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Syllabus

COMPANY LAW

M-224

UNIT-I

Definition, Features & Classification of Companies.

UNIT-II

Incorporation of Company with special reference to documents viz memorandum of association, articles of association, prospectus and statement in lieu of prospectus.

UNIT-III

Company Meetings and Resolution: Statutory, Annual General & Extraordinary general meetings.

UNIT-IV

Power of the Company Law Board to call meeting, Requisition of valid meeting, voting, resolutions, minutes, proxy quorum. Issue, allotment, transfer and transmission of shares.

UNIT-V

Right & duties of Company directors (including liabilities), directors as agent, trustees, qualifications, disqualification.

UNIT – I

INTRODUCTION

NOTES

STRUCTURE

1.1 Learning Objectives
1.2 Introduction
1.3 Definitions of Company
1.4 Characteristics of a Company
1.5 Kinds of Companies
1.6 Other Kinds of Companies
1.7 Summary
1.8 Review Questions
1.9 Further Readings

1.1 LEARNING OBJECTIVES

After going through this unit, students will be able to :

- state the fundamental concept of company;
- know the important features of a company;
- discuss the classification of a company.

1.2 INTRODUCTION

A company, means a group of persons associated together for the attainment of a common end, social or economic. It has "no strictly technical or legal meaning." It represents different kinds of associations, both business and otherwise.

The term registered company means a company incorporated under the Companies Act, 1956 or some earlier Companies Acts. Companies incorporated under the Companies Act, 1956 are mostly business companies but they may also be formed for promoting art, charity, research, religion, commerce, or any other useful purpose.

1.3 DEFINITIONS OF COMPANY

A company, in broad sense, may mean an association of individuals formed for some common purpose. But it is a voluntary association of persons. It has capital divisible into parts, known as shares. At the same time it is an artificial

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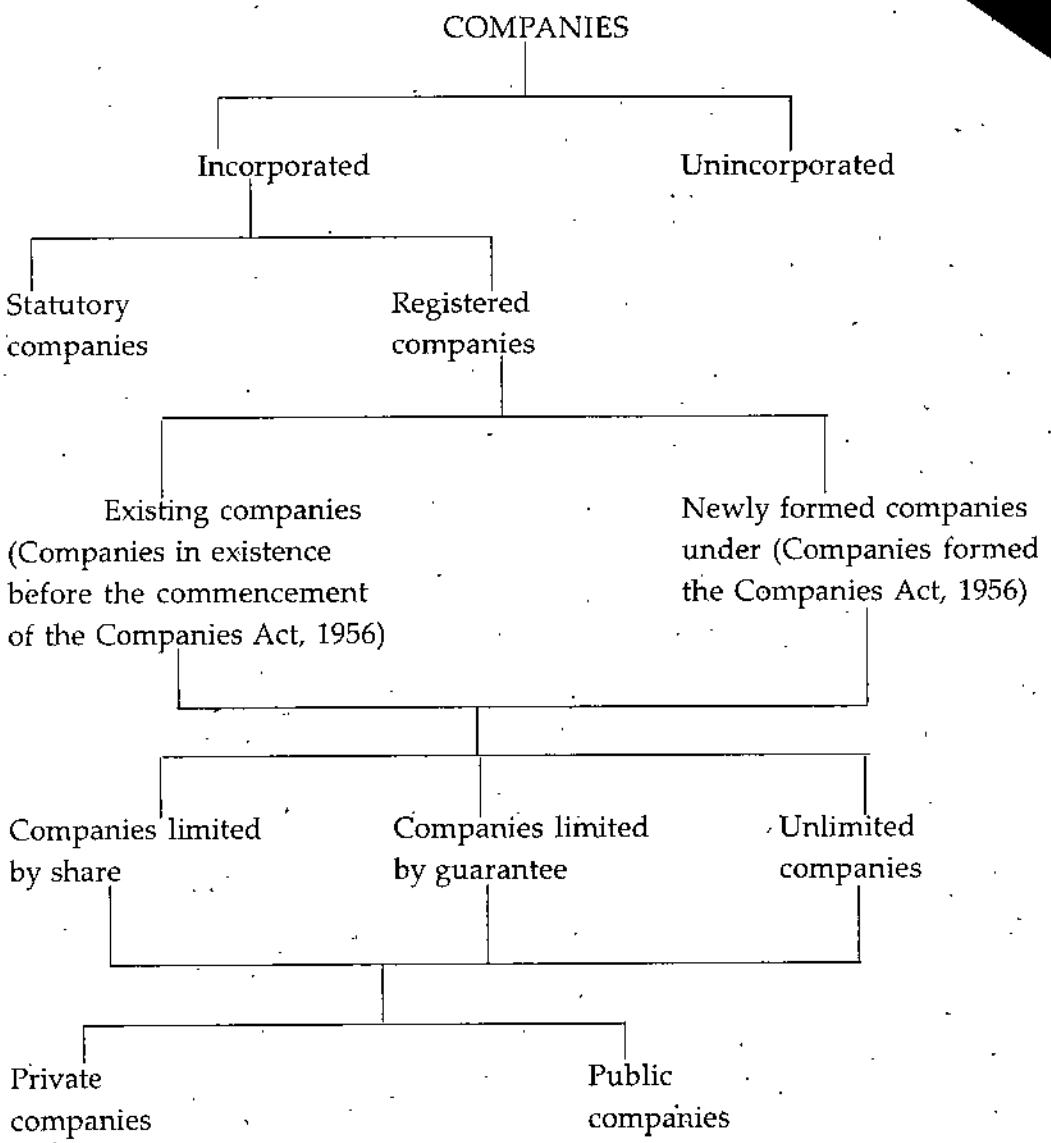
can go on for ever. "During the war all the members of one private company, while in general meeting, were killed by a bomb. But the company survived: not even a hydrogen bomb could have destroyed it". The company may be compared with a flowing river where the water keeps on changing continuously still the identity of the river remains the same. Thus, a company has perpetual existence, irrespective of changes in its membership.

