of company, prepare the memorandum and articles of association and get them vetted, printed, stamped and signed. On the submission of all formalities, the registrar issues a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act. Any person who furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, shall be punishable for fraud under section 447. In such a case, the Tribunal may also on an application made to it pass suitable orders.

1.15 GLOSSARY

Company: A company means a body of individuals associated together for a common objective, which may be business for profit or for some charitable purposes.

Registered Company: A registered company is one which is formed and registered the Indian Companies Act, 2013 or under any earlier Companies Act in force in India.

Public Company: A public company means a company which is not a private company. Any seven or more persons can join hands to form a public company.

Holding Company: A company shall be deemed to be the holding company to another if that other is its subsidiary.

Limited liability: Usually refers to limited companies where the shareholders' liability to pay the debts of the company is limited to the value of their shares.

Unlimited Company: A company not having any limit on the liability of its member is called an unlimited company.

Incorporate: It refers to the legal act of creating a company.

Chartered Companies: A company created by the grant of a charter by the Crown is called a Chartered Company and is regulated by that Charter.

Statutory Companies: These are constituted by special Act of Parliament or State Legislature. Examples of these types of companies are Reserve Bank of India, Life Insurance Corporation of India, etc.

Government Company: A Government company as any company in which not less than fifty-one per cent 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

Investment Company: Investment Company means a company whose principal business is the acquisition of shares, debentures or other securities.

Perpetual Succession: An incorporated company never dies except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and remains the same entity, despite total change in the membership.

Prospectus: Any document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any securities of a body corporate.

Certificate of Incorporation: A certificate issued by the Registrar of Companies of a State indicating that a company's memorandum of association and articles of association have been accepted for filing and that the company is incorporated.

Conclusive evidence: Preponderant evidence that may not be disputed and must be accepted by a Court as a definitive proof of a fact.

1.16 SELF ASSESSMENT QUESTIONS

1. Define company. What are its essential characteristics?

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2. "The fundamental attribute of corporate personality is that the company is a legal entity distinct from the members." Elucidate the above statement.

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3. Explain the concept of limited liability. What are exceptions to the principle of limited liability?

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4. What do you understand by corporate veil and when is it disregarded?

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5. What is the difference between company and partnership?

6. What are the different types of company?

7. What is the difference between public company and private company?

8. What are the special privileges and exemptions of private companies?

9. When does a private company become a public company?

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10. What steps are required to be taken for the formation of a public limited company?

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11. What does 'conclusive evidence' means in relation to certificate of incorporation? Discuss the same citing case laws.

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1.17 SUGGESTED READINGS

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DOCUMENTS

Structure

2.1 INTRODUCTION

The memorandum along with articles of association of a company is the most important documents for the formation of a company and for its functioning thereafter. The memorandum of association contains the name, situation of registered office, objects, capital and liability clauses. The articles are its bye-laws or rules and regulations that

govern the management and internal affairs and the conduct of its business. Both the documents are required to be registered with the Registrar of Companies during incorporation.

2.2 OBJECTIVES

This lesson intends to make the reader understand

- the concept of Memorandum of Association, its purpose, contents, registration, the alterations of Memorandum of Association and effect of such alterations;
- the concept of Articles of Association, its purpose, contents, registration, the alterations that can be carried out in the Articles of Association and effect of such alterations;
- the legal effect of these document;
- doctrine of ultra vires, doctrine of indoor management and the various exceptions to the said doctrine.
- the meaning, ingredients and contents of prospectus;
- shelf prospectus information memorandum and red-herring prospectus along with relevant provisions under the Companies Act including disclosures, approval, penalties etc.

2.3 MEANING OF MEMORANDUM OF ASSOCIATION

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world. 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 Act. This 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. To subscribe means to append one's signature or mark a document as an approval or attestation of its contents.

According to Section 2(56) of the Companies Act, 2013, "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.

Section 4 of the Act specifies in clear terms the contents of this important document which is the charter of the company. The memorandum of association of a company contains the objects to pursue which the company is formed. It not only shows the objects of formation but also determines the scope of its operations beyond which its actions cannot go.

The memorandum of association is a document of great importance in relation to the proposed company. It contains the fundamental conditions upon which alone the company is allowed to be incorporated.It is the charter of the company and defines its *reason d'etre.* It lays down the area of operation of the company. It also regulates the external affairs of the company in relation to outsiders. Its purpose is to enable shareholders and those who deal with the company to know what its permitted range of enterprise is. It not only shows the object of the formation of a company but also the utmost possible scope of it. It is, as it were, the area beyond which the actions of the company cannot go; inside that area the shareholders may make such resolutions for their own governance as they think fit.

2.3.1. Purpose of memorandum

Purpose of memorandum is twofold:

1. The prospective shareholders shall know the field in, or the purpose for, which their money is going to be used by the company and what risk they are undertaking in making investment.

2. The outsiders dealing with the company shall know with certainty as to what the objects of the company are and as to whether the contractual relation into which they contemplate to enter with the company is within the objects of the company.

2.3.2 Form of Memorandum of Association

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 Companies Act, 2013, 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.

(i) The Form in Table A is applicable in the case of companies limited by shares;

(ii) The Form in Table B is applicable to companies limited by guarantee not having a share capital;

(iii) The Form in Table C is applicable to the companies limited by guarantee having a share capital;

(iv) The Form in Table D is applicable to unlimited companies not having a share capital;

(v) The Form in Table E is applicable to unlimited companies having a share capital.

A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.

2.4 CONTENTS OF MEMORANDUM

The memorandum of every company shall contain the following clauses (described as conditions of company's incorporation):

2.4.1 Name Clause:

A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known. The memorandum shall state the name of the company with *"Limited"* as the last word of the name in case of a public limited company, and with *"Private Limited"* as the last words of the name in case of a private limited company.

A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

(a) the name of the proposed company; or

(b) the name to which the company proposes to change its name.

Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 60 days from the date of the application. The name stated in the memorandum shall not be such that its use by the company, in the opinion of the Central Government, is undesirable. A name which is identical to or too nearly resembles, the name by which a company in existence has been previously registered, will be deemed to be undesirable. The company may adopt any suitable name provided it is not undesirable. However, the following types / classes of names may not be adopted by a company:

(i) Name identical with name of an existing company - The name stated in the memorandum shall not be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(ii) **Name constituting offence or undesirable in opinion of Central government-** The name stated in the memorandum shall not be such that its use by the company will constitute an offence under any law for the time being in force or is undesirable in the opinion of the Central Government.

(iii) **Name showing connection with government**- A company shall not be registered with a name which contains 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.

(iv) **Such word or expression, as may be prescribed-** A company shall not be registered with a name which contains any word or expression which may be prescribed,

unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

(v) **Prohibition of use of certain names-** The Emblems and Names Act, 1950, prohibits the use of or registration of a company or a firm with any name or emblem specified in the schedule to that Act. The schedule specifies, amongst others, the following items, i.e.

(a) the name, the emblem or official seal of the –

(1) United Nations Organization,

(2) The World Health Organization,

(3) The United Nations Educational, Scientific and Cultural Organization,

(b) the Indian National Flag,

(c) the name, emblem or official seal of Central Government and State Governments,

(d) the name, emblem or official seal of the President of India or Governor of any State.

(vi) **Misleading names-**Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 60 days from the date of the application. 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. 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. Thus, in ***Ewing v. Buttercup Margarine Co. Ltd. (1917) 2 Ch. 1***, the plaintiff, who carried on business under the name of the Buttercup Dairy Co., obtained an injunction against the defendant (Buttercup Margarine Co. Ltd.), on the grounds that the public might think that the two businesses were connected, the word "Buttercup" being a fancy one.

If by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company whether registered under the Companies Act, 2013, or the previous company law, the Central Government may direct the company

to change its name. The company shall change its name within a period of 3 months from the issue of the above direction after passing an ordinary resolution for the purpose. The Central Government is empowered to direct a company, at any point of time to rectify its name if by inadvertence it has been registered with a name similar to that of an existing company. If a company is so directed by the Central Government, it must change the name within 3 months of the direction after passing an ordinary resolution.

Central Government is also empowered to order rectification of name where such name in its opinion constitutes an infringement of a registered trademark. The proprietor of the registered trade mark may make an application to the Central Government for an order for rectification of name because it is identical to or too nearly resembles the applicant's registered trademarks. Such application must be made within three years from the date of incorporation or the registration or change of name whether under this Act or previous company law. In such a case the Central Government may direct the company to change its name and the company shall change its name, within a period of six months from the issue of such direction, after passing an ordinary resolution for the purpose.

Where a company changes its name or obtains a new name, it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

2.4.2 Publication of name:

The name of the company and the address of its registered office must be painted or displayed outside every office or place at which its business is carried on, in a conspicuous position and in legible letters in English and in the language in general use in that locality. The name must also be engraved on the company's common seal. Further, the name of the company and the address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any must be mentioned in legible characters in all business letters, in all its bill heads, letter papers and in all its notices and other official publications, as well as in all negotiable instruments and other prescribed documents.

However, where a company has changed its name or names during the last two years, it shall paint or display or print, as the case may be, along with its name, the former name or names so changed during the last two years as required above.

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.

2.4.3 Registered Office Clause:

The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein. Within 15 days of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent. The company must also furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

Section 12(3) of Companies Act, 2013, states that every 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;

(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 hundies, promissory notes, bills of exchange and such other documents as may be prescribed.

Provided that 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 as required under clauses (a) and (c).

2.4.4 Objects Clause:

The third compulsory clause in the memorandum sets out the objects for which the company has been formed. 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.

The objects clause is of great importance because it determines the purpose and the capacity of the company. 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.

Although express powers are necessary, a company may do anything which is incidental to and consequential upon the powers specified, and the act will not be ultra vires. Thus, a trading company has an implied power to borrow money, draw and accept bills of exchange in the ordinary form, but a railway company cannot issue bills although it may borrow money. The subscribers to the memorandum of association enjoy almost unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.

It is on the basis of the main objects clause that the concerned Registrar of Companies enquires as to the objects intended to be pursued by the company either immediately or within a reasonable time after its incorporation. The Registrar must satisfy himself by reference to certain documents, information or explanations furnished by the company.

The memorandum of association of a company is its charter defining the objects of its existence and operations. Its purpose is 'to enable the shareholders, creditors and those dealing with the company to know what the permitted range of the enterprise is. It is ultra vires for a company to act beyond the limits of its memorandum. Any attempted departure will be invalid and cannot be validated even if assented to by all the shareholders of the company. Ultra vires means an act or transaction of a company, which though it may not be illegal, is beyond the company's powers by reason of not being within the objects of the memorandum of association. The memorandum is, so to speak, the limit beyond which a company cannot travel. The Memorandum of Association is the 'LakshmanRekha' for a company. An act beyond the objects mentioned in the memorandum is ultra vires and void and cannot be ratified.

2.4.5 The Liability Clause:

The memorandum of association shall state the liability of members of the company, whether limited or unlimited, and also state,—

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 thecontributories among themselves.

2.4.6 Capital Clause:

This is the fifth compulsory clause which must state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously

described as "nominal", "authorised" 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. This clause lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum. 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 authorised to issue capital beyond its authorised/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorised capital, the amount received on excess number of shares should be returned. Out of the issued capital, the total amount actually subscribed or agreed to be subscribed is known as subscribed capital, and this subscribed capital again may be wholly paid or partly paid, in which latter case the balance would be payable on future calls when made. The amount actually paid by the shareholders is called the paid-up capital.

If the amount of the authorised capital (nominal capital), of the company is stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall also contain a statement in an equally prominent position and in equally conspicuous terms the amount of capital which has been subscribed and the amount paid-up.

2.4.7 The Association Clause:

The Association clause contains the declaration of the subscribers to the memorandum. 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.The statutory requirements regarding subscription of memorandum are that:

(i) each subscriber must take at least one share;

(ii) each subscriber must write opposite his name the number of shares which he agrees to take.

The memorandum shall be signed by atleast 7 subscribers in case of a public company, and by atleast two subscribers in case of a private company (not being a one person company), and by one person in case the company to be formed is a one person company.

2.5 DOCTRINE OF ULTRA VIRES

In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of ultra vires. As a result, an act which is ultra vires is void, and does not bind the company. Neither the company nor the contracting party can sue on it. Also, as stated earlier, the company cannot make it valid, even if every member assents to it. The general rule is that an act which is ultra vires the company is incapable of ratification. An act which is intra vires the company but outside the authority of the directors may be ratified by the company in proper form. The rule is meant to protect shareholders and the creditors of the company. If the act is ultra vires (beyond the powers of) the directors only, the shareholders can ratify it. If it is ultra vires the articles of association, the company can alter its articles in the proper way.

The doctrine of ultra vires is illustrated by the case of ***Ashbury Railway Carriage and Iron Co. Ltd. v. Riche, (1878) L.R. 7 H.L. 653***. In this case, the memorandum of the company defined the following objects for the company:

(a) to make, sell, or lend on hire, railway carriages and wagons;

(b) to carry on the business of mechanical engineers and general contractors;

(c) to purchase, lease, work, and sell mines, minerals, land and buildings.

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, "That is a contract which we desire to make, which we authorise the directors to make", still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

However, later on, the House of Lords held in other cases that the doctrine of ultra vires should be applied reasonably and unless it is expressly prohibited, a company may do an act which is necessary for or incidental to the attainment of its objects. Section 13(1)(d) of the Companies Act, 1956 [Corresponds to section 4(1)(c) of the Companies Act, 2013] provides that the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof be stated in the memorandum. However, even when the matters considered necessary in furtherance of the objects are not stated, they would be allowed by the principle of reasonable construction of the memorandum.

The main feature and facet of doctrine of ultra vires is that the company being a corporate person should not be mulcted (fined or punished) for its own acts or acts of its agents, if they are beyond its powers and privileges. Where the company exceeds its authority the act is good to the extent of the authority and bad as to the excess. But if the excess cannot be separated from the authority conferred on the company by the memorandum, the whole transaction would be affected by the doctrine of ultra vires and would be void. But there is nothing to prevent a company from protecting its company.

The leading case on the point is ***National Telephone Company v. St. Peter Port Constables, (1900) A.C. 317.*** A telephone company put up telephone wires in a certain area. The company had no powers in the memorandum to put up wires there. The defendants cut them down. Held, the company could sue for damage to the wires.

Whether a particulars act on the part of a company is within its powers is a question of fact and is decided on the construction of the terms on the memorandum.

In the case of ***A. Lakshmanaswami Mudaliar v. L.I.C., A.I.R. 1963 S.C. 1185***, the directors of the company were authorised "to make payments towards any charitable or any benevolent object or for any general public or useful object". In accordance with shareholders' resolution the directors paid ₹ 2 lacs to a trust formed for the purpose of promoting technical and business knowledge. The company's business having been taken over by L.I.C., it had no business left of its own. The Supreme Court held that the payment was ultra vires the company. Directors could not spend company's money on any charitable or general objects. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. It is pertinent to add that the powers vested in the Board of directors, e.g., power to borrow money, is not an object of the company. The powers must be exercised to promote the company's objects. Charity is allowed only to the extent to which it is necessary in the reasonable management of the affairs of the company. It was held thatthere must be proximate connection between the gift and the company's business interest.

Implied Powers: The powers exercisable by a company are to be confined to the objects specified in the memorandum. While the objects are to be specified, the powers exercisable in respect of them may be express or implied and need not be specified. Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act through agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers expressed in the memorandum.The principle underlying the exercise of such powers is that a company, in carrying on the business for which it is constituted, must be able to pursue those things which may be regarded as incidental to or consequential upon that business.

Powers which are not implied: The following powers have been held not to be implied and it is, therefore, prudent to include them expressly in the objects clauses:

(1) acquiring any business similar to the company's own business.

(2) entering into an agreement with other persons or companies for carrying on business in partnership or for sharing profit, joint venture or other arrangements. Very clear powers are necessary to justify such transactions.

(3) taking shares in other companies having similar objects.

(4) taking shares of other companies where such investment authorisesthe doing indirectly that which will not be intra vires if done directly;

(5) promoting other companies or helping them financially.

(6) a power to sell and dispose of the whole of a company's undertaking.

(7) a power to use funds for political purposes.

(8) a power to give gifts and make donations or contribution for charities not relating to the objects stated in the memorandum;

(9) acting as a surety or as a guarantor.

Ultravires the directors: If an act or transaction is ultravires the directors (i.e. beyond their powers but within the powers of the company), the shareholders can ratify it by a resolution in a general meeting or even by acquiescence provided they have knowledge of the facts relating to the transaction to be ratified. If an act is within the powers of the company, any irregularities may be cured by the consent of shareholders.

Ultravires the Articles: If an act or transaction is ultravires the Articles, the company can ratify it by altering the Articles by a Special resolution. Again, if the act is done irregularly, it can be validated by the consent of the shareholders provided it is within the powers of the company.

2.5.1 Effects of Ultra Vires Transactions

(i) **Void ab initio** – The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon.**As u**ltra vires contracts are void ab initio and hence cannot become intra vires by reason of estoppel or ratification.

(ii) **Injunction:** The members can get an injunction to restrain a company wherein ultra vires act has been or is about to be undertaken.

(iii) **Personal liability of Directors:** It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if

such capital is diverted to purposes alien to the company's memorandum, the directors will be personally liable to replace it.

In ***Jehangir R. Modi v. ShamjiLadha, [(1866-67) 4 Bom. HCR (1855)]***, the Bombay High Court held, "A shareholder can maintain an action against the directors to compel them to restore to the company the funds of the company that have by them been employed in transactions that they have no authority to enter into, without making the company a party to the suit". In case of deliberate misapplication, criminal action can also be taken for fraud. However, a distinction must be drawn between transactions which are ultra vires the company and the transactions which are ultra vires the directors. Where the directors exceed their authority the same may be ratified by the general body of the shareholders. Provided the company has the capacity to do that transaction as per its memorandum of association.

(iv) **Property of company secure:** Where a company's money has been used ultra vires to acquire some property, the company's right over such property is held secure and the company will be the right party to protect the property. This is because, though the property has been acquired for some ultra vires object, it represents the money of the company.

(v) **Ultra vires borrowing:** Ultra vires borrowing does not create the relationship of creditor and debtor.

2.6 ALTERATION OF MEMORANDUM

Section 13(1) of the Companies Act, 2013 provides that save as provided in section 61 (Dealing with power of limited company to alter its share capital), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. The memorandum of association of a company may be altered in the following respects:

(1) By changing its name [Sections 13(2)].

(2) By altering it in regard to the State in which the registered office is to be situated [Section 13(4) &(7)].

(3) By altering its objects [Section 13 (1) & (9).

(4) By altering its share capital (Section 61).

(5) By reorganizing its share capital (Sections 230 to 237).

(6) By reducing its capital (Section 66).

The provisions or conditions of the memorandum of association relating to the name clause, registered office clause, the objects clause, limited liability clause, subscriber's share clause as provided in Section 4 of the Companies Act, 2013 or any other specific provisions contained therein, can be altered by following the prescribed procedure laid down in the Act. Strict compliance of the prescribed procedure is demanded by law. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a nullity.

Further section 13(6) 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). Section 13(10) provides that no alteration made under this section shall have any effect until it has been registered in accordance with the provisions of the said section. Further, any alterationof the memorandum, 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 procedure for the alteration of the compulsory clauses or conditions of the memorandum is discussed in detail in the following paragraphs.