5. **Common seal.** A company being an artificial person has no body similar to natural person and as such it cannot sign documents for itself. It acts through natural persons who are called its directors. But having a legal personality, it can be bound by only those documents which bear its signature. Therefore, the law has provided for the use of a common seal, with the name of the company engraved on it, as a substitute for its signature. Any document bearing the common seal of the company and duly witnessed by at least two directors will be legally binding on the company.
6. **Limited liability.** The liability of the members for the debts of the company is limited to the amount unpaid on their shares howsoever heavy losses the company might have suffered. For example, if a shareholder buys 100 shares of ₹. 10 each and pays ₹. 5 on each share, he has paid up ₹. 500 and can be made to pay another ₹. 500, but he cannot be made to pay more than ₹. 1,000 in all. No shareholder cab be called upon to pay more than the nominal or face value of shares held by him, in case of a company with limited liability. Thus, by the virtue of this characteristics the personal property of the shareholder cannot be seized for the debts of the company, if he holds a fully paid-up share.
7. **Transferability of shares.** The shares of a *public company* are freely transferable and members can dispose of their shares whenever they like without seeking any permission from the company or the other members. In a *private company*, however, some restriction on the right to transfer shares is essential in its articles as per Section 3(1)(iii) of the Act. Although restriction on the right to transfer may also be placed in the case of a public company in certain cases, *e.g.*, in case of partly paid shares, but absolute right of the members to transfer shares cannot be restricted and any provision in the articles to that effect shall be void.

It may, however, be noted here that a company possesses the above mentioned characteristics by the virtue of its *incorporation* or registration under the Companies Act.

1.5 KINDS OF COMPANIES

Following chart shows the classification of companies:



Companies may be classified from different points of view :

Kinds of Companies According to the Mode of Incorporation

A company may be incorporated either by a special Act of legislature or under the Companies Act and accordingly a company may be: (1) statutory company, or (2) incorporated company.

1. **Statutory company.** Companies intending to carry on some business of national importance are formed in this way. Examples of such companies are : Reserve Bank of India, State Bank of India, Industrial Finance Corporation, Indian Airlines, Life Insurance Corporation, Food Corporation of India, Unit Trust of India, etc. It is incorporated by a special

ɜ Central or State legislature. The powers which
ɹch companies are defined by the Acts constituting
they are not required to have a memorandum of
ɹent which defines the limitation of the powers of a
to use the word 'limited' as part of their names. The
panies is conducted under the supervision and control
General of India. Although each statutory company is
ɹe provisions of its special Act, the provisions of the
ɜt, 1956 also apply to them, in so far as the said provisions
ɹsistent with the provisions of the special Acts under which
anies are formed (Sec. 616).

ɜed or registered company. All existing companies in India,
ɹe statutory companies, have been formed in this way and are
ɜd by the provisions of the Companies Act, 1956. A company
ɜred under the Companies Act is known as 'Incorporated' or 'Registered' company. It may, however, be noted that Insurance, Banking and Electric Supply companies though incorporated under the Companies Act are also governed for most of their operative matters by provisions of their special Acts, *viz.*, the Insurance Act, 1938, the Banking Regulation Act,1949, and the Electricity Supply. Act,1948, and the provision of the Companies Act will be applicable to these companies only to such extent as these are not inconsistent with those contained in the special Acts governing them (sec. 616).

Registered companies can further be classified in two ways: *(i)* on the basis of number of members, and *(ii)* on the basis of liability of members.

Kinds of Registered Companies on the Basis of Number of Members

On the basis of the number of members a registered company may be : (1) private company, or (2) public company.

1. Private company. A "Private Company" is defined by Section 3 (1) (iii) of the Act as a company which, by its articles of association :

(a) restricts the right of the members to transfer shares, if any;

(b) limits the number of its members to fifty, excluding members who are or were in the employment of the company; and

(c) prohibits any invitation to the public to subscribe for any shares in, or debentures of the company.

The significance of the words 'if any' used in sub-clause *(a)* above may be borne in mind. As a result of these words, the articles of association of a private company having no share capital shall have to place restrictions specified in the aforesaid sub-clauses *(b)* and *(c)* only. In other words, in the case of a private

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company having no share capital, articles of association need not contain restriction regarding the right of the members to transfer shares.

For the purpose of counting the number of members in compliance of sub-clause *(b)* of the above definition, the Section further lays down that:

(i) members who have been formerly in the employment of the company shall not be counted provided they were members while in that employment and have continued to be members after the employment ceased; and

(ii) where two or more persons hold one or more shares of the company jointly, they shall be treated as a single member.

The maximum number of members required to form a private company is two. A private company enjoys some special privileges.

2. Public company. Section 3(1)(iv) defines it as, "A public company means a company which is not a private company". The minimum number required to form a public company is seven.

Elaborating the above definition, a 'public Company' is one, which :

(i) does not have any restriction on the transfer of shares, if any;

(ii) does not limit the maximum number of members; and

(iii) can invite public for the subscription of its shares and debentures.

(Of course it is under to legal obligation to invite public for this purpose if it is confident of obtaining the required capital privately).

Kinds of Registered Companies on the Basis of Liability of Members

On the basis of liability of members, the Companies Act makes provision for registration of three types of companies, namely:

(1) Companies limited by shares, or

(2) Companies limited by guarantee, or

(3) Unlimited companies.

Each of these types may be a 'public company' or a 'private company'— (Sec. 12).

1. **Companies limited by shares.** A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them is termed "a company limited by shares" [Sec. 12(2)(a)]. Such a company is popularly called as limited liability company. The liability can be enforced at any time during the existence and also during the winding up of the company. Such a company must have share capital as the extent if liability is determined by the face

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value of shares. Most of the companies in India are of this type and it is with companies of this class that we are mainly concerned.