2.6.1 Alteration of Name Clause

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 necessary if the change relates to the addition/deletion of the word 'Private' to the name of the company consequent to the conversion of a private company into a public company and vice versa. When any change in the name of a company is made as above, 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 the change in the name shall be complete and effective only on the issue of such a certificate.

Rectification of name: Under Section 16 of the Companies Act, 2013, rectification of the name of the company is required to be carried out if, through inadvertence or otherwise, a company (whether on its first registration or on its registration by a new name) is registered by a name whichis identical to or too nearly resembles the name of a company already in existence. The rectification of the name must also be carried out if the Central Government so directs at any point of time after the registration of the company. The direction of the Central Government is required to be complied with by the company within a period of 3 months from the date of issue thereof.

Where a company changes its name or obtains a new name, it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum. Any default in complying with the direction issued by the Central Government would render the company liable for punishment with fine which may extend to one thousand rupees for every day during which default continues and its officers in default shall be liable for fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

Effect of change of name: The change of name 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. However, where a company changes its name and the new name has been registered by the Registrar, the commencing of legal proceedings in the former name is not valid. In spite of a change in name the entity of the company continues. The company is not dissolved nor does any new company come into existence. If any legal proceeding is commenced, after change in the name, against the company in its old name, the company should be treated as if it is not in existence. It is not an incurable defect and the plaint can be amended to substitute the new name.

By change of name of a company, the constitution of the company is not changed, only the name changes. It is not similar to the reconstitution of a partnership which means creation of a new legal entity altogether.

Fresh certificate of incorporation: When a company changes its name, the Registrar shall enter the new name of the company on the Register in place of the former name. It shall also issue to the company a fresh certificate of incorporation. The change of name shall be complete and effective only on issue of such a certificate. The Registrar shall also make the necessary alteration in the Memorandum of the company.

2.6.2 Alteration of Registered Office Clause

(a) Change within the local limits of same town: Section 12(5) of the Companies Act, 2013 provides that except on the authority of a special resolution passed by a company, the registered office of the company shall not be changed:—

(a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or whereit may be situated later by virtue of a special resolution passed by the company; and

(b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.

No company shall change the place of its registered office from then jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director on an application made in this behalf by the company in the prescribed manner.

Thus according to Section 12(5), a company can change its registered office from one place to another within the local limits of the city, town or village, where it is situated, by merely passing a Board resolution. A notice of the change is required to be given to the Registrar in the prescribed form within 15 days of such change. This does not involve alteration of memorandum.

(b) Change from one city to another within the same State: If the registered office is to be shifted from one city, town or village to another city, town or village within the same State, a special resolution has to be passed in the general meeting of the company. A notice of the change is required to be given to the Registrar in prescribed forms, within 15 days of such change towards special resolution passed.

(c) Change within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies: Confirmation by the Regional Director will be necessary for changing registered office of a company from one place to another if the change of registered office is from the jurisdiction of one Registrar to the jurisdiction of another within the same State. 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. 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. The said ROC shall record the ordered changes in its records. 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: 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 of the company which must be confirmed by the Central Government on an application made to it.

Procedure for alteration:

(i) Special Resolution: A Special Resolution shall be passed at a general meeting so as to change the registered office from one state to another.

(ii) Approval by Central government: Further, the alteration of the provisions of the memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Central Government on an application made to it in the prescribed form and manner.

(iii) Consent of affected parties: The Central Government shall dispose of the application in this regard 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.

(iv) Certified copy of order of Central government to be filed with Registrar: 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. 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 such time and in such manner as may be prescribed, along with a printed copy of Memorandum as altered. The Registrar 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 shall be conclusive evidence that all the requirements of the Act with respect to change and the confirmation thereof have been complied with.

2.6.3 Alteration of Objects Clause of the Company

The object clause is the most important in the memorandum of association. The legal personality of a company exists only for the particular purposes of incorporation as defined in the objects clause. The power of alteration of objects is subject to two limits, i.e. –

(A) substantive or physical limits; and

(B) procedural limits.

(A) Substantive or Physical limits: The objects of a company may be altered by special resolution so as to enable the company –

(i) To carry on its business more economically or more efficiently: The alteration must however leave the business of the company substantially what it was before the alteration. This clause contemplates only such changes in the mode of conducting business as will enable it to be carried on more economically or more efficiently.

(ii) To attain its main purpose by new or improved means: The emphasis here is on attaining the company's main purpose. The word purpose is more restrictive than objects and consequently the alteration must be one to carry out the main purpose of the company rather than one of the objects of the company although that object may be described in the memorandum as a main object.

(iii) To enlarge or change the local area of its operations: An alteration of this nature may necessitate an alteration in the name of the company.

(iv) To carry on some business which may conveniently or advantageously be combined with the objects specified in the memorandum: A company may be allowed to carry on some business which is a departure from the business already carried on provided such business is one which can conveniently or advantageously be combined with the existing business of the company and is not destructive of or inconsistent with the existing business.

(v) To restrict or abandon any of the objects specified in the memorandum.

(vi) To sell or dispose of the whole or any part of the undertaking or of any of the undertakings of the company.

(vii) To amalgamate with any other company or body of persons.

(B) Procedural limits for alteration:

a) Special Resolution: A company may, by a special resolution and after complying with the specified procedure, alter the provisions of its memorandum. It means that a company can change its objects by passing a special resolution. Consequently, a company can change its objects clause by passing a special resolution. Further in case of a listed company, the special resolution for alteration in the objects clause of the Memorandum of Association needs to be passed through Postal Ballot. Further, a company, which has raised money from public through prospectus and has any unutilized amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—

(i) the details, as may be prescribed, in respect of such resolution shall be published in the newspapers State (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;

(ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board. Also for deleting any portion of the objects clause, the procedure laid down has to be followed. A company may wish to alter its objects stated in its memorandum due to various reasons e.g. if a company wishes to cut-back i.e. where it feels it has diversified in various directions and that management of the company has become difficult or uneconomical, it may alter its objects to sell or dispose of whole or part of its undertaking(s).

b) Copy of special resolution to be filed: A company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company.

c) Certification of Registration: 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.

2.6.4 Alteration of Liability Clause

A company may, by a special resolution and after complying with the prescribed procedure, 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. Further, a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company.

2.6.5 Alteration of Capital Clause

A limited company having a share capital may make the following types of alterations in its memorandum by an ordinary resolution, if so authorised by its articles, at its general meeting:-

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

(ii) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares:

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

(iv) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that the proportion between the amount paid and unpaid shall remain the same.

(v) 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. The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both.

2.7 ARTICLES OF ASSOCIATION

The Articles of Association or just Articles are the bye-laws or rules and regulations of the companythat govern the management and internal affairs and the conduct of its business. They are framed with the object of carrying out the aims and objects as set out in the Memorandum of Association. Both the documents, i.e. the Articles and Memorandum, are required to be registered with the Registrar of Companies during incorporation. The Articles are next in importance to the Memorandum which contains the fundamental conditions upon which alone a company is allowed to be incorporated. They are as such subordinate to, and controlled by, the Memorandum.In framing the articles of a company, care must be taken to ensure that regulations framed do not go beyond the powers of the company itself as contemplated by the memorandum. Before dealing with a company, it is

advisable to read the memorandum and articles of the company to understand aspects, such as powers of Board, scope of company's activities etc. and its relationship with the outside world.

2.7.1 Meaning and Nature of Articles of Association

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.

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 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 betweenthemselves 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 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. But they must keep within the limits marked out by the memorandum and the Companies Act. The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company.

But the Articles of Association of a company are not 'law' and do not have the force of law. If any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in too.

2.7.2 Articles Subordinate to Memorandum

The articles of a company are subordinate to and subject to the memorandum of association and any clause in the Articles going beyond the memorandum will be ultra vires. But the articles are only internal regulations, over which the members of the company have full control and may alter them according to what they think fit. Only care has to be taken to see that regulations provided for in the articles do not exceed the powers of the company as laid down by its memorandum. Articles that go beyond the company's sphere of action are inoperative, and anything done under the authority of such article is void and incapable of ratification.

2.7.3 Articles in Relation to Memorandum

Even though the articles are subordinate to the memorandum yet if there be any ambiguity in the memorandum, the articles may be used to explain it but not so as to extend the objects. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation and the internal regulations of the company are to be construed together.

2.7.4 Companies Which Must Have Their Own Articles

The following companies shall have their own Articles, namely:

(a) unlimited companies;

(b) companies limited with guarantee;

(c) private companies limited by shares.

The Articles shall be signed by the subscribers of the memorandum and registered along with the memorandum. A public company may have its own articles of association. If it does not have its own articles, it may adopt Table F in Schedule I to the Act.

Adoption and application of Table F:

There are three alternative forms in which a public company may adopt articles:

1. It may adopt Table F in full;

2. It may wholly exclude Table F and set out its own articles in full;

3. It may frame its own articles and adopt part of Table F.

In other words, unless the articles of a public company expressly exclude any or all provisions of Table F, Table F shall automatically apply to it.

Forms of articles in case of other companies:

The articles of any company, not being a company limited by shares, shall be in such one of the forms in Tables G, H, I, and J in schedule I to the Act, as may be applicable, or in a form as near thereto as circumstances admit.

2.8 REGISTRATION OF ARTICLES

Section 7(1) provides that at the time of incorporation of a company there shall be filed 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. Every type of company whether public or private and whether limited by shares or limited by guarantee having a share capital or not having a share capital or an unlimited liability company must register their articles of association.

Section 5(2) provides that the articles shall also contain such matters, as may be prescribed. However, nothing prescribed in this sub-section shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management.

As mentioned above, 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. A company may adopt all or any of the regulations contained in the model articles applicable to such company. In case of any company, which is registered after the commencement of Companies Act 2013, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

Therefore 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. If articles are not registered, automatically Table F in Schedule I apply, and if registered, Table F in Schedule I 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 alongwith the memorandum for registration. Further it will be specifically stated therein that Table 'F' will not apply.

2.9 CONTENTS OF ARTICLES

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.

8. Transfer and transmission of shares.

9. Nomination.

10. Forfeiture of shares.

11. Alteration of capital.

12. Buy back.

13. Share certificates.

14. Dematerialisation.

15. Conversion of shares into stock.

16. Voting rights and proxies.

17. Meetings and rules regarding committees.

18. Directors, their appointment and delegations of powers.

19. Nominee directors.

20. Issue of Debentures and stocks.

21. Audit committee.

22. Managing director, Whole-time director, Manager, Secretary.

23. Additional directors.

24. Seal.

25. Remuneration of directors.

26. General meetings.

27. Directors meetings.

28. Borrowing powers.

29. Dividends and reserves.

30. Accounts and audit.

31. Winding up.

32. Indemnity.

33. Capitalisation of reserves.

Utmost caution must be exercised in the preparation of the articles of association of a company. At the same time, certain provisions of the Act are applicable to the company "notwithstanding anything to the contrary in the articles". Therefore, the articles must contain provisions in respect of all matters which are required to be contained therein so as not to hamper the working of the company later.

2.9.1 Form and signature of Articles: Statutory requirements

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.

2.10 ALTERATION OF ARTICLES OF ASSOCIATION

A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Section 14(1) of Companies Act, 2013, provides that subject to the provisions of this 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 private company into a public company; or 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.

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 except with the approval of the Tribunal which shall make such order as it may deem fit.

Every alteration of the articles under this section and a copy of the order of the Tribunal 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.

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.

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. However, in spite of the power to alter its articles, a company can exercise this power subject only to certain limitations. These are:

1. **Must not conflict with Memorandum:** The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.

2. **Must not be inconsistent with Companies Act or other statute:** The alteration must not be inconsistent with any provisions of the Companies Act or any other statute. Similarly, where a resolution was passed expelling a member and authorising the director to register the transfer of his shares without an instrument of transfer, the resolution was held to be invalid as being against the provisions of the Act ***[Madhava Ramachandra Kamath v. Canara Banking Corporation [1941] 11 Com Cases 78 (Mad)]***. On the other hand, articles may impose on the company conditions stricter than those provided under the law; for example, they may provide that a matter should be passed by a special resolution when the Act requires it to be passed by an ordinary resolution.

3. **Must not sanction anything illegal or opposed to public policy:** The alteration must not purport to sanction anything which is illegal or opposed to public policy.

4. **Must be bonafide for benefit of company:** The alteration must be bona fide for the benefit of the company as a whole.

5. **Must not constitute a fraud on the minority by a majority:** The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad. In other words, an alteration to the articles must not discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage over the latter. For instance in ***Brown v. British Abrasive Wheel Co. Ltd., (1919) 1 Ch. 290***, a company was in financial difficulties. The majority of the shareholders were willing to provide more capital if the remaining 2 % shareholders would sell them their shares. The majority then passed a special resolution altering the articles so as to enable 9/10th of the shareholders to buy out any other shareholders. It was held that the alteration of articles could be restrained as it was designed to allow the majority to do compulsorily what they could not do by agreement and it was not for the benefit of the company as a whole.

6. **Must not increase liability of members:** Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing.

7. **Breach of contract:** By effecting alteration in its articles, a company cannot escape from its contractual obligation with any person. The company will always be liable in such a case.

8. **Must not be inconsistent with order of Tribunal under Section 242 of Companies act, 2013:** If vide any order made under Section 242 of Companies Act, 2013, by the Tribunal upon any application before it for relief in cases of oppression etc., the articles of a company are altered, then the company shall not have power, except if permitted under the order, to make, without leave from the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

9. **Approval of Central Government in Some Cases:** Amendment of Articles relating to Managing, Whole-time director and non-rotational directors requires Central Government's approval.

Subject to the foregoing conditions, the Articles in a company can be altered and no clause can be included in the Articles that it is not alterable. Persons who become members of a company have no right to assume that the Articles will always remain in a particular form.

Of course a section or a class of shareholders cannot be unfairly or oppressively treated. Thus, though the requisite majority of members could pass a special resolution to alter the Articles and if the alteration has the effect of making a fraud on the minority, the minority shareholders not being less than the number specified in the Act, could move the Court / Tribunal for redressing their grievances.

However, the issue warrants reference to the rule in ***Foss v. Harbottle (1843) 2 Hare 461*** where the court held that no individual shareholder nor a minority of shareholders in a company can take it upon himself or themselves to remedy an alleged wrong involved in the actions of directors if the said wrongful act is something which the majority can regularise and approve of.

2.10.1 Effect of Altered Articles

Alteration binds members in the same way as original articles. The altered articles shall bind the company and the members to the same extent as if they had been signed by the company and by each member, means the articles as originally framed, or as they may from time to time stand altered are valid under theprovisions of the Act. There is clear power to alter the articles, and as altered, they bind members just in the same way as did the original articles.

Section 8: Company cannot alter Article except with the approval of Central Government

Section 8(4)(i) provides that a company registered under section 8 i.e. companies with charitable objects shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

2.11 DISTINCTION BETWEEN MEMORANDUM AND ARTICLES

The main points of distinction between the memorandum and articles are given below:

1. Memorandum of association is the charter of the company and defines the fundamental conditions and objects for which the company is granted incorporation. Articles of association are the rules and regulations framed to govern this internal management of the company.

2. Memorandum defines the scope of the activities of the company, or the area beyond which the actions of the company cannot go. Articles, on the other hand, are the rules for carrying out the objects of the company as set out in the memorandum.

3. Memorandum is the supreme document. Articles are subordinate to memorandum. If there is a conflict between the Articles and Memorandum, the memorandum prevails.

4. Every company must have its own memorandum. A company limited by shares need not have Articles of its own. In such a case, Table F applies.

5. Clauses of the memorandum cannot be easily altered. They can only be altered in accordance with the mode prescribed by the Act. In some of the cases, alteration requires the permission of the Central Government or the Court. In the case of articles of association, members have a right to alter the articles by a special resolution. Generally there is no need to obtain the permission of the Court or the Central Government for alteration of the articles.

6. Memorandum of association cannot include any clause contrary to the provisions of the Companies Act. The articles of association are subsidiary both to the Companies Act and the memorandum of association.

7. The memorandum generally defines the relation between the company and the outsiders, while the articles regulate the relationship between the company and its members and between the members inter se.

8. Acts done by a company beyond the scope of the memorandum are absolutely void and ultra vires and cannot be ratified even by unanimous vote of all the shareholders. But the acts of the directorsbeyond the articles can be ratified by the shareholders.

2.12 LEGAL EFFECT OF THE MEMORANDUM AND ARTICLES

The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles. Also, all monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

We shall examine the extent to which the memorandum and articles bind:

(a) the members to the company;

(b) the company to the members;

(c) the members inter se; and

(d) the company to outsiders.

(a) Members Bound to the Company:

The memorandum and articles constitute a contract binding the members of the company. The members, as members, are bound to the company. Each member must, therefore, observe the provisions of the memorandum and articles. In ***Boreland's Trustee v. Steel Brother and Co. Ltd. (1901) 1 Ch. 279,*** the articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. B, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles, as the shares were purchased by B in terms of the articles.

(b) Company Bound to the Members:

Since the articles constitute a contract binding the company to its members in their capacity as members, a member can bring an action against the company for infringement by it of the memorandum or articles. For example, an individual member can sue the company for an injunction restraining it from improper payment of dividend. Further, the company is bound to individual members in respect of their ordinary rights as members, e.g. the right to receive share certificate in respect of shares allotted to them, or to receive notice of general meeting, etc. Normally, action for breach of articles against the company can be brought only by a majority of the members. Individual or minority members cannot bring such a suit except when it is intended for enforcement of personal rights of members or to prevent the company from doing any ultra vires or illegal act, fraud, or oppression and mismanagement.

(c) Member Bound to Member

As between the members inter se each member is bound by the articles to the other members but that does not mean the memorandum and articles create an express contract among the members of the company. Thus, a member of a company has no right to bring a suit to enforce the articles in his own name against any other member or members. It is the company alone which can sue the offender so as to protect the aggrieved member. It is in this way that the rights of members inter se are regulated. A shareholder may, however, sue in his own name to restrain another, or others from doing fraudulent or ultra vires acts. Articles do not affect or regulate the rights arising out of a commercial contract, with which the members have no concern, i.e., rights completely outside the company's relationship.

(d) Company not bound to Outsiders:

The term "outsider" signifies a person who is not a member of the company even if he is a director of or solicitor to the company. Even in regard to members, the articles bind the company to them in their capacity as members. As between outsiders and the company, neither the memorandum nor the articles would give any contractual rights to outsiders against the company or its members even though the names of outsiders are mentioned in those documents in connection with the arrangements that the company might have contemplated for carrying on its business. The articles do not confer any contractual rights even upon a member in a capacity other than that of a member. To succeed, the party suing must prove a contract outside and independent of the articles.

In ***Eley v. Positive Life Insurance Co., (1876) 1 E.X.D. 88***, the articles provided that the solicitor to the company would not be removed from office except for misconduct. Eley acted as solicitor to thecompany and also became a member of the company. Company discontinued his services and then he sued the company for damages for breach of contract. It was held that he had no cause of action because the articles did not constitute any contract between the company and himself. His action was dismissed.

This rule, however, proved to be rather harsh and so the Courts later on modified it. The modified rule is as follows:

While the articles cannot create a contract between the company and any person other than a member in his capacity as a member, they may indicate the basis upon which contracts may be made by the company. If such a contract is entered into whether with a member of the company or any other person, the conditions stated in the articles will be tacitly adopted by that contract, unless expressly negatived or varied by the contract itself.

The question sometimes arises as to whether directors are bound by whatever is contained in the articles. In case the directors contravene the provisions in the articles, the directors render themselves liable for an action by members. On the other hand, members can also ratify acts of directors. If any loss is incurred by the company, directors are liable to reimburse to the company any loss so incurred.

2.13 CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES

The memorandum and articles, when registered, become public documents and can be inspected by anyone on payment of nominal fee. Therefore, every person who contemplates entering into a contract with a company has the means of ascertaining and is consequently presumed to know, not only the exact powers of the company but also the extent to which these powers have been delegated to the directors, and of any limitations placed upon the exercise of these powers. In other words, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. In fact, he is regarded not only as having read those documents but also as having understood them according to their proper meaning.

Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company For example, if the articles provide that a bill of exchange to be effective must be signed by two directors, a person dealing with the company must see that it is so signed; otherwise he cannot claim under it. In ***KotlaVenkataswamy v. Rammurthy, AIR 1934 Mad 579,*** the articles required that all documents should be signed by the managing director, secretary and the working director on behalf of the company. A deed of mortgage was executed by the secretary and the working director only and the Court held that no claim would lie under such a deed. The Court said that the mortgagee should have consulted the articles

before the deed was executed. Therefore, even though the mortgagee may have acted in good faith and the money borrowed applied for the purpose of the company, the mortgage was nevertheless invalid.

The doctrine of indoor management protects third parties who are entitled to an assurance that all the procedural aspects of a transaction are carried out. Outsiders dealing with incorporated bodies are bound to take notice of limits imposed on the corporation by the memorandum or other documents of constitution. Nevertheless they are entitled to assume that the directors or other persons exercising authority on behalf of the company are doing so in accordance with the internal regulations as set out in the Memorandum & Articles of Association. The impact of this doctrine on practical relations is thus stated in HALSBURY: "A company is subject to the rule that, where the conduct of a party charged with a notice shows that he had suspicions of a state of facts the knowledge of which would affect his legal rights, but that he deliberately refrained from making inquiries, he will be treated as having had notice, though he is not entitled to claim for his own advantage.

2.14 DOCTRINE OF INDOOR MANAGEMENT

While the doctrine of 'constructive notice" seeks to protect the company against the outsiders, the principal of indoor management operates to protect the outsiders against the company. According to this doctrine, as laid down in ***Royal British Bank v. Turquand, (1856) 119 E.R. 886***, persons dealing with a company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire the regularity of any internal proceedings. In other words, while persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see that the company carries out its own internal regulations.

In ***Royal British Bank v. Turquand*** (supra), the directors of a banking company wereauthorised by the articles to borrow on bonds such sums of money as should from time to time, by resolution of the company in general meeting, be authorised to borrow. The directors gave a bond to Turquand without the authority of any such resolution. It was held that Turquand could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed. Lord Hatherly observed,

"Outsiders are bound to know the external position of the company, but are not bound to know its indoor management".

Section 176 of Companies Act, 2013, provides for the Validity of Acts of Directors - No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company:

Provided that nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or have been terminated.

The object of the section is to protect persons dealing with the company - outsiders as well as members by providing that the acts of a person acting as director will be treated as valid although it may afterwards be discovered that his appointment was invalid or that it had terminated under any provision of this Act or the Articles of the company.

2.14.1 Exceptions to the doctrine of indoor management

The above noted 'doctrine of indoor management' is, however, subject to certain exceptions. In other words, relief on the ground of 'indoor management' cannot be claimed by an outsider dealing with the company in the following circumstances:

1. **Where the outsider had knowledge of irregularity**: The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowing fully well that the directors do not have the authority to make the transaction but still enters into it, cannot seek protection under the rule of indoor management. In ***Howard v. Patent Ivory Co. (38 Ch. D 156),*** the articles of a company empowered the directors to borrow upto one thousand pounds only. They could, however, exceed the limit of one thousand pounds with the consent of the company in general meeting. Without such consent having been obtained, they borrowed 3,500 pounds from one of the directors who took debentures. The company refused to pay the amount. Held that, the debentures were good to the extent of onethousand pounds only because the director had notice or was deemed to have the notice of the internal irregularity.

2. **No knowledge of memorandum and articles**: Again, the rule cannot be invoked in favour of a person who did not consult the memorandum and articles and thus did not rely on them. In ***Rama Corporation v. Proved Tin & General Investment Co. (1952) 1All. ER 554***, T was a director in the company. He, purporting to act on behalf of the company, entered into a contract with the Rama Corporation and took a cheque from the latter. The articles of the company did provide that the directors could delegate their powers to one of them. But Rama Corporation people had never read the articles. Later, it was found that the directors of the company did not delegate their powers to T. The Plaintiff relied on the rule of indoor management. Held, they could not because they even did not know that power could be delegated.

3. **Forgery**: The rule of indoor management does not extend to transactions involving forgery or to transactions which are otherwise void or illegal ab initio. In the case of forgery it is not that there is absence of free consent but there is no consent at all. The person whose signatures have been forged is not even aware of the transaction, and the question of his consent being free or otherwise does not arise. Consequently, it is not that the title of the person is defective but there is no title at all. Therefore, howsoever clever the forgery might have been, the personates acquire no rights at all. Thus, in ***Rouben v. Great Fingal Consolidated (1906) AC 439,*** wherethe secretary of a company forged signatures of two of the directors required under the articles on a share certificate and issued certificate without authority, the applicants were refused registration as members of the company. The certificate was held to be nullity and the holder of the certificate was not allowed to take advantage of the doctrine of indoor management.

Forgery, in the case of a company, can take different forms. It may, besides forgery of the signatures of the authorised officials, include the execution of a document towards the personal discharge of an official's liability instead of the liability of the company. Thus, in ***Kreditbank Cassel v. Schenkers Ltd. (1927) 1 KB 826,*** a bill of exchange signed by the manager of a company with his own signature under words stating that he signed on behalf of the company, was held to be forgery when the bill was drawn in favour of a payee to whom the manager was personally indebted. The bill in this case was held to be forged because it purported to be a different document from what it was in fact; it purported to be issued on behalf of the company in payment of its debt when in fact it was issued in payment of the manager's own debt.

4. Negligence: The 'doctrine of indoor management', in no way, rewards those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry, he is estopped from relying on the Rule. In the case of ***Underwood v. Benkof Liverpool (1924) 1 KB 775***, a person who was a sole director and principal shareholder of a company deposited into his own account cheques drawn in favour of the company. Held, that, the bank should have made inquiries as to the power of the director. The bank was put upon an enquiry and was accordingly not entitled to rely upon the ostensible authority of director.

5. **Existence of an agency**: Again, the doctrine of indoor management does not apply where the question is in regard to the very existence of an agency. In ***VarkeySouriar v. Keraleeya Banking Co. Ltd. (1957) 27 Com Cases 591 (Ker.)***, the Kerala High Court held that the 'doctrine of indoor management' cannot apply where the question is not one as to scope of the power exercised by an apparent agent of a company but is with regard to the very existence of the agency.

6. **Act ultra-vires the company:** This Doctrine is also not applicable where a pre-condition is required to be fulfilled before company itself can exercise a particular power. In other words, the act done is not merely ultra vires the directors/officers but ultra vires the company itself.

In the end, it is worthwhile to mention that section 6 of the Companies Act, 2013 gives overriding force andeffect to the provisions of the Act, notwithstanding anything to the contrary contained in the memorandum or articles of a company or in any agreement executed by it or for that matter in any resolution of the company in general meeting or of its board of directors. A provision contained in the memorandum, articles, agreement or resolution to the extent to which it is repugnant to the provisions of the Act, will be regarded as void.

2.15 MEANING AND DEFINITION OF PROSPECTUS

Prospectus is a disclosure document inviting public, to subscribe for the securities of the company, to enable the investors to take rational investment decisions and to protect their rights, by giving various material facts and prospects about the company.

Section 2(70) of the Companies Act, 2013 defines a prospectus as "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."

On the basis of aforesaid definition, it may be said that a document should have following ingredients to constitute a prospectus:

(a) There must be an invitation to the public;

(b) The invitation must be made "by or on behalf of the company or in relation to an intended company";

(c) The invitation must be "to subscribe or purchase";

(d) The invitation must relate to any securities of the company.

Invitation to public

In essence, it means that a prospectus is an invitation issued to the public to offer for purchase/subscribe any securities of the company. A document is deemed to be issued to the public, if the invitation to subscribe for share capital is such as to be open to anyone who brings his money and applies in prescribed form, whether the prospectus was addressed to him or not. The test is not who receives the document, but who can apply for the securities in response to the invitation contained in it. However, an issue will not be "Public" if-

(i) It is directed to a specified person or a group of persons, and

(ii) It is not calculated to result in the securities becoming available to other persons.

It has been held in ***Pramatha Nath Sanyal v. Kali Kumar Dutt, A.I.R. 1925 Cal. 714,*** which advertisement in newspaper to invite application for purchase of remaining shares of a company is prospectus. In this case the directors were penalized for not complying with the requirements of filing a copy thereof with Registrar of Companies.

A single private communication does not satisfy the term "issue". In ***Nash v. Lynde (1929) A.C. 158*** case, several copies of a document marked "strictly confidential" and containing particulars of a proposed issue of shares, were sent accompanied with application form by the managing director who, in turn, gave it to a client who passed it on to a relation. Thus, the document was passed on privately through a small circle of friends of the directors. The House of Lords held that there had been no issue to the public and any action for compensation by the allottee for loss sustained by reason of an omission in the document, failed.

2.15.1 Contents of Prospectus / Disclosures in Prospectus

Section 26(1) of companies Act, 2013, states that every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state the information, stated in the following table.

As regards to the matters prescribed in the prospectus the company has to comply with Section 26(1) read with Rule 3 of Companies (Prospectus and Allotment of Securities) Rules 2014. Accordingly the company has to comply with the disclosure requirements prescribed under Section 26(1) of the Act and Rule 3:

2.15.2 Information to be stated in Prospectus

1. The names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed;

2. The dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

3. A statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner;

4. Details about underwriting of the issue;

5. The consent in writing of the directors, the auditors, bankers to the issue, expert's opinion, if any, all the persons named in the prospectus and of such other persons, as may be prescribed;

6. The authority for the issue and the details of the resolution passed therefor;

7. Procedure and time schedule for allotment and issue of securities;

8. The capital structure of the company in the prescribed manner. The capital structure of the company shall be presented in the following manner, namely: -

(i) (a) the authorised, issued, subscribed and paid up capital (number of securities, description and aggregate nominal value);

(b) the size of the present issue;

(c) the paid up capital- (A) after the issue; (B) after conversion of convertible instruments (if applicable);

(d) the share premium account (before and after the issue);

(ii) the details of the existing share capital of the issuer company in a tabular form, indicating therein with regard to each allotment, the date of allotment, the number shares allotted, the face value of the shares allotted, the price and the form of consideration:

9. The main objects of public offer, terms of the present issue and such other particulars as may be prescribed. The prospectus to be issued shall contain the following particulars, namely: -

(a) the objects of the issue;

(b) thepurpose for which there is a requirement of funds ;

(c) the funding plan (means of finance);

(d) the summary of the project appraisal report (if any);

(e) the schedule of implementation of the project;

(f) the interim use of funds, if any;

10. The main objects and present business of the company and its location, schedule of implementation of the project;

11. Particulars relating to—

(a) management perception of risk factors specific to the project;

(b) gestation period of the project;

(c) extent of progress made in the project;

(d) dead lines for completion of the project; and

(e) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;

12. The minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;

13. The details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and

14. Disclosures in such manner as may be prescribed about sources of promoter's contribution;

2.15.3 Reports to be set out in the Prospectus

Section 26(1) (b) states that the following reports to be set out in the prospectus for the purposes of the financial information, namely:—

1. Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed;

2. Reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed;

Provided, in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in such manner as may be prescribed, the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;

3. Reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus;

Provided, in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in theprescribed manner, the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and

4. Reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly.

2.15.4 Other matters and reports to be stated in the prospectus

The prospectus shall include the following other matters and reports, namely:-

(1) If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly –

(a) in the purchase of any business; or

(b) in the purchase of an interest in any business and by reason of that purchase, or anything to be done in consequence thereof, or in connection therewith; the company shall become entitled to aninterest in either the capital or profits and losses or both, in such

business exceeding fifty per cent. thereof, a report made by a chartered accountant (who shall be named in the prospectus) upon-

(i) the profits or losses of the business for each of the five financial years immediately preceding the date of the issue of the prospectus ; and

(ii) the assets and liabilities of the business as on the last date to which the accounts of the business were made up, being a date not more than one hundred and twenty days before the date of the issue of the prospectus;

(c) in purchase or acquisition of any immoveable property including indirect acquisition of immoveable property for which advances have been paid to even third parties, disclosures regarding -

(i) the names, addresses, descriptions and occupations of the vendors;

(ii) the amount paid or payable in cash, to the vendor and, where there is more than one vendor, or the company is a sub-purchaser, the amount so paid or payable to each vendor, specifying separately the amount, if any, paid or payable for goodwill;

(iii) the nature of the title or interest in such property proposed to be acquired by the company; and

(iv) the particulars of every transaction relating to the property, completed within the two preceding years, in which any vendor of the property or any person who is, or was at the time of the transaction, a promoter, or a director or proposed director of the company had any interest, direct or indirect, specifying the date of the transaction and the name of such promoter, director or proposed director and stating the amount payable by or to such vendor, promoter, director or proposed director in respect of the transaction.

(2)(a) If - (i) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or are to be applied directly or indirectly and in any manner resulting in the acquisition by the company of shares in any other body corporate; and

(ii) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith, that body corporate shall become a subsidiary of the company, a

report shall be made by a Chartered Accountant (who shall be named in the prospectus) upon -

(A) the profits or losses of the other body corporate for each of the five financial years immediately preceding the issue of the prospectus; and

(B) the assets and liabilities of the other body corporate as on the last date to which its accounts were made up.

(b) The said report shall -

(i) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the issuer company and what allowance would have been required to be made, in relation to assets and liabilities so dealt with for the holders of the balance shares, if the issuer company had at all material times held the shares proposed to be acquired; and

(ii) where the other body corporate has subsidiaries, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner as provided in sub-clause (ii) of clause (a).

(3) The matters relating to terms and conditions of the term loans including re-scheduling, prepayment, penalty, default.

(4) The aggregate number of securities of the issuer company and its subsidiary companies purchased or sold by the promoter group and by the directors of the company which is a promoter of the issuer company and by the directors of the issuer company and their relatives within six months immediately preceding the date of filing the prospectus with the Registrar of Companies shall be disclosed.

(5) The matters relating to Material contracts; Time and place at which the contracts together with documents will be available for inspection from the date of prospectus until the date of closing of subscription list.

(6) The related party transactions entered during the last five financial years immediately preceding the issue of prospectus as under -

(a) all transactions with related parties with respect to giving of loans or, guarantees, providing securities in connection with loans made, or investments made ;

(b) all other transactions which are material to the issuer company or the related party, or any transactions that are unusual in their nature or conditions, involving goods, services, or tangible or intangible assets, to which the issuer company or any of its parent companies was a party; the disclosures for related party transactions for the period prior to notification of these rules shall be to the extent of disclosure requirements as per the Companies Act, 1956 and the relevant accounting standards prevailing at the said time.

(7) The summary of reservations or qualifications or adverse remarks of auditors in the last five financial years immediately preceding the year of issue of prospectus and of their impact on the financial statements and financial position of the company and the corrective steps taken and proposed to be taken by the company for each of the said reservations or qualifications or adverse remarks.

(8) The details of any inquiry, inspections or investigations initiated or conducted under the Companies Act or any previous companies law in the last five years immediately preceding the year of issue of prospectus in the case of company and all of its subsidiaries; and if there were any prosecutions filed (whether pending or not); fines imposed or compounding of offences done in the last five years immediately preceding the year of the prospectus for the company and all of its subsidiaries.

(9) The details of acts of material frauds committed against the company in the last five years, if any, and if so, the action taken by the company.

(10) A fact sheet shall be included at the beginning of the prospectus which shall contain–

(a) the type of offer document ("Red Herring Prospectus" or "Shelf Prospectus" or "Prospectus").

(b) the name of the issuer company, date and place of its incorporation, its logo, address of its registered office, its telephone number, fax number, details of contact person, website address, e-mail address;

(c) the names of the promoters of the issuer company;

(d) the nature, number, price and amount of securities offered and issue size, as may be applicable;

(e) the aggregate amount proposed to be raised through all the stages of offers of specified securities made through the shelf prospectus;

(f) the name, logo and address of the registrar to the issue, along with its telephone number, fax number, website address and e-mail address;

(g) the issue schedule;

(i) date of opening of the issue;

(ii) date of closing of the issue;

(iii) date of earliest closing of the issue, if any.

(h) thecredit rating, if applicable;

(i) all the grades obtained for the initial public offer;

(j) the name(s) of the recognised stock exchanges where the securities are proposed to be listed;

(k) the details about eligible investors;

(l) coupon rate, coupon payment frequency, redemption date, redemption amount and details of debenture trustee in case of debt securities.

2.15.5 When Section 26(1) is not applicable?

Section 26(2) states that section 26(1) does not apply to:-

(a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or

(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

2.15.6 Filing a copy of prospectus with registrar etc.

Section 26(4) states that no prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

Section 26(6) further states that every prospectus issued under sub-section (1) shall, on the face of it,—

(a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and

(b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.

Section 26(7) states that the Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

Section 26(8) states that no prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar under sub-section (4).

2.15.7 Including a statement by an expert in the prospectus

Section 26(5) states that a prospectus issued under sub-section (1) shall not include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.

2.15.8 Penalty for contravention of Section 26

Section 26(9) states that if a prospectus is issued in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

2.15.9 Advertisement of Prospectus

Section 30 of Companies Act, 2013, provides that where an advertisement of any prospectus of a company is published in any manner, it shall be necessary to specify therein the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and the names of the signatories to the memorandum and the number of shares subscribed for by them, and its capital structure.

2.16 Shelf Prospectus

"Shelf Prospectus" means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. Accordingly as per Section 31—

1. Any class of companies, as prescribed by the Securities and Exchange Board may file a shelf prospectus with the Registrar at the stage of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under such prospectus. Further, in respect of a second or subsequent offer issued during the period of validity of shelf prospectus, no further prospectus is required.

2. A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer and other prescribed changes, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under such prospectus. Where a company or any other person has

received applications for the allotment of securities along with advance payments of subscription before the making of any such change, they shall intimate the changes to such applicants. If the applicants express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days.

3. Where an information memorandum is filed, every time an offer of securities is made as aforesaid, such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

The concept of shelf prospectus will save expenditure and time of the companies in issuing a new prospectus every time they wish to issue securities to the public within a period of one year.

2.17 Red-Herring Prospectus

"Red Herring Prospectus" means a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

Section 32 of the Act deals with Red Herring Prospectus. It provides that"

1. As per this section, a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.

2. A company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

3. A red herring prospectus shall carry the same obligations as are applicable to a prospectus. Any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

4. Upon the closing of the offer of securities, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

Red herring prospectus is issued during book building process. Red herring prospectus contains either the floor price of securities offered or a price band along with the range

within which the Bids can move. The applicants bid for the shares quoting the price and the quantity that they would like to bid at.

SEBI (ICDR) Regulations prescribe certain disclosures to be made in the red-herring prospectus. Once the offer for securities is closed, a final prospectus stating therein the total capital raised whether by way of debt or share capital, the closing price of the securities and any other details which are not complete in the red-herring prospectus shall be filed with SEBI in the case of listed public company and in any other case with the Registrar of companies only.