2. **Companies limited by guarantee.** A company limited by guarantee may be defined as "a company having the liability of its members limited by its memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up" [Sec. 12(2)(b)]. The amount guaranteed by each member cannot be demanded until the company is wound up, hence it is in the nature of reserve capital. It is to observed that in this type of companies the liability of the members can only be implemented after the commencement of winding up of the company, whereas in the case of companies limited by shares the liability, if any, can be enforced at any time during the existence as well as during winding up of the company. Such companies may or may not have share capital. But they are formed generally without share capital for non-trading purposes, *e.g.*, for the promotion of commerce, art, science, culture, sports, etc., because if they are formed for trading purposes, they must, in practice possess a share capital for carrying on business, and the registration of a guarantee company with a share capital would be in no way better than registration in the ordinary way as a company limited by shares. The Chambers of Commerce, trade associations and sports clubs are usually guarantee companies because neither they require huge capital nor aim at making profit. The articles of association of such a company must state the number of members with which the company is to be registered.
3. **Unlimited companies.** A company having no limit on the liability of its members is an unlimited company [Sec. 12(2)(c)]. Thus the liability of members in this type of companies is unlimited, i.e., it may extend to the personal property of the members. Like partnership every member is liable to contribute, in proportion to his interest in the company, towards the amount required for payment in full of the total liabilities of the company, and if one is unable to contribute any thing then the additional deficiency is to be shared among the remaining members in proportion to their capital in the company. But it is different from an ordinary partnership in one important respect, i.e., creditors of such a company cannot sue members directly and they can only resort to the winding up of the company on default, the reason is that being a registered company it has a separate entity in law. It must be noted, however, that here also the liability of a member is enforceable only at the time of winding up.

4.6 OTHER KINDS OF COMPANIES

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Some other types of companies which are referred to, under the Companies Act, are as follows :

Licensed Companies or Companies not for Profit

Section 25 relates to licensed companies. Such companies are also registered under the Companies Act like any other company but before they are registered a licence may be obtained from the Central Government. Any association formed for promoting commerce, art, science, religion, charity or any other useful object and which does not intend to apply its profits, if any, for payment of any dividend to its members but instead to apply its income in promoting its objects can be obtain a licence from the Central Government and can get itself registered as a company with limited liability. On registration it enjoys certain exemptions and privileges as compared to an ordinary limited company. Such companies may exclude the words 'limited' or 'private limited' from their names. They are registered without paying any stamp duty on their memorandum and articles of association. These companies are also exempted from complying with the provisions of Sections 147, 160(1)(aa), 166(2), 171(1), 209(4)(a), 257, 264(1), 285, 287, 299, 301, and 302(2) of the Companies Act either wholly or in part, as per Government of India Notification No. S.O. 1578 dated 8th July,1961. The if the fundamental conditions of the licence are contravened. Such companies may be public or private companies and may or may not have share capital.

It is worth noting that a partnership firm may be a member in a licensed company in its firm name and it is only on the dissolution of the firm that its membership shall cease [Sec. 25(4)].

One Man Company or Family Company

Where one man holds pratically the whole of the share capital of a company and takes a few more dummy members (usually family members) simply to meet the statutory requirement of the minimum member of persons (6 more persons in case of a public company one other person in case of a private company), such a company is known as "one man company". Such a company is perfectly in order in the eyes of law and is regarded to have a separate entity, as distinct from the majority shareholder (Salomon vs. Salomon & Co. Ltd.).

Foreign Company

It means any company incorporated outside India which has an established place of business in India [Sec. 591 (1)]. Where, for example, representatives of a foreign company frequently come and stay in a hotel in India for purchasing raw material, machinery, cotton etc., the foreign company has a place of business in India.

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A company has an established place of business in India if it has a specified or identifiable place at which it carries on business such as an office, store house, godown or other premises with some visible sign or physical indication that the company has a concrete connection with the particular premises [Deverall v. Grant Advertising Inc., (1954) 3 All E.R. 389].

Where a minimum of 50 per cent 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/and by one or more bodies corporate incorporated in India, whether singly or jointly, such company shall comply with such provisions as may be prescribed as if it were an Indian company [Sec. 591 (2)].

Government Company

A Government company is defined in Section 617 as "any company in which not less than 51 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 and includes a company which is a subsidiary of a Government company as thus defined."

Holding and Subsidiary Companies

On the basis of control, companies may be classified into :

1. Holding companies, and
2. Subsidiary companies (Sec. 4).

1. Holding Company [Sec. (4)(4)]. A company is known as the holding company of another company if it has control over that other company. According to Sec. 4(4), a company is "deemed to be the holding company of another if, but only if, but only if, that other is its subsidiary." Now the question is : What is a subsidiary company?

2. Subsidiary company [Sec. 4 (1)]. A company is known as a subsidiary of another company when control is exercised by the latter (called holding company) over the former called a subsidiary company. According to Sec. 4 (1), a company (say, Company S) is deemed to be a subsidiary of another company (say, Company H) in the following 3 cases :

(1) Company controlling composition of Board of Directors. Where a company (Company H) controls the composition of Board of directors of another company (Company S), the latter (Company S) becomes the subsidiary of the former (Company H). For this purpose, the composition of Company S's Board of directors is deemed to be controlled by company H if Company H can appoint or remove all or a majority of directors of Company S. 'Control' involves the power to appoint all or a majority of the directors without the consent or concurrence of some other person. It might arise either from holding of shares

giving sufficient voting rights or from special rights conferred by the company's Articles.

Example. The Board of directors of a company (company S) consists of 7 directors. Any other company (Company H) which has authority to appoint 4 directors is deemed to be the holding company of the former (Company S) which is called the subsidiary company.