2.18 Abridged Prospectus

"Abridged Prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. Section 33 states that no form of application can be issued for the purchase of any securities of a company unless it is accompanied by an abridged prospectus. There are, however, four exceptions to this rule:

(a) where the offer is made in connection with the bona fide invitation to a person to enter into an underwriting agreement with respect to such securities;

(b) where the securities are not offered to the public;

(c) where the offer is made only to the existing members or debenture holders of the company with or without a right to renounce;

(d) where the shares or debentures offered are in all respects uniform with shares or debentures already issued and quoted on a recognised stock exchange.

A copy of the prospectus shall be furnished to a person on a request being made by him before the closing of the subscription list and the offer. If a company makes any default in complying with the provisions of this section, it shall be liable to a penalty of fifty thousand rupees for each default.

The Golden Rule or Golden Legacy

It is the duty of those who issue the prospectus to be truthful in all respects. This Golden Rule was pronounced by Kinderseley, V.C. in ***New Brunswick, etc., Co. v. Muggeridge, (1860) 3 LT 651***, and has come to be known as the "golden legacy". "*Those who issue a prospectus hold out to the public great advantages which will accrue to the persons who will take shares in the proposed undertaking. Public is invited to take shares on the faith of the representation contained in the prospectus. The public is at the mercy of company promoters. Everything must, therefore, be stated with strict and scrupulous accuracy. Nothing should be stated as a fact which is not so and no fact should be omitted, the existence of which might in any degree affect the nature or quality of the privileges and advantages which the prospectus holds out as inducement to take shares. In short, the true nature of the company's venture should be 'disclosed'. If concealment of any material fact has prevented an adequate appreciation of what was stated, it would amount to misrepresentation. Thus, even if every specific statement is literally true, the prospectus may be false if by reason of the suppression of other material facts, it conveys a false impression".*

In ***R.V. Kylsant (1932) K.B. 442***, all statements in the prospectus were literally true but it failed to disclose that the dividends stated in it as paid, were not paid out of trading profits, but out of realized capital profits (secret reserves). The statement that the company had paid dividends for a number of years was true. But the company has incurred losses for all those years (1921-27) and no disclosure was made of this fact. The prospectus was held to be false in material particulars and the managing director and chairman, who knew that it was false, were held guilty of fraud.

Liability for Untrue Statement in Prospectus

It is now clear that a prospectus must be complete and perfect in all details or in other words nothing should be omitted and nothing must be untrue in a prospectus. Where an untrue statement occurs in a prospectus, there may arise (i) civil liability (ii) criminal liability. Every person who is a director of the company at the time of the issue of the prospectus, every promoter of the company and every person, including an expert, who has authorised the issue of a prospectus, shall be liable. Since the liability of these persons is to the allottee

of securities, we may discuss this matter under the heading remedies for mis-statements in a prospectus.

2.19 SUMMARY

The chapter discussed about essential documents such as: The Memorandum of Association, Articles of Association and Prospects.The Memorandum of Associationis a document which sets out the constitution of the company. It defines as well as confines the powers of the company. If the company enters into contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be ultra vires the company and hence void. The memorandum of association of a company may be altered by changing its name, altering it in regard to the State in which the registered office is to be situated or its objects, altering or reorganizing its share capital, reducing its capital or making the liability of the directors unlimited.

Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. 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. A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. As per doctrine of constructive notice, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. While the doctrine of constructive notice seeks to protect the company against the outsiders, the doctrine of indoor management operates to protect the outsiders against the company. While persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. However, there are certain exceptions to doctrine of indoor management.

Prospectus has been defined as any document described or issued as a prospectus and includes a red herring prospectus or shelf prospectus 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. All public companies making public offer issue a prospectus. Shelf prospectus means a prospectus in respect of which the securities or class of securities

included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. Red herring prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. Companies Act and SEBI guidelines provide for contents and disclosures required in a prospectus.

2.20 GLOSSARY

Memorandum of Association: The Memorandum of Association is the constitution of a company. It is a document, which amongst other things, defines the area within which the company can act. It is, therefore, required to state the object for which the company has been formed, the business that it would undertake, the liability, the capital which it shall be allowed to raise, the nature of liability of its members, the name of the State where the registered office of the company shall be located.

Ultra Vires: Beyond the scope of / outside the authority of someone or something; In company law, doctrine of ultra vires refers to beyond the scope of memorandum.

Alteration: The state of being altered; a change made in the form or nature of a thing; changed condition. In Company Law the memorandum and articles sometime requires alterations.

Shelf Prospectus: A Prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over certain period without the issue of a further Prospectus.

Red Herring Prospectus: Red herring prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

Abridged Prospectus: A bridged Prospectus is usually a shorter form of the Prospectus and possesses all the significant features of a Prospectus. This accompanies the application form of public issues.

Articles of Association: Articles of Association which contains the rules and regulations relating to the internal management of a company.

Indoor Management: It operates to protect outsiders against the company. It protects innocent parties who are doing business with the Company and are not in a position to know if some internal rule has not been complied with.

Rule of Constructive Notice: To protect the company against outsiders. The rule of constructive notice is confined to the external position of the company and, therefore, it follows that there is no notice as to how the company's internal machinery is handled by its officers.

2.21 SELF ASSESSMENT QUESTIONS

1. What do you understand by the memorandum of association? What is its purpose?

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2. "Memorandum of association is a charter of the company". Comment upon the statement and explain the clauses which are included in a memorandum of association of a company.

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3. What do you understand by the doctrine of "ultra-vires"? Discuss the decided case "Ashbury Railway & Iron Co. v. Riche"

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4. What is the importance of the objects clause of the memorandum of association? If a company undertakes to do anything which is not either expressly or impliedly provided for by the objects clause, what would be the consequences?

5. What do you understand by the articles of association? What is their purpose?

6. "The power of altering the articles is wide, yet it is subject to a large number of limitations". Explain.

7. Explain the relationship between memorandum and articles.

8. Distinguish Articles from Memorandum.

9. What is the meaning and significance of the doctrine of "Indoor Management"? What are the exceptions to the said doctrine?

10. Discuss the extent to which articles of association binds:

(a) the members to the company,

(b) the company to the members,

(c) the members among themselves, and

(d) the company to the outsiders.

11. What is a prospectus? Is the issue of a prospectus compulsory on the part of a company?

12. Discuss in detail the contents and the form of a prospectus.

13. Write short notes on:

    a) Abridged prospectus;
    b) Registration of a prospectus.
    c) Shelf prospectus.
    d) Red-herring prospectus.

14. Explain in brief the "Golden rule" or "Golden Legacy".

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2.22 SUGGESTED READINGS

P.P.S. Gogna, A Text Book of Company Law, Sultan Chand Publications, New Delhi

N.D. Kapoor, Elements of Mercantile Law, Sultan Chand Publications, New Delhi.

Chawla & Garg, Company Law, Kalyani Publisher, New Delhi

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1. D.K. Jain: Company Law Ready Reckoner; Bharat Law House Pvt. Ltd.; Delhi.
2. Garg, Sareen, Sharma, Chawla: Mercantile Law, Kalyani Publishers, Ludhiana
3. N.D. Kapoor, Elements of Company Law, Sultan Chand & Sons, New Delhi
4. R. Suryanarayanan: Company Law Ready Reckoner; Commercial Law Publishers, Delhi.
5. Palmer: Company Law (Vol. 1); Stevens & Sons Ltd., London.

6. L.C.B. Gower: Principles of Modern Company Law; Stevens & Sons Ltd., London.

7. Bare Act, The Companies Act, 2013, Asia Law House, Hyderabad

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APPOINTMENT OF DIRECTORS

Structure

3.1 INTRODUCTION

On incorporation, a company becomes a person in the eyes of law, it has a perpetual succession, its members may come and may go but the company lives till its death as aforementioned. It has a common seal, which is affixed on all the legal documents executed on behalf of the company in the presence of and signed by authorised signatory or signatories. It is empowered to hold all properties in its own name and in its own right. It can sue others and can be sued by others in its own name. With all the strapping of a legal person, a company is unlike a living human being. It has no physical existence. It has no eyes to see, no ears to hear, no hands to sign and execute documents, no brain to think and no nerves to communicate among its various limbs. In order to enable a company to live and to achieve its objects as enshrined in the objects clause of its Memorandum of Association, it has necessarily to depend upon some agency, known as Board of directors. The Board of directors of a company is a nucleus, selected according to the procedure prescribed in the Act and the Articles of Association. Members of the Board of directors are known as directors, who unless especially authorised by the Board of directors of the

Company, do not possess any power of management of the affairs of the company. Acting collectively as a Board of directors, they can exercise all the powers of the company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

3.2 OBJECTIVES

After going through this chapter you will be able to:

i. Understand the concept of directors.

ii. Know about the various types of directors.

iii. Get an insight into the laws related to appointment of directors.

iv. Understand the qualifications and disqualifications of directors.

v. Know the powers, duties and liabilities of the directors.

vi. Understand legal provisions related to managerial remuneration.

vii. Know about calculation of managerial remuneration.

3.3 DEFINITION OF DIRECTOR

The Companies Act, 2013 does not contain an exhaustive definition of the term "director". Section 2 (34) of the Act prescribed that "director" means a director appointed to the Board of a company.

Section 2 (10) of the Companies Act, 2013 defined that "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company.

3.3.1 NUMBER AND COMPOSITION OF DIRECTORS

Section 149(1) of the Companies Act, 2013 requires that every company shall have:

1. Number of Directors:

a. a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company.

b. a maximum of fifteen directors.

A company may appoint more than fifteen directors after passing a special resolution in a general meeting and approval of Central Government is not required.

2. Woman Director: Such class or classes of companies as may be prescribed, shall have at least one woman director.

Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014, prescribes the following class of companies shall appoint at least one woman director-

i. every listed company;

ii. every other public company having :-

a. paid–up share capital of one hundred crore rupees or more; or

b. turnover of three hundred crore rupees or more.

3. Minimum Stay: Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

4. Independent Director: Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Rule 4 of Companies (Appointment and Qualification of Directors) rules 2014, provides that the following class or classes of companies shall have at least two directors as independent directors -

i. the Public Companies having paid up share capital of 10 crore rupees or more; or

ii. the Public Companies having turnover of 100 crore rupees or more; or

iii. the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

3.3.2 CLASSIFICATION OF DIRECTORS

As per the Companies Act 2013, The Companies Act refers to the following four specific categories of directors:

1. **Managing Director [Section 2(54)]:** A director who has substantial powers of Management.

2. **Whole-time Director [Section 2(94)]:** A director who is in the whole-time employment of the company.

3. **Independent Director [Section 149(6)]:** An independent director, in relation to a company, means a director other than a managing director or a whole time director or a nominee director,-

a. who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

b. (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

c. who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

d. none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors,

(i) amounting to two percent or more of its gross turnover or total income or

(ii) 50 lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year.

4. **Nominee Director [Section 149]:** A director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

3.3.3 APPOINTMENT OF DIRECTORS: SECTION 152

First Director

The first directors of most of the companies are named in their articles. If they are not so named in the articles of a company, then subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

In the case of a One Person Company, an individual being a member shall be deemed to be its first director until the director(s) are duly appointed by the member in accordance with the provisions of Section 152.

3.3.4 GENERAL PROVISIONS RELATING TO APPOINTMENT OF DIRECTORS

1. Except as provided in the Act, every director shall be appointed by the company in general meeting.
2. Director Identification Number is compulsory for appointment of director of a company.
3. Every person proposed to be appointed as a director shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under the Act.
4. A person appointed as a director shall on or before the appointment give his consent to hold the office of director in the prescribed form.
5. Articles of the Company may provide the provisions relating to retirement of the all directors. If there is no provision in the article, then not less than two-thirds of the total number of directors of a public company shall be persons whose period

of office is liable to determination by retirement by rotation and eligible to be reappointed at annual general meeting.

At the annual general meeting of a public company one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one third, shall retire from office.

The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment.

At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto. If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless—

i. a resolution for the re-appointment of such director has been put to the meeting and lost;

ii. the retiring director has expressed his unwillingness to be so re-appointed;

iii. he is not qualified or is disqualified for appointment;

iv. a resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or

v. Section 162 i.e. appointment of directors to be voted individually is applicable to the case.

3.3.5 APPOINTMENT OF ADDITIONAL DIRECTOR: SECTION 161 (1)

The board of directors can appoint additional directors, if such power is conferred on

them by the articles of association. Such additional directors hold office only up to the date of next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director.

3.3.6 APPOINTMENT OF ALTERNATE DIRECTOR: SECTION 161 (2)

Section 161(2) of the Act allowed the followings:

i. The Board of Directors of a company must be authorised by its articles or by a resolution passed by the company in general meeting for appointment of alternate director.

ii. The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.

iii. The person to be appointed as the Alternate Director shall be the person other than the person beholding any alternate directorship for any other Director in the Company.

iv. If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria for Independent Directors.

v. An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

vi. If the term of office of the original director is determined before he so returns to India, any provision for the automatic re- appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

3.3.7 APPOINTMENT OF DIRECTORS BY NOMINATION: SECTION 161(3)

This new sub-section now provides for appointment of Nominee Directors. It states that subject to the articles of a company, the Board may appoint any person as a director

nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.

3.3.8 APPOINTMENT OF DIRECTORS IN CAUSAL VACANCY: SECTION 161 (4)

If any vacancy is caused by death or resignation of a director appointed by the shareholders in General meeting, before expiry of his term, the Board of directors can appoint a director to fill up such vacancy. The appointed director shall hold office only up to the term of the director in whose place he is appointed.

3.3.9 APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY: SECTION 162(1)

A single resolution shall not be moved for the appointment of two or more persons as directors of the company unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it. A resolution moved in contravention of aforesaid provision shall be void, whether or not any objection was taken when it was moved. A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

3.3.10 PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS: SECTION 163

The articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years and casual vacancies of such directors shall be filled as provided in subsection (4) of section 161.

3.3.11 RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP: SECTION 160

A person who is not a retiring director shall be eligible for appointment to the office of a

director at any general meeting, if he, or some member intending to propose him as a director, has, not less than fourteen days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than 25% of total valid votes cast either on show of hands or on poll on such resolution.

3.3.12 NOTICE OF CANDIDATURE OF A PERSON FOR DIRECTORSHIP: SECTION 160(2) AND RULE 13

The company shall inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office, at least seven days before the general meeting by serving individual notices to members through e-mail and where no e-mail address is available then in writing and by placing notice of such candidature or intention on the website of the company, if any.

If the company advertises such candidature/intention, not less than 7 days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the registered office's district and at least once in English language in an English newspaper circulating in that district in which the registered office of the company is situated, then it shall not be required to serve individual notices upon the members as aforesaid.

3.3.13 NUMBER OF DIRECTORSHIPS: SECTION 165

Maximum number of directorships, including any alternate directorship a person can hold is 20. It has come with a rider that number of directorships in public companies/ private companies that are either holding or subsidiary company of a public company shall be limited to 10. Further the members of a company may restrict above mentioned limit by passing a special resolution.

Any person holding office as director in more than 20 or 10 companies as the case may be before the commencement of this Act shall, within a period of one year from such commencement, have to choose companies where he wishes to continue/resign as director.

There after he shall intimate about his choice to concerned companies as well as concerned Registrar.

Such person shall not act as director in more than the specified number of companies after despatching the resignation or after the expiry of one year from the commencement of this Act, whichever is earlier.

If a person accepts an appointment as a director in contravention of above mentioned provisions, he shall be punishable with fine which shall not be less than '5,000 but which may extend to '25,000 for every day after the first day during which the contravention continues.

3.4 DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR: SECTION 164

1. A person shall not be eligible for appointment as a director of a company, if—

a. he is of unsound mind and stands so declared by a competent court;

b. he is an undischarged insolvent;

c. he has applied to be adjudicated as an insolvent and his application is pending;

d. he has been 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 and a period of five years has not elapsed from the date of expiry of the sentence.

   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;

e. an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

f. he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;

g. he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

h. he has not got the DIRECTOR IDENTIFICATION NUMBER (DIN).

2. According to Section 164(2) any person who is or has been director of any company which

a. as not filed any financial statements and Annual Return for three continuous financial year or

b. has defaulted in payment of debentures/deposit/dividend etc, shall also not be eligible for appointment as director of any public company and for re- appointment in the same company for a period of five years from the date on which the said company fails to do so.

c. a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified above.

3.5 VACATION OF OFFICE OF DIRECTOR: SECTION 167

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;

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 6 months;

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 or associate company, ceases to hold such office or other employment in that company.

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 above, he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs.5,00,000 or with both. [Section 167(2)]

In case all the directors of a company vacate their offices under any of the disqualifications specified above 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. [Section 167(3)]

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 [Section 167(1)] above.

3.6 REMOVAL OF DIRECTORS: SECTION 169

A company may, remove a director except the director appointed by National Company Law Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard after passing the ordinary resolution.

Provided that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two third of the total number of directors according to the principle of proportional representation.

A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.

On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,—

a. in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

b. send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-section (2).

A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed. If the vacancy is not filled under sub-section (5), it may be filled as a casual vacancy in accordance with the provisions of this Act:

Provided that the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

Nothing in this section shall be taken—

a. as depriving a person removed under this section of any compensation or damages payable to him in respect of the termination of his appointment as director as per the terms of contract or terms of his appointment as director, or of any other appointment terminating with that as director; or

b. as derogating from any power to remove a director under other provisions of this Act.

3.7 RESIGNATION OF DIRECTOR: SECTION 168 & RULE 15, 16

A director may resign from his office by giving notice in writing. The Board shall, on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company.

Moreover, the director shall also forward a copy of resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation.

The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the Central Government shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting.

3.8 POWERS OF BOARD: SECTION 179

Section 179 of the Act deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board

can act or do the things for which powers are vested with them and not with general meeting. The following (section 179(3) read with Rule 8 of Companies (Management & Administration) Rules, 2014 powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely :-

1. to make calls on shareholders in respect of money unpaid on their shares;
2. to authorise buy-back of securities under section 68;
3. to issue securities, including debentures, whether in or outside India;
4. to borrow monies;
5. to invest the funds of the company;
6. to grant loans or give guarantee or provide security in respect of loans;
7. to approve financial statement and the Board's report;
8. to diversify the business of the company;
9. to approve amalgamation, merger or reconstruction;
10. to take over a company or acquire a controlling or substantial stake in another company;
11. to make political contributions;
12. to appoint or remove key managerial personnel (KMP);
13. to appoint internal auditors and secretarial auditor;

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in (4) to (6) above on such conditions as it may specify.

3.8.1 RESTRICTION ON POWERS OF BOARD: SECTION 180

The board can exercise the following powers only with the consent of the company by special resolution, namely –

1. to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

2. to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

3. to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company 's bankers in the ordinary course of business;

4. to remit, or give time for the repayment of, any debt due from a director.

The special resolution relating to borrowing money exceeding paid up capital and free reserves specify the total amount up to which the money may be borrowed by Board.

The title of buyer or the person who takes on lease any property, investment or undertaking on good faith cannot be affected and also in case if such sale or lease covered in the ordinary business of such company.

The resolution may also stipulate the conditions of such sale and lease, but this doesn't authorise the company to reduce its capital except the provisions contained in this Act.

The debt incurred by the company exceeding the paid up capital and free reserves is not valid and effectual, unless the lender proves that the loan was advanced on good faith and also having no knowledge of limit imposed had been exceeded.

3.8.2 CONTRIBUTIONS TO CHARITABLE FUNDS AND POLITICAL PARTIES: SECTION 181

The power of making contribution to 'bona fide' charitable and other funds is available to

the board subject to certain limits. Further, the permission of company in general meeting is required if such contribution exceeds five percent of its average net profits for the three immediately preceding previous years.

3.8.3 PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS: SECTION 182

According to Section 182 of the Act, a company, other than a government company which has been in existence for less than three financial years, may contribute any amount directly to any political party.

Further, the limit of contribution to political parties is 7.5% of the average net profits during the three immediately preceding financial years.

The contribution must be authorised by board in its meeting by resolution and such resolution deemed to be the justification in law for such contribution.

The donation may be directly or indirectly. The contribution so made if or likely to affect the public support for a political party deemed to be the contribution for political purpose.

If the expenditure incurred on advertisement in any publication souvenir, brochure, tract, pamphlet or the like is deemed as political contribution if such publication is by or on behalf of political party or if not, then for the advantage to such political party for a political purpose.

The company is required to disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year and the particular of total amount contributed and the name of political party to whom the contribution so made.

3.8.4 PENALTY FOR CONTRAVENTION

The contribution in contravention of the provisions of this section, the company shall be punishable for an amount of which may extend to five times of the amount so contributed and every officer who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times of the amount so contributed.

3.8.5 POWER OF BOARD AND OTHER PERSONS TO MAKE CONTRIBUTIONS TO NATIONAL DEFENCE FUND, ETC.: SECTION 183

The Board is authorised to contribute such amount as it thinks fit to the National Defence Fund or any other fund approved by the Government for the purpose of national defence. The company is required to disclose in its profit and loss account the total amount or amounts contributed by it during the financial year.

3.8.6 DISCLOSURE OF INTEREST BY DIRECTOR: SECTION 184

The Act provides for the disclosure by directors relating his concern or interest in any company or companies or body corporate (including shareholding interest), firms or other association of individuals by giving a notice in writing in form MBP 1 (Rule 9(1)) at the first meeting of board after being appointed as director and at first meeting of board of every financial year, in addition to this, any change required to be disclosed in next board meeting.

As per section 184 (2) of the Act, every director is required to disclose the nature of his concern or interest at the meeting of board in which the contract or arrangement is discussed and he has not to participate in such meeting.

The abovementioned interest may be direct or indirect and relating to some contract or arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which such director or such director in association with other director holds more than two percent shareholding or is a promoter, manager, Chief Executive Officer of that body corporate or with a firm or other entity in which such director is a partner, owner or member as the case maybe.

It shall be the duty of the director giving notice of interest to cause it to be disclosed at the meeting held immediately after the date of the notice. (Rule 9(2))

If a director is not concerned or interested at the time of contract but subsequently becomes concerned or interested is required to disclose his interest or concern at the meeting of the board held immediately after arose of such interest or concern.

All notices shall be kept at the registered office and such notices shall be preserved for a period of eight years from the end of the financial year to which it relates and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for the purpose. (Rule 9(3))

If a contract or arrangement entered into by the company without disclosure of interest by director or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.

The contravention of the provisions leads to punishment for a term which may extend to one year or with fine which shall not be less than 50,000 rupees but which may extend to 1 lakh rupees or both.

Any contract or arrangement entered into or to be entered into between two companies, where any director of any company holds more than two percent of the paid up capital in other company, the provisions of this section shall not apply.

3.8.7 RELATED PARTY TRANSACTIONS: SECTION 188

With reference to company, the term 'related party' means and includes the following:

a. a director or his relative,

b. KMP or their relative,

c. firm in which a director, manager or his relative is a partner,

d. a private company in which a director or manger or his relative is a director or member,

e. a public company in which a director or Manager is a director and holds along with his relatives more than 2% of its paid up share capital.

f. a person on whose advice, directions or instruction (except given in professional capacity) a director or manager is a accustomed to act,

g. a holding/ subsidiary or associate company, subsidiary 's subsidiary, and such person as would be prescribed.

3.9 DUTIES OF DIRECTORS

Corporate failures in the recent past such as Satyam, Sahara, Kingfisher brought out the fact that the Companies Act, 1956 ("1956 Act") which existed over a period of 50 years was ineffective at handling some of the present day challenges of a growing industry and interests of increasing classes of sophisticated stakeholders. The Companies Act 2013 ("2013 Act") has been enacted with a view to meeting the present day challenges of corporate governance arising from stakeholders' expectations. The 2013 Act has ushered in a new era of corporate governance, by increasing the roles and responsibilities of the board, protecting shareholders' interests, bringing in a disclosure based regime and built in deterrence through self-regulation.

The 2013 Act has introduced several measures which have the effect of considerably enhancing the duties and liabilities of directors and imposition of stringent penal provisions in case of breach of any statutory provisions. While some of the requirements already existed for listed companies as part of the Listing Agreement, the new requirements under the 2013 Act apply to all companies.

The 2013 Act has now codified directors' duties (similar to the UK Companies Act) under Section 166. The provisions of this Section apply to all categories of directors, including independent directors.

Section 166 of the 2013 Act stipulates the following duties:

1. **Duty to act according to Articles [Section 166(1)]:** Act provides that a director of a company (including a private company) shall act in accordance with the Articles of the company.

2. **Duty of good faith [Section 166(2)]:** He has to act in good faith in order to promote the objects of the company for the benefit of its members as a whole. Directors must act honestly and diligently in the interests of the company. Good faith also requires that directors should not make any secret from their dealings

with the company. He has to act in the best interest of the company, its employees, shareholders, community and for the protection of environment.

3. **Duty of reasonable care [Section 166(3)]:** He has to carry on his duties with due and reasonable care, skill and diligence and exercise independent judgment.

4. **No conflict of duty and interest [Section 166(4)]:** He shall not involve in a situation in which he may have a direct or indirect interest that conflicts or likely to conflict with the interest of the company.

5. **No undue gain [Section 166(5)]:** He shall not achieve or attempt to achieve any undue gain or advantage either to himself, his relatives, partners or associates.

6. **No assignment of office [Section 166(6)]:** A director of a company shall not assign his office and any assignment so made shall be void.

Penalty: If he contravenes any of the above provisions of section 166, he shall be punishable with fine which shall not be less than Rs.1 lac which may extend to Rs.5 lacs. It is also provided that if he is found guilty of making any undue gain during the course of discharging his duties as a director, he shall be liable to refund an amount equal to such gain to the company.

The duties set out in this Section are not exhaustive. Apart from the duties set out in Section 166, directors are also responsible for various obligations provided under other Sections of the 2013 Act. For example:

a. The board needs to lay the financial statements for approval and adoption at the annual general meeting of the shareholders (Section 129);

b. The directors are responsible for devising proper systems to ensure compliance with the provisions of all applicable laws and to ensure that such systems are adequate and are operating effectively (Section 134);

c. Director needs to ensure that the company complies with obligations relating to corporate social responsibility provided under Section 135;

d. The board is responsible for appointing first auditors (Section 139);

e. A director needs to disclose his interest in a contract with the company (Section 184);

f. A director is prohibited from engaging in forward dealing of securities (Section 194);

g. The board is responsible for appointment of whole time key managerial personnel (Section 203);

h. The directors are responsible for issuance of notice ad holding of board meetings and general meetings etc.

3.9.1 Balancing Conflict of Interests

Under the 1956 Act, a director's primary duties were to the company and its shareholders. Although employees and creditors interests were recognized in matters pertaining to insolvency, but the law was settled that a director should primarily act in the best interests of all shareholders. With the 2013 Act, there is an attempt to shift the focus for directors from looking solely at shareholders' interests to taking account interests of other stakeholders as well. Though the idea may seem convincing from a corporate governance perspective, several practical difficulties could arise. For example, no guidelines for order of preference have been provided and accordingly, it is not clear whose interests should take precedence in case of conflicting interests. Thus, in such situations, would it be prudent for a director to act in the interest of employees ignoring the interests of the shareholders?

Also, since the 2013 Act also requires the director to take into account environmental and community concerns, will an interpretation that a director who is on the board of a tobacco company or cigarette manufacturing company is in breach of the provisions of the 2013 Act right from day one, hold good?

Further, this provision would also have a significant impact on nominee directors. In exercising their fiduciary duties, nominee directors often seek instructions from the appointing shareholder in relation to decisions that need to be taken, for example, the manner in which to vote during a particular resolution. It would be difficult for a nominee director to act where the instructions of his nominating shareholder run inconsistent with the interests of a class of stakeholders.

Such practical situations would make balancing act difficult for directors. To minimize risks, the board should consider seeking inputs from its different categories of stakeholders to identify what stakeholders believe may be an appropriate course of action.

3.9.2 INDEPENDENT DIRECTORS

Apart from the duties mentioned above, which are applicable to all directors, independent directors are also additionally required to comply with code of conduct specified under Schedule IV of the 2013 Act.

The Schedule has stipulated 13 (thirteen) different duties to be performed by an independent director. Some of these duties include:

a. Regularly updating and refreshing the skills, knowledge and familiarity with the company.

b. Strive to attend and participate actively in all meetings of the Board and the committees and general meetings.

c. Keeping well informed about the company and the external environment in which it operates.

d. Not to unfairly obstruct the functioning of a proper board or committee.

e. To pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure himself that the same are in the interest of the company.

f. To ensure that the company has an adequate and functional vigil mechanism and also to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

g. Not to disclose confidential information, including commercial secrets, technologies, unpublished price sensitive information, etc., unless such disclosure is expressly approved by the board or is required by law.

Apart from the duties, the Code also covers other aspects, such as it provides guidelines for professional conduct, role and functions of independent directors, manner of appointment, reappointment, resignation/removal, need for separate meetings of independent directors and evaluation of independent directors by the entire board.

As seen from the above, various duties and responsibilities have been cast on independent directors, including protecting interests of minority shareholders, harmonizing conflict of interests of stakeholders, acting as a mediator in cases of conflicting interests etc considering the importance of their role from a corporate governance perspective.

3.10 LIABILITY OF DIRECTORS

The liabilities of directors can be classified into:

1. Civil liability. 2. Criminal liability.

Being fiduciaries, directors are exposed to liabilities as a consequence of a breach of their duties. While liabilities may arise under various statutes, the focus here is on liabilities arising under company law. The first set of liabilities is statutory in nature, being specifically set forth in the Companies Act, 2013 (the 2013 Act). These could be either civil liability requiring directors to make payments to victims or the state, or they could criminal liability resulting in fines or imprisonment. The approach in the new regime has been to impose stiffer penalties in case of a criminal offence so as to constitute a strong deterrent on director conduct that falls short of the desired standards.

The second set of liabilities could arise from claims made against the directors either by the company or the shareholders for breaches of directors' duties. Since directors owe the duties to the company, at the outset it is the company that can bring a claim. Where the company is unable (or does not wish) to do so, it is open to the shareholders to bring a derivative claim on behalf of the company to recover monies for breach of directors' duties. These claims are quite robust in theory, but are riddled with tremendous difficulties in practice. At a substantive level, there are obvious inadequacies regarding the types of remedies that can be exercised for breaches of directors' duties.

Contravention of provisions of Section 166 (relating to codified duties) is punishable with a fine which shall not be less than Rs 1 Lakh but which may extend to Rs 5 lakhs.

Further, penal provisions throughout the 2013 Act have been made more stringent and provide for increased penalties as compared to the 1956 Act. On an average, the minimum amount of fine that is imposed under certain Sections is Rs 25,000 which in certain cases extends to Rs 25 crores or even more. Set out below is the list of few contraventions, where the penalties are Rs 1 crore or more:

a. Violation of provisions relating to not-for-profit companies (Section 8);

b. Violation of provisions relating to subscription of securities on private placement (Section 42);

c. Issue of duplicate share certificates with an intent to defraud [Section 46 (5)];

d. Failure to repay deposits within specified time [Section 74 (3)];

e. Contravention of provisions relating to insider trading [Section 195 (2)].

Apart from monetary penalties, certain offences even attract imprisonment. Most of the offences leading to imprisonment under the 2013 Act are non-cognizable (that is would need warrant to arrest) but there are certain serious offences which are cognizable in nature and would not require a warrant to arrest. These offences are mainly connected to fraud or intent to defraud. Some of such offences are listed below:

i. Furnishing of any false or incorrect particulars of any information or suppressing any material information in any of the documents filed with the Registrar of Companies in relation to the registration of a company (Section 7 (6);

ii. Including in the prospectus any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead (Section 34);

iii. Fraudulently inducing persons to invest any money (Section 36);

iv. Default under Section 56 relating to transfer and transmission of shares with an intent to defraud;

v. Offences relating to reduction of share capital (Section 66).

The company has the right to initiate legal action against directors, in case of breach of their duties. Apart from this, the 2013 Act has also introduced the novel concept of 'class action suits' under Section 245. Under this concept, a group of shareholders (constituting a minimum of 100 shareholders or such minimum percentage of total shareholders as may be prescribed) can bring an action on behalf of all affected parties, against the company and/or its directors, for any fraudulent or wrongful act or omission of conduct on its/their part. Further, the 2013 Act proposes to set up a National Company Law Tribunal which is expected to provide speedier and more efficient remedy.

Apart from the 2013 Act, there are several other statutes, such as Negotiable Instruments Act, Consumer Protection Act, which lay down increased liabilities on directors. In case of default on the part of the Company, there are several instances where the complainant as a strategy, would make all the directors party to the suit, to put pressure on the company. Once a director is made a party, he will have to go through the time consuming and cumbersome court procedures to prove his innocence. This will no doubt cause lots of hardship and inconvenience to an innocent director.

3.10.1 Concept of 'Officer in Default'

As provided under the 1956 Act, the definition of the term "officer in default" includes directors. Various penal provisions in the 2013 Act, which seek to penalize a company's officers would accordingly include company's directors and charge them for offences committed under the Act.

The term "officer who is in default" has been defined under Section 2 (60) of the 2013 Act as:

"officer who is in default for the purposes of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely –

every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the

board or participation in such proceedings without objecting to the same, or where such contravention has taken place with his consent or connivance."

It is pertinent to note here that the term 'officer in default' now seeks to implicate every director (including nominee director) who is aware of the contravention. He need not even participate in any meetings of the board, but if the information as to a contravention is contained in any of the proceedings of the board received by him, he is deemed liable. Also, in view of the aforesaid provisions, a director needs to ensure that any objection raised by him at a board meeting is duly recorded in the minutes.

3.10.2 Exemptions for Independent Directors

Section 149(12) of the 2013 Act, inter-alia, states that notwithstanding anything contained in this Act an independent director shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. This carve out has been provided to independent directors considering the limited degree or involvement of an independent director in the day to day affairs of the company.

The term 'attributable through Board processes' would normally be interpreted to mean that a director would be deemed to have knowledge of all matters that are taken at the board level. However, the term is not clearly defined and accordingly would be open to judicial interpretation and uncertainties. Further, the term 'knowledge' is also subjective and would be open to judicial interpretation.

Since now the Act would hold independent directors for any action taken with their consent, it would be extremely important for independent directors to be extremely cautious when it comes to giving consent to any proposal. Else, they will have to be prepared to face the consequences of their actions.

Further, although, the law is attempting to limit the scope of offences in respect of independent directors, at the time of prosecution, all directors irrespective of their category are issued summons. Thereafter, the burden of proof lies on the independent director to prove that he was diligent in the discharge of his duties and that he had acted in a bona fide manner.

However, till such a conclusion is drawn, the independent director suffers a lot of inconvenience and embarrassment.

Considering the importance attached to their role, it is important that independent directors act in a more proactive manner, attend board meetings regularly and question all decisions which appear inappropriate.

Practical Recommendations

The 2013 Act has endowed directors with enhanced duties and liabilities, to make them more accountable and be personally liable in case of wrongs committed by them.

Considering the stringent penal provisions imposed even for not so grave non-compliances, it is necessary that directors adopt an extra cautious approach. They will need to ensure that they always act in the best interest of all stakeholders. Even a slight laxity on their part may be a good reason to put them behind bars. Here are some of practical recommendations which directors may find useful, whilst discharging their duties:

a. All directors (including independent directors) need to attend as many board meetings as possible to ensure that they are fully aware of the company's business. For improving attendance, they may consider proposing that the company should at the beginning of each year, tentatively set up agreed dates, timings and venues for meetings of the board and committees (except in exceptional circumstances).

b. Directors should read all necessary papers and relevant background information made available to them for meetings to enable their meaningful participation and contribution.

c. Directors must ensure that any questions raised by them in a board meeting or any dissent expressed is properly recorded in the minutes of the meeting so as to provide prima facie evidence, in case the role of the director is questioned at any time.

d. Directors (especially new directors) need to ensure that they receive appropriate training on governance and directors' legal duties.

e. Directors need to ensure that they take legal advice, in cases of doubt.

f. Directors need to ensure that they have obtained directors' and officers' liability insurance to provide them with some degree of comfort.

3.10.3 Below Table is Indicative of Some of the Sections Which Deals With Imprisonment

Section	Who is liable and the Civil/Criminal liability involved
53- Prohibition on issue of shares at discount	· Company-Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs. · Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.
68(11)- Power of Company to purchase its own securities	· Company-Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs. · Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs or with both.
71(11)- Debentures	· Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 2 lakh and may extend to Rs. 5 lakhs or with both.
92(5)- Annual return	· Company-Fine- Not less than Rs. 50,000 Thousand and may extend to Rs. 5 lakhs.

	· Officer in default- Maximum imprisonment of six months or Fine- Not less than Rs. 50,000 Thousand and may extend to Rs. 5 lakhs or with both.
118(12)- Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot.	Any person found guilty of tampering with the minutes- Maximum imprisonment for 2 years and Fine- Not less than Rs. 25,000 but which may extend to Rs. 1 lakh.
128(6)- Books of account, etc., to be kept by Company	Officer in default- Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
129(7)- Financial statement	Officer in default- Maximum imprisonment of 1 year or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
134- Financial statement, Board's report, etc	· Company-Fine- Not less than Rs. 50,000 and may extend to Rs.25 lakhs · Officer in default- Maximum imprisonment of 3 years or Fine- Not less than Rs. 50,000 and may extend to Rs. 5 lakhs or with both.
167- Vacation of office of director	Director – Maximum imprisonment for 1 year or Fine- Not be less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.

185(2)- Loan to directors, etc.	· Company-Fine- Not less than Rs. 5 lakhs and may extend to Rs.25 lakhs · Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 5 lakhs and may extend to Rs. 25 lakhs or with both.
186(13) Loan and investment by Company	· Company-Fine- Not less than Rs.25,000 and may extend to Rs. 5 lakhs · Officer in default- Maximum imprisonment of 2 years or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
188(5)- Related party transactions	· In case of unlisted Company, be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees
57- Punishment for personation of shareholder	· Such person in default- Minimum 1 year to maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.
58(6)- Refusal of registration and appeal against refusal	· Such person in default- Minimum 1 year to Maximum 3 years imprisonment or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs.