A company (Company H) is deemed to have power to appoint a person as a director in another company (say Company S) in the following 3 cases :

(i) If Company H can appoint him as a director by the exercise in his favour of the power of appointment held by the company.

(ii) If his appointment as director follows necessarily from his appointment as director or manager of, or to any other office of employment, in Company H.

(iii) If Company H or any of its subsidiaries has the power to nominate him as director.

(2) Holding of majority of shares. Where a company (Company H) holds more than half in nominal value of equity share capital of another company (Company S), the latter (Company S) becomes the subsidiary of the former (Company H). The words 'nominal value of equity capital' in Sec. 4 means the face value of the equity capital which has been subscribed.

(3) Subsidiary of another subsidiary. Where a company (Company S) is subsidiary of another company (say Company H_1) which is itself subsidiary of the controlling company (Company H), the former (Company S) becomes the subsidiary of the controlling company (Company H).

Example. Company S is a subsidiary of Company H and Company S_1 is a subsidiary of company H, by virtue of the above Clause. If Company S_2 is a subsidiary of Company S_1, Company S_2 will be a subsidiary of Company S and consequently also of Company H, by virtue of the above Clause.

The following chart explains the point :

Company H (Holding Company)

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Company S_1 (Subsidiary of Company H)

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Company S_2 (Subsidiary of Company S_1)

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Company S_3 (Subsidiary of Company S_2)

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Company S_3 and Company S_2 are subsidiary of Company H.

To sum up : A Company (Company S) is deemed to be a subsidiary of another company (Company H) if:

(a) the other company (Company H) is a member of it (Company S) and controls the composition of its (Company S's) Board of directors; or

(b) the other company (Company H) holds more than half in nominal value of its (Company S's) equity share capital; or

(c) it (Company S) is a subsidiary of another company (say Company S_1) which is in turn a subsidiary of that other company (Company S).

In determining whether a company (Company S) is a subsidiary of another (Company H), shares held or power exercisable in the following cases shall be disregarded :

(1) Any shares held or power exercisable by the company (Company H) in a fiduciary capacity.

(2) Any shares held or power exercisable by any person as a nominee for the company (Company H).

(3) Any shares held or power exercisable by any person by virtue of the provisions of any debentures or of a trust deed for securing any issue of such debentures of the other company (Company S) [Sec.4 (3)].

In Sec. 4, the expression 'company' includes any body corporate.

A holding company and its subsidiaries are separate legal entities and each has a separate corporate veil. The fact that a company is a holding company, does not mean that the holding and the subsidiary companies constitute one company. Except to the extent the Statute indicates the nature of a holding company and the subsidiary company, the corporate veil remains.

1.7 SUMMARY

- A company, in broad sense, may mean an association of individuals formed for some common purpose. But it is a voluntary association of persons. It has capital divisible into parts, known as shares.
- A company may be incorporated either by a special Act of legislature or under the Companies Act and accordingly a company may be: (1) statutory company, or (2) incorporated company.
- On the basis of the number of members a registered company may be : (1) private company, or (2) public company.
- A Government company is defined in Section 617 as "any company in which not less than 51 per cent of the paid-up share capital is held by the Central Government or by any State Government or Governments.

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1.8 REVIEW QUESTIONS

1. Define company.
2. What are the principal characteristics of a company?
3. Distinguish between statutory and incorporated company.
4. What are the major features of private and public companies?
5. Define holding and subsidiary company.

1.9 FURTHER READINGS

- Dr. Singh, Avtar, ***Introduction to Company Law***, 2006, Eastern Book Co. India.
- Gogna, P.P.S., ***A Textbook of Company Law***, 2004, S. Chand Publication, New Delhi.

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UNIT– II

INCORPORATION OF COMPANY

STRUCTURE

2.1 Learning Objectives
2.2 Introduction
2.3 Incorporation of Company
2.4 Certificate of Incorporation
2.5 Promoter
2.6 Memorandum of Association
2.7 Contents of Memorandum (Sec. 13)
2.8 Alteration of Memorandum
2.9 Doctrine of Ultra Vires
2.10 Articles of Association
2.11 Alteration of Articles
2.12 Articles and Memorandum — Their Relation
2.13 Legal Effect of Memorandum and Articles
2.14 Prospectus
2.15 Summary
2.16 Review Questions
2.17 Further Readings

2.1 LEARNING OBJECTIVES

After going through this unit, students will be able to :

- state the fundamental concept of incorporation of a company;
- know the method of incorporation of company;
- discuss the application of memorandum of association, articles of association etc.,.

2.2 INTRODUCTION

To form a company certain steps are necessary, whether it is worthwhile forming a new company or taking over the business of an already established concern. All these steps are taken by certain persons known as "promoters". They do all the necessary preliminary work incidental to the formation of a company.

2.3 INCORPORATION OF COMPANY

With or without limited liability, any 7 or more persons (2 or more in case of a private company) associated for any lawful purpose may form an incorporated company. They shall subscribe their names to a Memorandum of Association and also comply with other formalities in respect of registration. A company so formed may be :

(1) a company limited by shares, or

(2) a company limited by guarantee, or

(3) an unlimited company.

Companies limited by shares are the most popular and we shall be chiefly concerned with them.

Lawful purpose : The purpose for which a company is proposed to be established must be lawful. It must not be in contravention of the general law of the country.

Subscribing their names : The expression 'subscribing their names to a Memorandum of Association' means signing the Memorandum. This implies an agreement between the persons concerned to associate themselves into a body corporate and 'subscribing' in this context means signing by such persons or their nominees the Memorandum in token of their agreement to so associate themselves.