59(5)- Rectification of register of members	· Company-Fine- Not less than Rs.1 lakh and may extend to Rs.5 lakhs · Officer in default- Maximum imprisonment of 1 years or Fine- Not less than Rs. 1 lakh and may extend to Rs. 3 lakhs or with both.
Chapter-IV- Registration of Charges	· Company-Fine- Not less than Rs.1 lakh and may extend to Rs.10 lakhs · Officer in default- Maximum imprisonment of six months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both.
137(3)- Copy of financial statement to be filed with Registrar	· Company-Fine- Not less than Rs.1000 for every day in default but not more than 10 lakhs· Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 1 lakh and may extend to Rs. 5 lakhs or with both.
182(4)- Prohibitions and restrictions regarding political contributions.	· Company-Fine- 5 times of the amount of contribution in contravention· Officer in default- Maximum imprisonment of 6 months and Fine- 5 times of the amount of contribution in contravention

184(4)- Disclosure of interest by director in its own name	· Such person in default- Minimum 1 year imprisonment or Fine- Not less than Rs. 50,000 and may extend to Rs. 1 lakh or both.
187(4)- Investments of Company to be held	· Company-Fine- Not less than Rs.25,000 and may extend to Rs.25 lakhs · Officer in default- Maximum imprisonment of 6 months or Fine- Not less than Rs. 25,000 and may extend to Rs. 1 lakh or with both

3.11 LEGAL PROVISIONS RELATED TO MANAGERIAL REMUNERATION

Just as profits drive business, incentives drive the managers of business. Not surprisingly then, in a fiercely competitive corporate environment, managerial remuneration is an important piece in the management puzzle. While it is important to incentivize the workforce performing the challenging role of managing companies, it is equally important not to go overboard with the perks and the pay. In India, to keep a check on unnecessary profit squandering by companies and, at the same time, to ensure adequate and reasonable compensation to managerial personnel, the law intervenes to do the balancing act.

3.11.1 REMUNERATION TO MANAGERIAL PERSONNEL

The expression Remuneration to Managerial Personnel refers to the remuneration payable to the

a) Managing director;

b) Whole time director; or

c) Manager

3.11.2 MAXIMUM MANAGERIAL REMUNERATION

Section 197 of the Companies Act, 2013 prescribed the maximum ceiling for payment of managerial remuneration by a public company to its managing director whole-time director and manager which shall not exceed 11% of the net profit of the company in that financial year computed in accordance with section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

Further, the company in general meeting may, with the approval of the Central Government, authorise the payment of remuneration exceeding 11% of the net profits of the company, subject to the provisions of Schedule V.

The net profits for the purposes of this section shall be computed in the manner referred to in section 198.

Different categories of managerial personnel entitled to remuneration	**Maximum percentage of net profits**
All directors when there is a manager or managing director or a whole-time director	1%
All directors when there is no manager of managing director or whole-time director	3%
Managing director (When there is one managing director)	5%
Manager (there is no provision of having more than one manager	5%
Whole-time directors (when there is one such director)	5%
Managing directors and whole-time directors taken together	10%
Total managerial remuneration to all directors, managing director(s) or manager and/or whole-time directors(s)	11%

3.11.3 MINIMUM REMUNERATION IN CASE OF NO PROFIT OR INADEQUATE PROFIT

If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including managing or whole time director or manager, any remuneration, except with the previous approval of the central government. However there is one exception to this rule. Where the appointment and remuneration of the managerial personnel is subject to the provision of section 203 the company can pay minimum remuneration (inspite of losses or inadequacy of profits) without the approval of the central government.

3.11.4 REMUNERATION TO DIRECTORS IN OTHER CAPACITY [SECTION 197(4)]

The remuneration payable to the directors including managing or whole-time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

a. he services rendered are of a professional nature; and

b. in the opinion of the Nomination and Remuneration.

3.11.5 SITTING FEES TO DIRECTORS FOR ATTENDING THE MEETINGS [SECTION 197(5)]

A director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board. Provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of rupees 1 lakh per meeting of the Board or committee thereof. The Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

3.11.6 MONTHLY REMUNERATION TO DIRECTOR OR MANAGER

A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other. [Section 197 (6)]

An independent director shall not be entitled to any stock option and may receive remuneration by way of fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. [Section 197 (7)]

Any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report. [Section 197 (14)]

3.11.7 REMUNERATION DRAWN IN EXCESS OF PRESCRIBED LIMIT

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company. [Section 197(9)]

The company shall not waive the recovery of any sum refundable to it under sub-section 9 mentioned above, unless permitted by the Central Government. [Section 197 (10)]

3.11.8 INSURANCE PREMIUM AS PART OF REMUNERATION

Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel. However, if such person is proved to be

guilty, the premium paid on such insurance shall be treated as part of the remuneration. [Section 197(13)]

3.11.9 DISCLOSURE OF REMUNERATION IN BOARD REPORT [(SECTION 197 (14)]

Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed. The central government through rules prescribed the following disclosure by a listed company in its Board's report:

i. the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;

ii. percentage increase in remuneration of each director and CEO in the financial year;

iii. percentage increase in the median remuneration of employees in the financial year;

iv. number of permanent employees on the rolls of company;

v. explanation on the relationship between average increase in remuneration and company performance;

vi. comparison of the remuneration of the Key Managerial Personnel against the performance of the company;

vii. variations in the market capitalisation of the company, price earnings ratio as at the closing date of the current financial year and previous financial year and percentage increase over decrease in the market quotations of the shares of the company in comparison to the rate at which the company came out with the last public offer in case of listed companies, and in case of unlisted companies, the variations in the net worth of the company as at the close of the current financial year and previous financial year;

viii. average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration;

ix. comparison of the each remuneration of the Key Managerial Personnel against the performance of the company;

x. the key parameters for any variable component of remuneration availed by the directors;

xi. the ratio of the remuneration of the highest paid director to that of the employees who are not directors but receive remuneration in excess of the highest paid director during the year;

xii. affirmation that the remuneration is as per the remuneration policy of the company.

The board's report shall include a statement showing the name of every employee of the company who-

i. if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than 60 lakh rupees;

ii. if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than 5 lakh rupees per month;

iii. if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

The above statement shall also indicate –

i. Designation of the employee;

ii. Remuneration received;

iii. Nature of employment, whether contractual or otherwise;

iv. Qualifications and experience of the employee;

v. Date of commencement of employment;

vi. The age of such employee;

vii. The last employment held by such employee before joining the company;

viii. The percentage of equity shares held by the employee in the company within the meaning of sub-clause (iii) of sub-rule (2) above; and

ix. Whether any such employee is a relative of any director or manager of the company and if so, name of such director.

The particulars of employees posted and working in a country outside India, not being directors or their relatives, drawing more than 60 lakh rupees per financial year or 5 lakh rupees per month, as the case may be, shall not be included in the above statement of the Board's report but such particulars shall be filed with the Registrar of Companies while filing the financial statement and Board Reports and such particulars shall be made available to any shareholder on a specific request made by him during the course of annual general meeting wherein financial statements for the relevant financial year are proposed to be adopted by shareholders.

3.12 MANAGERIAL REMUNERATION UNDER SCHEDULE V (PART II)

1. **Remuneration by Companies having Profits (Section I):** A company having profits in a financial year may pay remuneration to its managerial persons in accordance with Section 197.

2. **Remuneration by Companies having no profits or inadequate profits without Central Government approval (Section II):** Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its

profits are inadequate, it, may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) below:

(A)

Where the effective capital is	**Limit of yearly remuneration payable shall not exceed (Rs)**
Negative or less than 5 Crore	30 Lakhs
5 Crore and above but less than 100 Crore	42 Lakhs
100 Crore and above but less than 250 Crore	60 Lakhs
250 Crore and above	60 Lakhs plus 0.01% of the effective capital in excess of Rs. 250 Crore

If a special resolution is passed by the shareholders, the above limits shall be doubled.
Explanation: - It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

(B) In the case of managerial person who was not a shareholder, employee or a Director of the company at any time during the two years prior to his appointment as managerial person- 2.5% of the current relevant profit. If a special resolution is passed by the shareholders, this limit shall be doubled.

The Schedule V (Part II) also prescribes certain conditions and additional disclosures to be made in the explanatory statement to the notice of the general meeting, where remuneration is required to be paid in accordance with Schedule V.

Remuneration in Special Circumstances (Section III): Section III of Schedule V provides special circumstances under which companies having no profit or inadequate profit can pay remuneration to its managerial personnel in excess of amount provided in Section II of Schedule V above, without Central Government's approval.

3.13 CALCULATION OF NET PROFIT FOR THE PURPOSE OF MANAGERIAL REMUNERATION (SECTION 198)

Section 198 of the Companies Act, 2013 lays down the manner of calculations of net profits of a company any financial year for purposes of Section 197. Sub- Section (2) specifies the sums for which credit shall be given and sub-section (3) specifies the sums for which credit shall not be given while calculating the net profit.

Similarly, sub-section (4)/ (5) specifies the sums which shall be deducted/not deducted while calculating the net profit.

3.14 RECOVERY OF MANAGERIAL REMUNERATION IN CERTAIN CASES (SECTION 199)

This is a new provision introduced in the new Act. It provides for recovery of remuneration including stock options received by the specified Managerial Personnel, where the benefits given to them are found to be in excess of what is reflected in the restated financial statements.

It states that without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made there under, the company shall recover from any past or present managing director or whole-time director or manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

3.15 CENTRAL GOVERNMENT OR COMPANY TO FIX REMUNERATION LIMIT (SECTION 200)

In respect of cases where the company has inadequate or no profits, the Central Government or a company may fix the remuneration within the limits specified in the Act. While doing so, the Central Government or the company shall have regard to—

a. the financial position of the company;

b. the remuneration or commission drawn by the individual concerned in any other capacity;

c. the remuneration or commission drawn by him from any other company;

d. professional qualifications and experience of the individual concerned;

e. such other matters as may be prescribed

As per Rule 13.4 for the purpose of item (e) of section 200, the Central Government or the company shall have regard to the following matters while granting approval:

1. Financial and operating performance of the company during the three preceding financial years.

2. Relationship between remuneration and performance.

3. The principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other executive directors on the board and employees or executives of the company.

4. Whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.

5. The securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

3.16 COMPENSATION FOR LOSS OF OFFICE OF MANAGING OR WHOLE-TIME DIRECTOR OR MANAGER (SECTION 202)

No change has been made in this Section. It is a reproduction of the Section 318 of the Companies Act, 1956.

Section 202 provides that a company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

However, No payment shall be made in the following cases:—

a. where the director resigns from his office as a result of the reconstruction/ amalgamation of the company and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company/of resulting company from the amalgamation;

b. where the director resigns from his office otherwise than on the reconstruction/ amalgamation of the company;

c. where the office of the director is vacated due to disqualification;

d. where the company is being wound up due to the negligence or default of the director;

e. where the director has been guilty of fraud or breach of trust or gross negligence or mismanagement of the conduct of the affairs of the company or any subsidiary company or holding company; and

f. where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Any payment made to a managing or whole-time director or manager shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period. (Sub-section 3)

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them.

However, Section 202 not prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity. (Sub-section 4).

3.17 APPLICATION TO CENTRAL GOVERNMENT

Section 201 of the Companies Act, 2013 provides that before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued a general notice to the members indicating the nature of the application proposed to be made and such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and at least once in English in an English newspaper circulating in that district.

The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application. The Central Government prescribed that every application made to the Central Government under the provisions of Chapter XIII shall be made in Form No. 13.2.

It further prescribed that the companies other than listed companies and subsidiary of a listed company may without Central Government approval pay remuneration to its managerial person in the event of no profit or inadequate profit beyond ceiling prescribed in section II, part II of Schedule V subject to complying with the following conditions:-

i. Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under subsection (1) of section 178 also by the Nomination and Remuneration Committee, if any and while doing so record in writing clear reason and justification for payment of remuneration beyond the said limit;

ii. the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person;

iii. Prior approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding three years;

iv. A statement along-with a notice calling the general meeting referred to clause (iii) of sub-rule (2) above, shall contain the information as per sub clause (iv) of second proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

A synopsis of the modifications made is given below:

The new Act has considerably liberalized the provisions concerning Managerial Remuneration, subject to adequate disclosures to the shareholders. The necessity of approaching Central Government for approval has been substantially dispensed with.

1. Now, no approval of the Central Government is required for making payment of salary to Non Executive Directors by way of monthly payment provided it is within the limits provided.

2. The re-appointment of a managerial person cannot be made earlier than one year before the expiry of their term instead of two years as per the existing provision of section 317 of the 1956 Act.

3. Any Director who is in receipt of any commission from the company and who is a Managing Director or Whole-time Director of the Company can also receive any remuneration or commission from any Holding Company or Subsidiary Company of such Company subject to its disclosure by the Company in the Board's Report. This is a departure from the provision in the Companies Act, 1956. Further the directors however cannot accept remuneration or commission from any other Company including Associate Companies.

4. Independent Directors may be paid different Sitting Fees compared to other directors. Independent Directors cannot receive stock options. They may receive remuneration only by way of sitting fees, or reimbursement of expenses for participation in the Board and other meetings or profit related commission as approved by the members of the company.

5. Every Listed Company will have to disclose in the Board's report the ratio of the remuneration of each Director to the median employee's remuneration and such other details as prescribed by the Central Government through the Rules. In view of the widespread debate in the country and abroad on the subject of excessive managerial pay, the purpose of bringing this provision appears to disclose to the shareholders the extent of pay comparison among employees and directors.

6. Premium paid on any insurance policy taken by a Company on behalf of its Managing Director, Whole-Time Director, Manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the Company, shall not be treated as part of the remuneration payable to them unless such personnel is proved to be guilty.

7. For remuneration payable to any Director in any other capacity, if such services are of professional nature, no approval of the Central Government is required, when the Nomination and Remuneration Committee or Board of Directors is of the opinion, that the person possesses the necessary qualification for practice of profession. 8. In case of Nil or inadequate profit, the conditions under which the Company can pay remuneration to managerial person has been changed.

3.18 SUMMARY

Directors of a company are its eyes, ears, brain, hands and other essential limbs. Every public company shall have at least 3 directors and every private company shall have at least 2 directors and every one person company shall have at least 1 director under section 149. Directors are trustees for the company i.e. the directors are persons selected to manage the affairs of the company for the benefit of the shareholders. Section 164 lays down disqualifications of directors. Also individually only can be a director under section 152 of the Act. Maximum Number of Director is 15, which can be increased by passing a special Resolution. Certain prescribed class or classes of companies is required to have at least one woman director. This is a mandatory provision. Every company including one person company shall have at least on director who stays in India for a period of not less

than 180 days in the previous calendar year. Maximum limit on total number of directorship has been fixed at 20 companies including sub limit of 10 for public companies. The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as director. A director may be removed from the office by giving a special notice. A director may resign his office in the manner provided by the articles. Any officer or employee of a company shall be punishable with the fine on the complaint of the company or any creditor or contributory thereof, if he wrongfully obtains possession or withholds any property of the company. Companies Act, 1956 which existed over a period of 50 years was ineffective at handling some of the present day challenges of a growing industry and interests of increasing classes of sophisticated stakeholders. The Companies Act 2013 has been enacted with a view to meeting the present day challenges of corporate governance arising from stakeholders' expectations. The 2013 Act has ushered in a new era of corporate governance, by increasing the roles and responsibilities of the board, protecting shareholders' interests, bringing in a disclosure based regime and built in deterrence through self-regulation.The 2013 Act has introduced several measures which have the effect of considerably enhancing the duties and liabilities of directors and imposition of stringent penal provisions in case of breach of any statutory provisions. While some of the requirements already existed for listed companies as part of the Listing Agreement, the new requirements under the 2013 Act apply to all companies.

While it is important to incentivize the workforce performing the challenging role of managing companies, it is equally important not to go overboard with the perks and the pay. In India, to keep a check on unnecessary profit squandering by companies and, at the same time, to ensure adequate and reasonable compensation to managerial personnel, the law intervenes to do the balancing act.

3.19 GLOSSARY

i. Managing Director: A director who has substantial powers of Management.

ii. Whole-time Director: A director who is in the whole-time employment of the company.

iii. Independent Director: An independent director, in relation to a company, means a director other than a managing director or a whole time director or a nominee director

iv. Managerial Remuneration: Amount payable to the manager for the services rendered by him is known as managerial remuneration.

3.20 SELF ASSESSMENT QUESTIONS

1. What are the qualifications of a director? When a person is disqualified for appointment as a director of the company?

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2. What are the rules regarding disqualification of Directors?

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3. Explain the law relating to number of directors.

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4. Who may be appointed as director of a company?

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5. How can the directors be removed from the office before the expiry of their term?

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6. Under what circumstances is a director deemed to have vacated the office of directorship?

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7. What is the maximum and minimum limit in respect of managerial remuneration?

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8. Discuss with reference to company law the powers of government to fix or vary the managerial remuneration.

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3.21 LESSON END EXERCISES

1. Briefly discuss the provisions of the companies act, regarding appointment of directors of a company.

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2. Explain the qualifications and disqualifications of directors of a company.

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3. Discuss in detail legal provisions related to managerial remuneration.

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4. Explain the minimum remuneration payable to manager in case of inadequate or no profit to the company?

5. Explain in detail the various liabilities of director of a company under Companies Act, 2013.

6. Discuss in detail various rights and duties of a director of a company?

7. "The powers of directors are co-extensive with those of company itself." Discuss.

3.22 SUGGESTED READINGS

A.K. Mujumdar, Dr.G.K. Kapoor : Company Law and Practice; Taxmann, 59/32, New Rohtak Road, NewDelhi-110 005.

D.K. Jain: Company Law Ready Reckoner; Bharat Law House Pvt. Ltd.; T-

K.C. Garg, R.C.Chawla, Vijay Gupta: Company Law; Kalyani Publishers, 1/1, Rajinder Nagar,Civil Lines, Ludhiana – 141 001. Rohtak Road, New Delhi-110 005.

Taxmann's : Circulars & Clarifications on Company Law; Taxmann, 59/32, New 1/95, Mangolpuri Industrial Area, Delhi-110083.

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UNIT IV: MEETINGS & WINDING UP OF A COMPANY
MEANING, ESSENTIALS OF A VALID MEETING

Structure

4.1 INTRODUCTION

A company may have many kinds of meetings; general meetings are one among them. In very simple terms, a meeting of general body may be called general meeting. General meeting comprises all general members of a company.

It may be noted that to be a meeting there must be more than one person. Therefore, meeting may not be possible in case of One Person Company (OPC) unless law presume something under a legal notion.

NOTE: THE STATUTORY MEETING AND STATUTORY REPORT UNDER SECTION 165 OF COMPANIES ACT, 1956 HAVE BEEN OMITTED IN COMPANIES ACT, 2013.

Board resolutions are an important part of Indian Secretarial System. All the powers available to the board can be exercised through a board resolution. Further it is very important to draft the resolution in precise and to the point manner covering all aspects and relevant provisions of law. A Company being an artificial person, any decision taken by it shall be in the form of a Resolution.

Winding-up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights. Winding-up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are realized and liabilities are discharged out of proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. At the end of the winding up the company will have no assets or liabilities and it will, therefore, be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation to be brought to an end. The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law. However, the purpose must not be exploited for the benefit or advantage of any class or person entitled to submit petition for winding up of a company. It may be noted that on winding up, the company does not cease to exist as such except when it is dissolved. The

administrative machinery of the company gets changed as the administration is transferred in the hands of the liquidator. Even after commencement of the winding-up, the property and assets of the company belong to the company until dissolution takes place. On dissolution the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

4.2 OBJECTIVES

After going through this chapter you will be able to:

I. Understand different types of meetings

II. Know about the quorum required for meetings

III. Get an insight into the meeting of the board.

IV. Understand the meaning of resolution

V. Know about the types of resolutions

VI. Get an insight into the matters required sanctions by different resolutions.

VII. Understand the concept of winding up of a company.

VIII. Know about modes of winding up of a company and procedures involved.

IX. Differentiate between various modes of winding up of a company.

4.3 MEANING OF MEETING

Meetings play a vital role in the functioning and governance of a company. The primary purpose of a Meeting is to ensure that a company gives reasonable and fair opportunity to those entitled to participate in the Meeting to take decisions as per the prescribed procedures. A company, being an artificial person, can, in respect of matters to be decided at General Meeting, take such decisions through its Members by way of Resolutions passed at validly held Meetings. Meetings of Members are known as General Meetings and determining what constitutes such validly held Meeting is of utmost importance.