Documents to be Filed with the Registrar

Following documents duly stamped together with the necessary fees are to be filed with the Registrar if proposed name of company is approved by the Registrar of Companies :

1. The Memorandum of Association duly signed by the subscribers.
2. The Articles of Association, if any, signed by the subscribers to the Memorandum of Association. A public company limited by shares need not have its own Article of Association. It may instead adopt Table A in Schedule I to the Act.
3. The agreement, if any, which the company proposes to enter into with any individual for appointment as its managing or whole-time director or manager [Sec. 33 (1)].
4. A list of the directors who have agreed to become the first directors of the company (this applies to a public company limited by shares) and their written consent to act as directors and take up qualification shares (Sec. 266).
5. A declaration stating that all the requirements of the Companies Act and other formalities relating to registration have been complied with. Such declaration shall be signed by any of the following persons : viz.,

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(a) an Advocate of the Supreme Court or of a High Court; or

(b) an attorney or a pleader entitled to appear before a High Court; or

(c) a secretary or a chartered accountant in whole-time practice in India, who is engaged in the formation of the company; or

(d) a person named in the Articles as a director, manager or secretary of the company [Sec. 33 (2)].

For the purposes of Sec. 33 (2), 'Chartered accountant in whole-time practice in India' means a chartered accountant within the meaning of the Chartered Accountants Act, 1949 who is practising in India and who is not in full-time employment.

Then within 30 days of the date of incorporation of the company, a notice of the situation of the registered office of the company shall be given to the Registrar who shall record the same (Sec. 146).

2.4 CERTIFICATE OF INCORPORATION

When the requisite documents are filed with the Registrar and the statutory requirements regarding registration have been duly complied with. In exercising this duty, the Registrar is not required to carry out any investigation. The only duty cast on him before he registers a company is to see that the requirements prescribed under Secs. 33 (1) and (2) are complied with [Methodist Church v. Union of India, (1985) 57 Comp. Cas. 443].

If the Registrar is satisfied as to the compliance of statutory requirements, he retains and registers the Memorandum, the Articles and other documents filed with him and issues a 'certificate of incorporation', *i.e.*, of the formation of the company [Sec. 33 (3)].

If there is any minor defect in any document, the Registrar may ask for its rectification. But if there is a material and substantial defect, he may refuse registration.

By issuing certificate of incorporation the Registrar certifies under his hand that the company is incorporated and in the case of a limited company, that the company is limited (Sec. 34).

Once the certificate of incorporation is issued by the Registrar, nothing is to be inquired into as to the regularity of the prior proceedings. The certificate cannot be disputed on any grounds whatsoever. It cannot be challenged even in cases:

(a) where the Memorandum is altered after the signatories put their signatures on the Memorandum but before it is registered with the Registrar, or

(b) where the Memorandum is signed by only one person for all the 7 subscribers, or

(c) where all the signatories are minors, or

(d) where signatures to the Memorandum are forged.

Note the following case :

Jubilee Cotton Mills Ltd. v. 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. Held, 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.

The certificate of incorporation has been held to be conclusive on the 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 comes into existence.

Even though the certificate of incorporation is conclusive for the purpose of incorporation, it does not make an illegal object a legal one. But the position is firmly established that if a company is born, the only method to put an end to it is by winding it up [T.V. Krishna v. Andhra prabha (Pvt.) Ltd., A.I.R. (1960) A.P. 123].

Copy of certificate of incorporation. Any one can obtain a copy of the certificate of incorporation of a company on payment of the prescribed fee.

Effects of Registration (Sec. 34)

(1) On the registration of the Memorandum of a company, the Registrar shall certify under his hand that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the Memorandum and other persons, who are members of the company, shall be a body corporate.

(3) The body corporate shall be known by the name contained in the Memorandum.

(4) It shall be capable forthwith of exercising all the functions of an incorporated company.

(5) It shall have perpetual succession and a common seal.

(6) The liability of the members to contribute to the assets of the company in the event of its being wound up shall be limited.

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When a company is registered and a certificate of incorporation is issued by the Registrar, three important consequences follow :

1. The company becomes a distinct legal entity. Its life commences from the date mentioned in the certificate of incorporation.
2. The company acquires a perpetual succession. The members may come and go, but it goes on for ever, unless it is wound up.
3. The company's property is not the property of the 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 the individual shareholders.

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.

2.5 PROMOTER

A promoter is a person who does the necessary preliminary work incidental to the formation of a company.

Persons who control a company's affairs are its promoters. It is they who conceive the idea of forming the company, with reference to a given object and then to set it going. It is they who take the necessary steps to incorporate the company, provide it with share and loan capital and acquire the business or property which it is to manage. When these things have been done, they hand over the control of the company to its directors, who are often the promoters themselves, under a different name.

Functions of a Promoter

The promoter of a company decides its name and ascertains that it will be accepted by the Registrar of companies. He settles the details of the company's Memorandum and Articles, the nomination of directors, solicitors, bankers, auditors and secretary and the registered office of the company. He arranges for the printing of the Memorandum and Articles, the registration of the company, the issue of prospectus, where a public issue is necessary. He is, in fact, responsible for bringing the company into existence for the object which he has in view.

Quasi-trustee

A promoter is neither an agent nor a trustee of the company under incorporation but certain fiduciary duties have been imposed on him under the Companies Act, 1956. He is not an agent because there is no principal born by that time and he is not a trustee because there is no cestui qui trust in existence. Hence he occupies the peculiar position of a quasi-trustee [Vali P. Rao v. Sri Ramanuja Ginning & Rice Factory (Pvt.) Ltd., (1986) 60 Comp. Cas. 568 (A.P.)].