4.4 KINDS OF MEETING

A general meeting may be -

1. Annual General Meeting (AGM)
2. Extra – ordinary General Meeting (EGM).

ANNUAL GENERAL MEETING (SECTION 96)

Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting. The company shall specify the meeting as such in the notices calling Annual General Meeting.

Financial year [(Section 2(41)]: In case of a company and body corporate, Financial Year mans the period ending on the 31st day of March every year. Where the company or body corporate has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up.

On an application made by a company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year.

This may be clear that where tribunal allow, the company or body corporate may have a financial year which may not end on the 31st day of March.

A company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per this definition of financial year.

This is beyond doubt that where the Act talking about year, which is not financial year, it is calendar year.

Time Periods for Annual General meeting:

In case of the first annual general meeting, it shall be held within a period of 9 months from the date of closing of the first financial year of the company. If a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.

This means, for a company incorporated on 1st day of January 2015, the first financial year shall be closed on 31st day of March 2016 and Annual General Meeting should be convened on or before 31st day of December 2016. However for a company incorporated on 31st day of December 2014, the first financial year shall be closed on 31st day of March 2015 and Annual General Meeting should be convened on or before 31st day of December 2015.

In any case other that first annual general meeting, it shall be held within a period of 6 months, from the date of closing of the financial year. Not more than 15 months shall elapse between the date of one annual general meeting of a company and that of the next.

The Registrar may, for any special reason, extend the time within which any annual general meeting, shall be held, by a period not exceeding 3 months. However the Registrar may not extend the time for first annual general meeting.

Where, last annual general meeting was held on 31st day of December 2015, next annual general meeting shall be held on or before 30th day of September 2016. However where, last annual general meeting was held on 31st day of May 2015, next annual general meeting shall be held on or before 31st day of August 2016. The Registrar may extend these dates to 31st day of December 2016 and 30th day of November 2016 respectively.

Day and time for Annual General Meeting: Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.

"National Holiday" means and includes a day declared as National Holiday by the Central Government. Yet, Republic Day, Independence Day and Gandhi's Birthday has been declared as National Holidays.

Power of tribunal to call Annual General Meeting (Section 97)

1. If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

2. Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

3. A general meeting held as per direction of the Tribunal shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.

EXTRA – ORDINARY GENERAL MEETING (SECTION 100)

1. The Board may, whenever it deems fit, call an extraordinary general meeting of the company.

Extra ordinary General Meeting on requisition:

The Board shall, at the requisition made by,—

a. in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;

b. in the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote, call an extraordinary general meeting of the company.

The requisition made shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.

If the Board does not, within 21 days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of 3 months from the date of the requisition.

A meeting by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.

Any reasonable expenses incurred by the requisitionists in calling a meeting shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.

Extra – Ordinary General Meeting by Tribunal (Section 98)

If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may,

i. either suo motu or

ii. on the application of any director or

iii. member of the company who would be entitled to vote at the meeting,—

a. order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

b. give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company.

Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

Any meeting called, held and conducted in accordance with any order made shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

4.5 PUNISHMENT FOR DEFAULT (SECTION 99)

If any default is made in holding a meeting of the company in accordance with section 96 or section 97 or section 98 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to 1 lakh rupees and in the case of a continuing default, with a further fine which may extend to 5000 rupees for every day during which such default continues.

4.6 NOTICE OF MEETING (SECTION 101)

1. A general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed:

   Provided that a general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode by not less than ninety-five per cent. of the members entitled to vote at such meeting.

2. Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.

3. The notice of every meeting of the company shall be given to—

a. every member of the company, legal representative of any deceased member or the assignee of an insolvent member;

b. the auditor or auditors of the company; and

c. every director of the company.

4. Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

4.7 QUORUM FOR MEETINGS (SECTION 103)

Unless the articles of the company provide for a larger number,

1. In case of a public company,—

a. 5 members personally present if the number of members as on the date of meeting is not more than one thousand;

b. 15 members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand;

c. 30 members personally present if the number of members as on the date of the meeting exceeds five thousand;

2. In the case of a private company, two members personally present, shall be the quorum for a meeting of the company.

If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company—

a. the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or

b. the meeting, if called by requisitionists under section 100, shall stand cancelled:

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (*a*), the company shall give not less than three days notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated.

3. If at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting, the members present shall be the quorum.

4.8 CHAIRMAN OF MEETINGS (SECTION 104)

1. Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.

2. If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act and the Chairman elected on a show of hands under sub-section (1) shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the meeting.

4.9 PROXIES (SECTION 105)

1. Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf:

   Provided that a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll:

   Provided further that, unless the articles of a company otherwise provide, this subsection shall not apply in the case of a company not having a share capital:

   Provided also that the Central Government may prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy:

   Provided also that a person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and such number of shares as may be prescribed.

2. In every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, there shall appear

with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

3. If default is made in complying with sub-section (*2*), every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.

4. Any provision contained in the articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit.

5. If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to one lakh rupees:

Provided that an officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

6. The instrument appointing a proxy shall—

a. be in writing; and

b. be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

7. An instrument appointing a proxy, if in the form as may be prescribed, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the articles of a company.

8. Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

4.10 RESTRICTION ON VOTING RIGHTS (SECTION 106)

1. Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.

2. A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.

3. On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

4.11 VOTING BY SHOW OF HANDS (SECTION 107)

1. At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on a show of hands.

2. A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands under sub-section (1) and an entry to that effect in the

books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise.

4.12 VOTING THROUGH ELECTRONIC MEANS (SECTION 108)

The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means.

4.13 DEMANDS FOR POLL (SECTION 109)

1. Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf,—

a. in the case a company having a share capital, by the members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power or holding shares on which an aggregate sum of not less than 5 lakh rupees or such higher amount as may be prescribed has been paid-up; and

b. in the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power.

2. The demand for a poll may be withdrawn at any time by the persons who made the demand.

3. A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.

4. A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than forty-eight hours from the time when the demand was made, as the Chairman of the meeting may direct.

5. Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.

6. Subject to the provisions of this section, the Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken.

7. The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

4.14 POSTAL BALLOT (SECTION 110)

1. notwithstanding anything contained in this Act, a company—

a. shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and

b. may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed, instead of transacting such business at a general meeting.

2. If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

4.15 REPRESENTATION OF PRESIDENT AND GOVERNORS IN MEETINGS (SECTION 112)

1. The President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting of the company or at any meeting of any class of members of the company.

2. A person appointed to act under sub-section (1) shall, for the purposes of this Act, be deemed to be a member of such a company and shall be entitled to exercise the same rights and powers, including the right to vote by proxy and

postal ballot, as the President or, as the case may be, the Governor could exercise as a member of the company.

4.16 MEETINGS OF THE BOARD (SECTION 173)

Section 173 of the Act deals with Meetings of the Board

1. The Act provides that the first Board meeting should be held within 30 days of the date of incorporation.
2. In addition to the first meeting to be held within 30 days of the date of incorporation, there shall be a minimum of four Board meetings every year and not more than 120 days shall intervene between two consecutive Board meetings.
3. In case of One Person Company (OPC), small company and dormant company, at least one Board meeting should be conducted in each half of the calendar year and the gap between two meetings should not be less than 90 days.

Notice of Board Meetings

1. The Act requires that not less than 7 days' notice in writing shall be given to every director at the registered address as available with the company. The notice can be given by hand delivery or by post or by electronic means.
2. In case the Board meeting is called at shorter notice, at least one independent director shall be present at the meeting. If he is not present, then decision of the meeting shall be circulated to all directors and it shall be final only after ratification of decision by at least one Independent Director.

4.17 REQUIREMENTS AND PROCEDURES FOR CONVENING AND CONDUCTING BOARD'S MEETINGS

Directors may participate in the meeting either in person or through video conferencing or other audio visual means.

Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides for the requirements and procedures, in addition to the procedures required for

Board meetings in person, for convening and conducting Board meetings through video conferencing or other audio visual means:

1. **Arrangements:** Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.

   The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care:

a. to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

b. to ensure the availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

c. to record the proceedings and prepare the minutes of the meeting;

d. to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;

e. to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

f. to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting, but the differently abled persons, may make request to the Board to allow a person to accompany him.

2. **Notice:** The notices of the meeting shall be sent to all the directors in accordance with the provisions of sub-section (3) of section 173 of the Act.

a. The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual

means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

b. A director intending to participate through video conferencing mode or audio visual means shall communicate his intention to the Chairman or the company secretary of the company.

c. If the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangement in this behalf.

d. The director, who desire, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.

e. In the absence of any such intimation from the director, it shall be assumed that the director will attend the meeting in person.

3. **Roll Call :** At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio visual means shall state, for the record, the following namely :

a. Name;

b. The location from where he is participating;

c. That he can completely and clearly see, hear and communicate with the other participants;

d. That he has received the agenda and all the relevant material for the meeting; and

e. That no one other than the concerned director is attending or having access to the proceedings of the meeting at the location mentioned in (b) above.

4. **After the roll call:** The Chairperson or the Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairman and confirm that the required quorum is complete.

Explanation: It is clarified that a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the Rules.

a. The roll call shall also be made at the conclusion of the meeting and at the re-commencement of the meeting after every break to confirm the presence of a quorum throughout the meeting.

b. With respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

5. **Statutory Registers:** The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode if they have given their consent to this effect and it is so recorded in the minutes of the meeting.

6. Participations of directors and Voting: Every participant shall identify himself for the record before speaking on any item of business on the agenda.

a. If a statement of a director in the meeting through video conferencing or other audio visual means is interrupted or garbled, the Chairperson or company secretary shall request for a repeat or reiteration by the director.

b. If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.

8. **Restriction of Access:** From the commencement of the meeting until the conclusion of such meeting, no person other than the Chairperson, directors,

Secretary and any other person whose presence is required by the Board shall be allowed access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board.

9. **Decision:** At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, dissented from the decision taken by majority.

10. **Minutes:** The minutes shall disclose the particulars of the directors who attended the

meeting through video conferencing or other audio visual means.

a. The draft minutes of the meeting shall be circulated among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board.

b. Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within 7 days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.

c. After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson.

Matters not to be dealt with in a Meeting through Video Conferencing or other Audio Visual Means

Rule 4 prescribe restriction on following matters which shall not be dealt with in any meeting held through video conferencing or other audio visual means:

i. the approval of the annual financial statements;

ii. the approval of the Board's report;

iii. the approval of the prospectus;

iv. the Audit Committee Meetings for consideration of accounts; and

v. the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

11. **Penalty:** Every officer of the company who is duty bound to give notice under this section if fails to do so shall be liable to a penalty of 25 thousand rupees.

4.18 COMPLIANCE WITH SECRETARIAL STANDARDS RELATING TO BOARD MEETINGS

For the first time in the history of Company Law in India, the Companies Act, 2013 has given statutory recognition to the Secretarial Standards issued by the Institute of Company Secretaries of India. Section 118(10) of the Act reads as under:

Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.

In the context of this provision, observance of Secretarial Standards issued by the Institute of Company Secretaries of India (ICSI) assumes special relevance and companies will have to ensure that there is compliance with these standards on their part. The ICSI is in process to bring out the Secretarial Standards in line with Companies Act, 2013 and has already issued the exposure draft of Secretarial Standard related to Board and General Meeting.

4.19 QUORUM FOR BOARD MEETINGS (SECTION 174)

1. One third of total strength, or

2. Two directors

whichever is higher shall be the quorum for a meeting.

If due to resignations or removal of director(s), the number of directors of the company is reduced below the quorum as fixed by the Articles of Association of the company, then, the continuing Directors may act for the purpose of increasing the number of Directors to that required for the quorum or for summoning a general meeting of the Company. It shall not act for any other purpose.

For the purpose of determining the quorum, the participation by a director through Video Conferencing or other audio visual means shall also be counted.

If at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of directors, the number of directors who are not interested and present at the meeting, being not less than 2 shall be the quorum during such time.

The meeting shall be adjourned due to want of quorum, unless the articles provide shall be held to the same day at the same time and place in the next week or if the day is National Holiday, the next working day at the same time and place.

It can thus be observed that the provisions of the Companies Act, 2013 relating to board meetings have been made more realistic and in line with the current expectations of the corporate sector.

4.20 PASSING OF RESOLUTION BY CIRCULATION (SECTION 175)

A company may pass the resolutions through circulation. The resolution in draft form together with the necessary papers may be circulated to the directors or members of committee at their address registered with the company in India or through electronic means which may include e-mail or fax.

The said resolution must be passed by majority of directors or members entitled to vote.

If more than one third of directors require that the resolution must be decided at the meeting, the chairperson shall put the resolution to be decided at the meeting. The resolution passed through circulation be noted at a subsequent meeting and made part of the minutes of such meeting.

4.21 MEANING OF RESOLUTION

Accordingly, a resolution may be defined as an agreement or decision made by the directors or members (or a class of members) of a company.

A proposed resolution is a motion. When a resolution is passed a company is bound by it. The resolutions could be on just about any subject in case of Board meetings since they are ultimately responsible for running the Company. The Act generally specifies the matters in respect of which resolutions are required to be passed by the members in general meetings.

4.22 KINDS OF RESOLUTION

Basically, there are three types of resolutions:

1. Ordinary Resolution,
2. Special Resolution and
3. Unanimous Resolution.

In case of Board Meetings, there is no concept of Special Resolutions and also unanimous resolutions are required in very few cases. However, in case of general meetings, all three are covered.

Section 114 of the Companies Act, 2013 defines an Ordinary and Special Resolutions. It states:

ORDINARY RESOLUTION

If the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.

a. the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

b. the notice required under this Act has been duly given; and

c. the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

Other than these two, there is also a concept of a unanimous resolution implying approval of all the members present and voting, without a single vote cast against it. Initially, as per Companies Act 1956 only one resolution required unanimous approval in the general meeting and the same has also been covered under section 162 (1) of the Companies Act 2013 which states that:

At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it."

However, in addition to above, for private companies, the Companies Act 2013 also inserts one more resolution which requires unanimous approval of all the members. As per sub-section 4 of section 5 for inclusion of "entrenchment provision" in the Articles of Association of an already existing Company, it should be "agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company."

Resolutions Requiring Special Notice (Section 115): Where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent. of total

voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

4.23 RESOLUTIONS PASSED AT ADJOURNED MEETING (SECTION 116)

Where a resolution is passed at an adjourned meeting of—

a. a company; or

b. the holders of any class of shares in a company; or

c. the Board of Directors of a company,

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

4.24 RESOLUTIONS AND AGREEMENTS TO BE FILED (SECTION 117)

1. A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed within the time specified under section 403:

   Provided that the copy of every resolution which has the effect of altering the articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or annexed to every copy of the articles issued after passing of the resolution or making of the agreement.

2. If a company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified under section 403 with additional fees, the company shall be punishable with fine which shall not be less than 5 lakh rupees but which may extend to 25 lakh rupees and every officer of the company who is in default, including liquidator of the company, if any, shall be punishable

with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

3. The provisions of this section shall apply to—

a. special resolutions;

b. resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;

c. any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;

d. resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;

e. resolutions passed by a company according consent to the exercise by its Board of Directors of any of the powers under clause (a) and clause (c) of sub-section (1) of section 180;

f. resolutions requiring a company to be wound up voluntarily passed in pursuance of section 304;

g. resolutions passed in pursuance of sub-section (3) of section 179.

4.25 MATTERS REQUIRING SANCTION BY ORDINARY RESOLUTIONS (OR)

S. No.	Sections	Details
1	**4**	In case a company had been incorporated by furnishing wrong or incorrect information for approval of its name, the Registrar may direct the Company to change its name within 3 months by passing an OR, after giving an opportunity of being heard.
2	**16**	If the name is too identical or resembles an already existing company's name or a registered trade mark, the CG shall direct the company to change its name within 3/6 months, as the case may be, by passing an OR.
3	**61**	A limited company having a share capital may, if so authorized by its articles, alter its memorandum in its General Meeting to— (a) increase its authorized 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. (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) Cancellation of uncalled share capital.
4	**63**	Capitalization of company's profit or reserve to issue fully paid bonus shares

5	**65**	Unlimited company to provide for reserve share capital on conversion Into a limited company by an OR.
6	**73 & 76**	A company may by passing an OR in General Meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to certain conditions. or accepting deposits from public under section 76
7	**102 read with 123, 139, 140, 142, 152**	Four main businesses transacted at the Annual General Meeting- (i) the consideration of financial statements and the reports of the Board of Directors and auditors; (ii) the declaration of any dividend; (iii) the appointment of directors in place of those retiring; (iv) the appointment of, and the fixing of the remuneration of, the auditors.
8	**148**	Remuneration of cost accountant shall also be fixed by ordinary resolution.
9	**161**	Pursuant to the AOA or by an OR passed in General Meeting; the Board may appoint an alternate director.
10	**169**	A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242 (Oppression and Mismanagement.), before the expiry of the period of his office after giving him a reasonable opportunity of being heard.
11	**181**	Contribution to bonafide charitable and other funds an amount >5% of its average net profits for three immediately preceding financial years, to be done by passing ordinary resolution.

12	**192**	Restriction on non-cash transactions involving directors of the company or its holding, subsidiary or associate company or a person connected with him without prior approval by means of an OR in General Meeting.
13	**196**	Subject to the provisions of section 197 (relating to managerial remuneration in case of absence or inadequacy of profits) and Schedule V, appointment of a managing director, whole-time director or manager by the Board of Directors shall be subject to approval by a resolution at the next General Meeting of the company.
14	**197**	The remuneration shall be paid to director subject to the provisions of section 197 and shall be determined in accordance with the provisions of Article of Association, or a resolution or if the article authorizes by a SR.
15	**304**	OR to be passed in a General Meeting requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved.
16	**310**	In case of winding up, appointment of official liquidator and fixing remuneration of liquidator.
17	**311**	To fill the vacancy in the office if official liquidator caused by death of liquidator, removal, resignation or otherwise.
18	**314**	The Company Liquidator call General Meeting for the purpose of obtaining the sanction of the company by ordinary resolution or by special resolution, as the case may require.

19	**318**	After considering the report of the Company Liquidator if majority of the members are satisfied that the company shall be wound up, they may pass a resolution for its dissolution.
20	**366**	For companies about to be registered as a company limited by guarantee, the members should have passed a resolution declaring the undertaking by each member.

4.26MATTERS REQUIRING SANCTION BY SPECIAL RESOLUTIONS (SR)

S. No.	Sections	Details
1	**5**	SR for alteration of Article of Association for including the provisions of "Entrenchment" in case of public company. In case of private company, approval of all the members required.
2	**12**	To change the registered office of the company outside the local limits of the city, town or village in which it is situated or from jurisdiction of one ROC to another ROC or from one state to another state.
3	**13**	For alteration of Memorandum of Association of the Company.
4	**14**	For alteration of Article of Association of the Company.
5	**13 & 27**	Change in the object clause of the MOA if the Company has unutilized amount of public money raised for objects as stated in the prospectus or to vary the terms of contract.
6	**41**	To issue Global Depository Receipt in any foreign country.