Fiduciary position of a promoter

The fiduciary position of a promoter may be summed up as follows :

1. Not to make any profit at the expense of the company. The promoter must not make, either directly or indirectly, any profit at the expense of the company which is being promoted. If any secret profit is made in violation of this rule, the company may, on discovering it, compel him to account for and surrender such profit [Cape Breton Co., RE (1885) 29 Ch. D. 795].
2. To give benefit of negotiations to the company. The promoter must, when once he has begun to act in the promotion of a company, give to the company the benefit of any negotiations or contracts into which he enters in respect of the company. Thus where he purchases some property for the company, he cannot rightfully sell that property to the company at a price higher than he gave for it. If he does so, the company may, on discovering it, rescind the contract and recover the purchase money.
3. To make a full disclosure of interest or profit. If the promoter fails to make a full disclosure of all the relevant facts, including any profit and his personal interest in a transaction with the company, the company may sue him for damages for breach of his fiduciary duty and recover from him any secret profit made even though rescission is not asked for or is impossible.
4. Not to make unfair use of position. The promoter must not make an unfair or unreasonable use of his position and must take care to avoid anything which has the appearance of undue influence or fraud.

Remuneration of Promoters

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

In practice, a promoter takes remuneration for his services in one of the following ways :

1. He may sell his own property at a profit to the company for cash or fully-paid shares provided he makes a disclosure to this effect.
2. He may be given an option to buy a certain number of shares in the company at par.
3. He may take a commission on the shares sold.
4. He may be paid a lump sum by the company.

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2.6 MEMORANDUM OF ASSOCIATION

First step in the formation of a company is to prepare Memorandum of Association.

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 raison d'etre (*i.e.*, reason for existence). 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.

Purpose of Memorandum

The purpose of the Memorandum is two-fold :

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 [Cotman v.Brougham, (1918) A.C. 514].

Printing and Signing of Memorandum (Sec. 15)

The memorandum of Association of a company shall be:

(a) printed,

(b) divided into paragraphs numbered consecutively, and

(c) signed by 7 (2 in case of a private company) subscribers.

Each subscriber shall sign (and add his address, description and occupation, if any) in the presence of at least 1 witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

The Memorandum of Association printed on computer on computer laser printers should be accepted by the Registrar for registration of a company provided it is neatly and legibly printed (Press Note, issued by the Department of Company Affairs, dated 22-6-1993).

Form of Memorandum (Sec. 14)

The Memorandum of Association of a company shall be in such one of the Forms in Tables B,C,D and E in Schedule I to the Companies Act, 1956, as may be applicable to the case of the company, or in a Form as near thereto as circumstances admit.

Table B relates to Memorandum of Association of a company limited by shares.

Table C relates to Memorandum and Articles of Association of a company limited by guarantee and not having a share capital.

Table D relates to Memorandum and Articles of Association of a company limited by guarantee and having a share capital.

Table E relates to Memorandum and Articles of Association of an unlimited company.

2.7 CONTENTS OF MEMORANDUM (SEC. 13)

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

1. The name of the company, with 'Limited' as the last word of the name in the case of a public limited company and with 'Private Limited' as the last word of the name in the case of a private limited company.
2. The State in which the registered office of the company is to be situate.
3. The objects of the company which shall be classified as:

(a) the main objects of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects ; and

(b) other objects of the company not included in *(a)*.

4. In the case of companies (other than trading corporations) with objects not confined to one State, the States to whose territories the objects extend.
5. Limited liability. The Memorandum of a company limited by shares or by guarantee shall also state that the liability of its members is limited.
6. Share capital. In the case of a company having a share capital, the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount. In such a company each subscriber shall take at least one share and shall write opposite his name the number of shares he takes.

The Memorandum of a company limited by guarantee shall also state that each member undertakes to contribute a certain sum to the assets of the company, if need be, in the event of its being wound up.

The Memorandum shall conclude with an 'association clause' which states that the subscribers desire to form a company and agree to take shares in it.

These clauses are now considered in detail :

1. The name clause (Sec. 20)

The name of a company establishes its identity and is the symbol of its existence.

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Rules regarding name. A company may, subject to the following rules, select any suitable name:

(1) Undesirable name to be avoided. A company cannot be registered by a name which, in the opinion of the Central Government, is undesirable. Broadly speaking, a name is undesirable and therefore rejected if it is either:

(a) too similar to the name of another company ; or

A company should not adopt a name which is identical with, or too closely resembles, the name of an existing company.

(b) misleading, *i.e.*, suggesting that the company is connected with a particular business or that it is an association of a particular type when this is not the case.

(2) Injunction if identical name adopted. If a company gets registered with a name which resembles the name of an existing company, the other company with whom the name resembles can apply to the Court for an injunction to restrain the new company from adopting the identical name [Ewing v. Buttercup Margarine Co. Ltd., (1917) 2 Ch. 1]. This is because the name of a company is part of its business reputation and the company gains a monopoly of the use of that name and no other company can be registered under a name identical with it or so nearly resembling it as is calculated to deceive or to mislead or to mislead the public [Hendriks v. Montague, (1881) 17 Ch. D. 638].

(3) 'Limited' or 'Private Limited' as the last word or word of the name. 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. In case the company has been formed for the promotion of art, science, religion, etc., the Central Government may permit, by a licence, the omission of the word 'Limited' or the words 'Private Limited' from the name.

Omission of the word 'Limited' makes the name incorrect. Where the word 'Limited' forms part of a company's name, omission of this word shall make the name incorrect. If the company makes a contract without the use of the word 'Limited', the officers of the company who make the contract would be deemed to be personally liable [Atkins & Co. v. Wardle, (1889) 61 L.T. 23].

The abbreviation 'Ltd.' or 'Ld.' May be used for the word 'Limited' in the name of a company [F. Stacey & Co. v. Wallis, (1921) 28 T.L.R. 211].

(4) Prohibition of use of certain names. The Emblems and Names (Prevention of Improper Use) Act, 1950 prohibits, the use of, or registration of a company or firm with, any name or emblem specified in the Schedule to that Act. The Schedule specifies, amongst others, the following item, *i.e.*, the name, emblem or official seal of the United Nations Organisation, the World Health Organisation, the United National Educational, Scientific and Cultural Organisation, the Indian National

Flag, the name, emblem or official seal Central Government and State Government, the name, emblem or official seal of the President of India or Governor of any State. The Act also prohibites the use of any name which may suggest or be calculated to suggest *(i)* the patronage of the Government of India or the Government of any State, or *(ii)* connection with any local authority or any corporation or body constituted by the Government under any law for the time being in force, the name or pictorial representation of Rashtrapati, Rashtrapati Bhavan or any Raj Bhavan, Mahatma Gandhi and the Prime Minister of India. These names or emblems may be used with the previous permission of the Central Government.

(5) Use of some key words according to authorized capital. If a company uses any of the following key words in its name, it must have a minimum authorized capital mentioned against the key words :

Key words	*Required authorized capital*
(i) Corporation 5 crores	₹
(ii) International, Globe, Universal, Continental, Inter-Continental, Asiatic, Asia, being the first words of the name	1 crore
(iii) If any of the words at *(ii)* above is used within the name (with or without brackets)	50 lakhs
(iv) Hindustan, India, Bharat, being the first word of the name	50 lakhs
(v) If any of the words at *(iv)* above is used within the name (with or without brackets)	5 lakhs
(vi) Industries/Udyog	1 crore
(vii) Enterprises, Products, Business, Manufacturing	10 lakhs.

2. The registered office clause (Sec. 146)

Every company shall have a registered office from the day on which it begins to carry on business, or as from the 30th day after the date of its incorporation, whichever is earlier. All communications and notices are to be addressed to that registered office. Notice of the situation of the registered office and every change shall be given to the registrar within 30 days after the date of incorporation of the company or after the date of change. If default is made in

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complying with these requirements, the company and every officer of the company who is in default shall be punishable with fine which may extend to ₹ . 500 for every day during which the default continues.

3. The objects clause [Sec. 13(1)]

The objects of a company shall be clearly set forth in the Memorandum, for a company can do what is within, or incidental to, the objects stated in the Memorandum. The objects clause both defines and confines scope of the company's powers, and once registered, it can only be altered as provided by the Act.

The purpose of the objects clause is:

(1) to enable subscribers to the Memorandum to know the uses to which their money may be put, and

(2) to enable creditors and persons dealing with the company to know what its permitted range of enterprise or activities.

The objects clause in the Memorandum of every company has to state:

(1) **Main objects** of the company to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects, and

(2) **Other objects** of the company not included in the above Clause.

Further, in the case of a company (other than a trading corporation) whose objects are not confined to one State, the States to whose territories the objects extend has also to be stated.

A company, which has a main object together with a number of subsidiary objects, cannot continue to pursue the subsidiary objects after the main object has come to an end.

2.8 ALTERATION OF MEMORANDUM

Alteration of Conditions

1. Change of name

By special resolution (Sec. 21). A company may change its name by a special resolution and with the approval of the Central Government signified in writing. But a change of name which merely involves the deletion or addition of the word 'Private' on the conversion of a public company into a private company or vice-versa does not require the approval of the Central Government.

By ordinary resolution (Sec. 22). Sometimes, through inadvertence or otherwise, a company is registered by a name which, in the opinion of the Central Government, is identical with, or too nearly resembles, the name of an existing company. In such a case, the company:

(a) may change its name, by ordinary resolution and with the previous approval of the Central Government,

(b) shall change its name if the Central Government so directs within 12 months of its registration. When so directed by the Central Government the company shall, by ordinary resolution and with the previous approval of the Central Government, change its name within a period of 3 months from the date of the direction. The above rule also applies to an existing company which is registered by a new name which is identical with, or too nearly resembles, the name of an existing company. If the company makes default in complying with any direction given by the Central Government in this regard, the company and every officer of the company who is in default shall be punishable with fine which may extend to ₹. 1,000 for every day during which the default continues.

Fresh certificate of incorporation (Sec. 23). Where a company changes its name, the Registrar shall enter the new name on the Register in the 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 the issue of such a certificate. The Registrar shall also make the necessary alteration in the Memorandum of Association of the company.

Right and obligations remain unaffected. The change of name shall not affect any right or obligations of the company, or render defective any legal proceedings by or against the company. Legal proceedings which might have been continued or commenced by or against the company by its former name may now be continued by its new name. This is because the alteration is only in name and not in the identity of the company [Kalipada v. Mahalaxmi Bank Ltd., A.I.R. (1966) Cal. 585].

2. Change of registered office

This may involve:

(1) Change of registered office within a State [Sec. 17-A as inserted by the Companies (Amendment) Act, 2002]. No company shall change the place of its registered office from one place to another within a State unless such change is confirmed by the Regional Director. The company shall make an application in the regard in the prescribed form to the Regional Director for confirmation. The confirmation shall be communicated to the company within four weeks from the date of receipt of application for such change.

It is important to note that the above provisions shall apply only to the companies which change the registered office from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies within the same State.

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The company shall file with the Registrar a certified copy of the confirmation by the Regional Director for change of its registered office under Sec. 17-A, within two months from the date of confirmation, together with a printed copy of the Memorandum of Association as altered and the Registrar shall register the same and certify the registration under his hand within one month from the date of filing of such document.

The certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and confirmation have been complied with and henceforth the Memorandum of Association as altered shall be the Memorandum of Association of the company.

(2) Change of registered office from one State to another (Sec. 17). A company may, by special resolution, change the place of its registered office from one State to another for certain purposes referred to in Sec. 17. These purposes are the same as in case of alteration of objects and are discussed under the heading "Alteration of objects".

Procedure of Alteration

(1) *Special resolution.* A special resolution shall be passed at a general meeting so as to change the place of registered office from one State to another.

(2) *Confirmation by the Central Government.* The alteration shall not take effect until it is confirmed by the Central Government on petition.