7	**48**	Where a company has share capital of different classes, the rights attached to any class of shares may be varied by consent of members holding 3/4th of the shares issued of that class or by a SR passed in their meeting.
8	**54**	Issue of Sweat Equity Shares. (Excepting this, shares cannot be issued at a discount.)
9	**62**	For issuing further shares to employees of the company under the scheme of employee stock option and/or issue to persons other than members . SR for determining the terms of issuing debentures convertible into shares or loans raised by the company into shares.
10	**66**	For reduction of Share Capital.
11	**68**	SR passed in General Meeting authorizing buy-back of shares.
12	**71**	For issuing Debenture convertible into shares, wholly or partly.
13	**94**	The company may keep registers; returns etc. in that place of office, where the 1/10th Members is residing and whose names have been entered in the Register of Members, if approved by SR in General Meeting.
14	**140**	Removal of auditor appointed u/s 139, before the expiry of his term and after obtaining approval of Central Govt.
15	**149(1)**	Company may appoint more than 15 directors after passing a SR.
16	**149(10)**	Re-appointment of an independent director for a further period of 5 years after passing a SR.

17	**165**	The members of a company may, by SR specify any lesser number of companies in which a director of the company may act as Directors.
18	**180**	Restriction on power of the Board. (Effective w.e.f. 12/ 09/2013)
19	**186**	Loans and investment by a Company.
20	**188**	SR before entering into contracts by companies having such paid up share capital or for transactions not exceeding such sums as prescribed (in the rules).
21	**196**	Appointment of persons aged 70 years or more as the Managing Director, Whole Time Director or Manager.
22	**197**	The remuneration shall be paid to director subject to the provisions of section 197 (relating to managerial remuneration in case of absence or inadequacy of profits) and shall be determined in accordance with the provisions of Article of Association, or a resolution or if the article authorizes by a SR.
23	**210**	SR is required to be passed for intimation to the CG that the affairs of the Company ought to be investigated.
24	**212**	SR is required to be passed for intimation that the affairs of the Company ought to be investigated by the Serious Fraud Investigation Office.
25	**248**	SR required or consent of 75% of shares holders required for making an application to the ROC for striking off the name of the Company.

26	**262**	Approval of shareholders, of both the companies, in General Meeting for scheme of merger and amalgamation of sick company with other company.
27	**271**	SR passed resolving winding up of the Company by the Tribunal.
28	**304**	For Voluntary Winding Up of the Company.
29	**314**	The Company Liquidator call General Meeting for the purpose of obtaining the sanction of the company by OR or by SR, as the case may require.
30	**319**	AND/OR in case the company liquidator elects to purchase the member's interests, the manner of raising the money must be determined by a SR
31	**321**	Arrangement between the company (about to be or is in the course of being wound up) and the creditors shall be binding on both of them if it is sanctioned by a SR and acceded by creditors holding 3/4th of the total amount due.
32	**343**	Company Liquidator to exercise certain powers subject to sanction by a SR and prior approval of the Tribunal.
33	**347**	SR, in case of voluntary winding up, for determining the manner for disposing the books and papers of a company completely wound up and to be dissolved.

Moreover, the Articles of Association of a Company may prescribe more stringent provisions for a particular matter as compared to the one specified by law for that matter and the Company is bound to follow it.

WINDING UP OF A COMPANY

4.27 MEANING OF WINDING UP OF A COMPANY

Winding-up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

Winding-up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are realized and liabilities are discharged out of proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. At the end of the winding up the company will have no assets or liabilities and it will, therefore, be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation to be brought to an end.

The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law. However, the purpose must not be exploited for the benefit or advantage of any class or person entitled to submit petition for winding up of a company. It may be noted that on winding up, the company does not cease to exist as such except when it is dissolved. The administrative machinery of the company gets changed as the administration is transferred in the hands of the liquidator. Even after commencement of the winding-up, the property and assets of the company belong to the company until dissolution takes place. On dissolution the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

4.28 MODES OF WINDING UP OF A COMPANY

Under Companies Act 2013, the Company may be wound up in any of the following modes:

A. By National Company Law Tribunal (Tribunal);

B. Voluntary winding up

The details regarding above modes of winding up have been discussed below:

WINDING UP BY THE TRIBUNAL

A company under Section 271(1) may be wound up by the

1. **Passing of special resolution for the winding up**: Where the Company has, by Special Resolution, resolved that the company may be wound up by the Tribunal, it may present an application for winding up to the tribunal. When the company has, by special resolution, resolved that the company be wound up by the Tribunal. Also when the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

2. **Conducting affairs in a fraudulent manner:** If on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up.

3. **Inability to pay debts, Section 271(2)** A company shall be deemed to be unable to pay its debts,—

a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

4. Just and Equitable: If the Tribunal is of opinion that it is just and equitable that there are just and equitable grounds for doing so.

The winding up petition is not a legitimate means of seeking to enforce payment of debt, which is bonafide disputed by the company.

Who may file Petition for the Winding up?

An application for the winding up of a company has to be made by way of petition to the Court. A petition may be presented under Section 272 by any of the following persons:

1. the company; or
2. any creditor or creditors, including any contingent or prospective creditor or creditors;
3. any contributory or contributories;
4. all or any of the parties specified above in clauses (a), (b), (c) together
5. the Registrar;
6. any person authorised by the Central Government in that behalf;
7. by the Central Government or State Government

1. **Petition by the Company:** The Company may make a petition through its directors with the authority of a special resolution passed at a general meeting. A petition by the Company for winding up before the tribunal will be admitted only it is accompanied by the statement of affairs, prescribed in form 4 and shall state the facts up to the date which shall not be a date more than fifteen days prior to the date of making the statement. This statement shall be certified by a 716 EP-CL chartered accountant. (Section 272(5) read with Rule 5 made under Chapter XX of the Companies Act 2013) Every contributory or creditor of the company shall be entitled to be furnished, by the petitioner or his authorized representative, with a copy of a petition. The contributory may seek an electronic copy from the registry of tribunal on payment of prescribed fee. (Rule 5(4) of the rules made under Chapter XX of the Companies Act 2013.

2. **Petition by the creditors:** A creditor or creditors (including any contingent or prospective creditor) may make petition before the tribunal would make a winding up order on such petition if the creditor proves that the claims are undisputed debt. Contingent or prospective Creditor Section 272(6) states that before a petition for winding up of a company presented by a contingent or prospective creditor is admitted, the leave of the Tribunal shall be obtained for the admission of the petition and such leave shall not be granted, unless in the opinion of the Tribunal there is a prima facie case for the winding up of the company and until such security for costs has been given as the Tribunal thinks reasonable. Rule 5(3) of Chapter XX states that a contingent or prospective creditor is one who is able to prove that he has a bonafide and prima facie case to establish his claim to the satisfaction of the Tribunal and his application shall be in accordance with sub-section (6) of section 272 to seek the leave of the Tribunal for the admission of the petition in Form No. 5. along with the fees as prescribed.

3. **Petition by the Contributories:** Section 2(26) defines "contributory" means a person liable to contribute towards the assets of the company in the event of its being wound up. For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of

such a contributory; Section 273(2) states that a contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

4. **Petition by the Registrar:** Accordingly the registrar can present a petition on the following grounds.

i. if the company is unable to pay its debts;

ii. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

iii. if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

iv. if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; The Registrar shall not present a petition on the ground that the company is unable to pay its debts unless it appears to him either from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 210 that the company is unable to pay its debts: The Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition: The Central Government shall not accord its sanction

unless the company has been given a reasonable opportunity of making representations. if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up.

Jurisdiction of Court for Entertaining Winding up Petition

In terms of the provisions of Section 10 of the Companies Act, 1956, the jurisdiction for entertaining winding up petition vests either in the High Court having jurisdiction in relation to the place where the registered office of the company is situated or the District Court of the area subordinate to the High Court, in which the jurisdiction has been vested either by the Act or by the Central Government by notification in the Official Gazette.

In *GTC Industries Ltd. v. Parasrampuria Trading* (1999) 34 CLA 380 (All HC), it was held that only High Court where the registered office is situated has jurisdiction in winding up, even if there was agreement between parties that dispute between parties will be resolved before High Court where registered office is not situated. Regardless of where agreement is executed, Company Court having jurisdiction over the place where the registered office is situated will have the jurisdiction to entertain a petition for winding up. *LKP Merchant Financing v. Arwin Liquid Gases* (2001) 103 Comp. Cas. 211 (Guj).

For the purposes of jurisdiction to wind up companies, the expression 'Registered Office' means the place which has longest been the registered office of the company during the six months immediately preceeding the presentation of the petition for winding up. *In Kalpana Trading v. N.C.L. Industries Ltd.* [(1996) 1 Comp. LJ 152], the Orissa High Court refused to entertain the petition for winding up as the Company had its place of Registered Office at Hyderabad.

B VOLUNTARY WINDING UP

Circumstances in which a company may be wound up voluntarily As per Section 304(1), a company may be wound up voluntarily,—

i. if the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved; or

ii. if the company passes a special resolution that the company be wound up voluntarily.

KINDS OF VOLUNTARY WINDING UP

A voluntary winding up is of two kinds:

i. Members' voluntary winding up; and

ii. Creditors' voluntary winding up.

Members' voluntary Winding Up

When the company is solvent and is able to pay its liabilities in full, it need not consult the creditors or call their meeting. Its directors, or where they are more than two, the majority of its directors may, at a meeting of the Board, make a declaration of solvency verified by an affidavit stating that they have made full enquiry into the affairs of the company and that having done so they have formed an opinion that the company has no debts or that it will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding up as may be specified in the declaration.

In *Shri Raja Mohan Manucha v. Lakshminath Saigal* (1963) 33 Comp. Cas. 719, it was held that where the declaration of solvency is not made in accordance with the law, the resolution for winding up and all subsequent proceedings will be null and void. Such a declaration must be made within five weeks immediately preceding the date of the passing of the resolution for winding up the company and be delivered to the Registrar for registration before that date. The declaration must be accompanied by a copy of auditor's report on the balance sheet and profit & loss account as at the latest practicable date before the

making of the declaration and also embody a statement of the company's assets and liabilities as at that date. Any director making a declaration without having reasonable grounds for the aforesaid opinion, shall be punishable with imprisonment extending up to six months or with fine extending up to Rs. 50,000 or with both [Section 488].

A winding up in the case of which such a declaration has been made and delivered in accordance with Section 488 is referred to as "a member's voluntary winding up".

Creditors' Voluntary Winding Up

As discussed earlier, where a declaration of solvency of the company is not made and delivered to the Registrar in a voluntary winding up it is a case of creditor's voluntary winding up.

DISTINCTION BETWEEN MEMBERS' AND CREDITORS' VOLUNTARY WINDING UP

The main differences between the two are as follows:

1. A member's voluntary winding up results where, before convening the general meeting of the company at which the resolution of winding up is to be passed, the majority of the directors file with the Registrar a statutory declaration of solvency. A creditors' voluntary winding up is one where no such declaration is filed.

2. In a member's voluntary winding up, the creditors do not participate directly in the control of the liquidation, as the company is deemed to be solvent; but in a creditors' voluntary winding up, the company is deemed to be insolvent and, therefore, the control of liquidation remains in the hands of the creditors.

3. There is no meeting of creditors in a members' voluntary winding up and the liquidator is appointed by the company; whereas in a creditors' voluntary winding up, meetings of creditors have to be called at the beginning and subsequently the liquidator is appointed by the creditors.

4. In a members' voluntary winding up the liquidator can exercise some of his powers with the sanction of a special resolution of the company; but in a creditors' voluntary

winding up he can do so with the sanction of the Court or the Committee of Inspection or of a meeting of creditors.

4.29 POWERS OF THE COURT TO INTERVENE IN VOLUNTARY WINDING UP

In voluntary winding up it is left to the company, the contributories and the creditors to settle their affairs without intervention of the Court as far as possible. However, the Companies Act, 1956, contains certain provisions which provide a means of access to the Court with a view to speed up the liquidation proceedings and to overcome the difficulties that may arise in the course of liquidation. The Court will intervene in the voluntary winding up whenever it is satisfied that such an intervention will be just and beneficial. In appropriate cases the Court can be approached for compulsory winding up (Section 440) or winding up being conducted under the supervision of the Court (Section 522).

The Court is vested with the following powers in voluntary winding up:

i. To appoint the Official Liquidator or any other person as liquidator where no liquidator is acting [Section 515(1)].

ii. To remove the liquidator and appoint the Official Liquidator or any other person as liquidator on justifiable cause being shown [Section 515(2)].

iii. To determine the remunerations of liquidator when the Official Liquidator is appointed as a liquidator [Section 515(3)].

iv. To amend, vary, confirm or set aside the arrangement entered into between a company and its creditors on an appeal being made by any creditor or contributory within 3 weeks of the completion of the arrangement (Section 517).

v. On an application of the Liquidator or contributory or creditor:

a. to determine any question arising in the winding up of a company [Section 518(1)(a)];

b. to exercise, as respects the enforcing of calls, the staying of suits or other legal proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court [Section 518(1)(b)].

vi. To set aside any attachment, distress or execution started against the estate or effects of the company after the commencement of the winding up on such terms as it thinks fit on an application made by the liquidator, creditor or contributory if the Court is satisfied that it is just and beneficial to do so [Section 518(3) and (4)].

vii. To order public examination of any person connected with promotion or formation of a company or any officer connected with the affairs of the company in regard to matters of promotion or formation or conduct of the business of the company or as to his conduct or dealing as officer thereof. Such an examination can be ordered on a report of the liquidator where he is of the opinion that a fraud has been committed by the persons aforesaid in the formation or promotion of the company or in the conduct of its affairs [Section 519(1)].

4.30 COMMENCEMENT OF WINDING UP

Section 441 of the Companies Act provides for the provisions relevant to commencement of winding up. The winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. But where, before the presentation of the petition a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution. Any proceedings taken in voluntary winding up will be deemed to have been validly taken unless the Court directs otherwise on proof of fraud or mistake. In all other cases, the winding up of a company must be deemed to have commenced at the time of the presentation of the petition for the winding up [Section 441]. Where an order is made by the Court on more than one petition the commencement of the winding up dates from the earliest petition. [See *Kent v. Freehold Land Co.,* (1868) 3 Ch. App. 493]. It may be noted here that voluntary winding up shall be deemed to commence at the time when resolution for voluntary winding up is passed (Section 486).

In *Rishabh Agro Industries Ltd. v. PNB Capital Services Ltd.* (2000) AIR SCW 1753, it was held that the words 'shall be deemed to have commenced' clearly show the intention

of legislature that although the winding up of a company does not in fact commence at the time of presentation itself, but it shall be presumed to commence from that stage. The word 'deemed' used in Section 441 would thus mean 'suspended', 'considered', 'construed', 'thought', 'taken to be' or 'presumed'.

PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP

The provisions applicable to every mode of winding up are comprehensively stated in Sections 324 to 365 of the Act and these apply to every mode of winding up whether it is a voluntary winding up and winding up by tribunal.

4.31 SUMMARY

A company, being an artificial person, can, in respect of matters to be decided at General Meeting, take such decisions through its Members by way of Resolutions passed at validly held Meetings. Meetings of Members are known as General Meetings and determining what constitutes such validly held Meeting is of utmost importance. A Company being an artificial person, any decision taken by it shall be in the form of a Resolution. The resolutions could be on just about any subject in case of Board meetings since they are ultimately responsible for running the Company. The Act generally specifies the matters in respect of which resolutions are required to be passed by the members in general meetings.

Winding up of a Company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors. An administrator called the liquidator is appointed and he takes control of the company, collects its assets, pays debts and finally distributes any surplus among the members in accordance with their rights. At the end of winding up, the company will have no assets or liabilities. When the affairs of a Company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of companies and its legal personality as a corporation comes to an end. Winding up is only a process while the dissolution puts an end to the existence of the company. There are three modes of winding up: winding up by Court (Tribunal) i.e. compulsory winding up, voluntary winding up and winding up subject to supervision of the Court. Section 433 lays down the grounds on which a company may be wound up, in compulsory winding up.

Section 439 specifies the persons by whom a petition for winding up of a company may be presented to the Court (tribunal) in compulsory winding up. When a company is wound up by the members or the creditors without the intervention of Court (tribunal), it is called as voluntary winding up, though it involves directions of the court. Section 484 specifies the circumstances in which a company may be wound up voluntarily. Section 488 divides voluntary winding up into two kinds i.e. Member's voluntary winding up and creditor's voluntary winding up. Under Companies Act 2013, the Company may be wound up in any of the following modes: (a) By National Company Law Tribunal (Tribunal); (b) Voluntary winding up.

4.32 GLOSSARY

i. Annual General Meeting: Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting.

ii. Quorum: Fixed minimum number of eligible members or stockholders (shareholders) who must be present (physically or by proxy) at a meeting before any official business may be transacted or a decision taken therein becomes legally binding.Proxy: A proxy is an agent legally authorized to act on behalf of another party or a format that allows an investor to vote without being physically present at the meeting.

i. Resolution: It is an agreement or decision made by the directors or members or a class of members of a company.

ii. Unanimous resolution: It is a resolution implying approval of all the members present and voting, without a single vote cast against it.

iii. Winding up: Winding up of a company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors.

iv. Contributory: Every person liable to contribute to the assets of the company in the event it's being wound up even includes holder of any shares which are fully paid up.

v. Compulsory Winding up: A winding up by an order of the National Company Law Tribunal.

vi. Voluntary winding up: A winding up by the member or creditors without the intervention of the court.

4.33 SELF ASSESSMENT QUESTIONS

1. What are the requisites of a valid meeting?

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2. What is meant by quorum? What are the provisions relating to quorum for different kinds of meetings?

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3. What do you understand by proxy?

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4. Write short notes on the following:

4 (a) Ordinary Resolution

4 (b) Special Resolution

4 (c) Unanimous Resolution

4 (d) What are the various modes of winding up?

4 (e). What is compulsory winding up?

4 (f) Who are entitled to make a petition to the Court?

4.34 LESSON END EXERCISES

1. Discuss in detail the various kinds of meetings that can be held by a company and also discuss the essentials of a valid general meeting.

2. Define the term minutes and discuss the various provisions regarding the keeping of minutes?

3. Mention the various resolutions and agreements which are required to be registered with the Registrar of companies.

4. Distinguish between a special resolution and a resolution requiring special notice. For what purpose is a special resolution is required.

5. What the different modes of winding are up provided under Companies Act 2013?

6. What are the circumstances under which a company may be wound up by National Company Law Tribunal?

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7. What are the circumstances under which a Company may be wound up voluntarily?

4.35 SUGGESTED READINGS

A.K. Mujumdar, Dr.G.K. Kapoor : Company Law and Practice; Taxmann, 59/32, New Rohtak Road, NewDelhi-110 005.

D.K. Jain: Company Law Ready Reckoner; Bharat Law House Pvt. Ltd.; T-

K.C. Garg, R.C.Chawla, Vijay Gupta: Company Law; Kalyani Publishers, 1/1, Rajinder Nagar,Civil Lines, Ludhiana – 141 001. Rohtak Road, New Delhi-110 005.

Taxmann's : Circulars & Clarifications on Company Law; Taxmann, 59/32, New 1/95, Mangolpuri Industrial Area, Delhi-110083.

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