(3) *Notice to affected parties.* Before confirming the alteration, the Central Government shall be satisfied that sufficient notice has been given to every person whose interest will be affected by the change, and that the consent of the creditors of the company has been obtained or their debts or claim have been discharged or secured.

(4) *Notice to Registrar.* The Central Government shall cause notice of the petition for confirmation of the change to be served on the Registrar. The Registrar shall also be given a reasonable opportunity to appear before the Central Government and state his objections and suggestions, if any, with respect to the confirmation of the change.

(5) *Power of the Central Government to confirm change discretionary.* The Central Government may confirm the change, on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(6) *Right and interests of members and creditors to be taken care of.* The Central Government shall have regard to the right and interests of every class of the members and the creditors of the company.

(7) *Purchase of shares of dissentient members.* The Central Government may adjourn the proceedings for the purchase of interests of dissentient members and may give necessary directions in this company.

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(8) *Copy of special resolution and the order of the Central Government to be filed with the Registrar (Sec. 18).* A company shall file with the Registrar:

(a) the special resolution passed by the company within one month from the date of such resolution;

(b) a certified copy of the order of the Central Government confirming the change within 3 months of the order. The company shall also file a printed copy of the Memorandum as altered. The Registrar shall register the same and certify the registration within 1 month from the date of filing of such documents. 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.

Time taken for drawing an order and for furnishing copy of the order by the Central Government will be excluded in computing the period of 3 months for filing it with the Registrar [Beauty Art Dyers & Cleaners (Pvt.) Ltd. v. Registrar of Companies, (1974) 44 Comp. Cas. 460].

Extension of time. The Central Government may extend the time for the filing of documents or for the registration of the change under Sec. 18 by such period as it thinks proper.

Effect of failure to register (Sec. 19). No alteration of Memorandum (as is referred to in Sec. 17) shall have effect unless it has been registered in accordance with the provisions of Sec. 18. If the document to be filed with the Registrar under Sec. 18, are not filed within the prescribed period, such alteration and order of the Central Government and all proceedings connected therewith shall become void and inoperative.

A certified copy of the confirming the change shall be filed by the company with the Registrar of the State in which the registered office is to be transferred and he shall register the same. All the records of the company shall then be transferred to the Registrar of the State in which the registered office of the company is transferred.

3. Alteration of objects (Sec. 17)

The objects clause is the most important clause 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.

Before the amendment of the Act in 1996, alteration of the "objects clause" in the Memorandum of a company required approval of its shareholders by a special resolution and confirmation of the same by the Central Government. The Amendment Act, 1996 seeks to remove the requirement of confirmation of change by the Central Government, with the result, that a company will now be free to amend the 'objects clause' with the approval of its shareholders. This is a recognition of the fact that it is a business decision and, therefore, the companies

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must be free to change the parameters of their business operations to suit the changing needs of business. Negatively it means that there is no scope for a quasi-judicial forum to determine what is right for the business community. The proposed change also reflects the need to create a level playing ground for domestic industries vis-à-vis multinationals and the change in the Government policy towards industrial licensing. The proposes change is a welcome measure as it reduces time frame for implementing expansion and diversification of business operations. However, confirmation by the Central Government will still be required in the case of change in registered office of a company from one State to another.

The power of alteration of objects is subject to two limits, namely:

(1) substantive or physical limit, and

(2) procedural limit.

Substantive limit. By Sec. 17 (1), the object of a company may be altered by special resolution so as to enable the company:

(a) 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.

Scientific poultry Breeders' Assn., Re(1933) Ch. 227. A company which was formerly forbidden by its Articles of Association from paying remuneration to its managers wanted to alter its object clause so as to acquire power to pay this remuneration to carry on its business more economically or efficiently. The alteration was allowed.

(b) 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 restricted 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.

(c) 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. The following case illustrates the point.

Egyptian Delta Land & Investment Co., Re (1907) W.N. 16. A company which was formed to acquire land in Egypt wanted to alter its Memorandum to take power to acquire land in Sudan. Held, the alteration could be made provided the company inserted the words 'and Sudan' after the word 'Delta' in its name.

(d) To carry on some business which may conveniently or advantageously be combined with the business of the company. 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 [Straw Products Ltd. v. Registrar of Companies, A.I.R. (1969) Ori. 91].

In the following cases alteration of the object clause was permitted :

Modi Spg. & Wvg. Mills Co. Ltd., Re (1963) 33 Comp. Cas. 901. The objects clause of the Memorandum of a company permitted it to manufacture yarn and cloth, but it was actually carrying on the manufacture of artificial silk cloth from yarn purchased in the market. The shareholders unanimously passed a special resolution for adding to the object clause the production of industrial and power alcohol with the object of producing acetate yarn itself for the manufacture of silk. The Registrar object of producing adoption of the new object by the company. The company was permitted to pursue the plan for production of acetate yarn itself for the manufacture of silk.

Mutual Property Insurance Co. Ltd. Petitioners, Re (1934) S.C. 61. A company which had the power to carry on any kind of insurance business except life insurance, wanted to add life insurance to its objects. Held, the company could do so provided it included the words 'and life' in its name.

(e) To restrict or abandon any of the objects specified in the Memorandum;

(f) To sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings, of the company; or

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

Procedure of alteration

(1) *Special resolution.* A special resolution shall be passed at a general meeting so as to alter the objects of the company.

(2) *Copy of special resolution to be filed.* The company shall file with the Central Government the special resolution within 1 month from the date of the resolution with a printed copy of the Memorandum as altered.

(3) *Certification of registration.* The Registrar shall register the special resolution and certify the registration under his hand within 1 month from the sate of the filing of the special resolution.

4. Change in liability clause

A company limited by shares or guarantee cannot change its Memorandum so as to impose any additional liability on the members or to compel them to buy additional shares of the company unless all the members agree in writing to such change either before or after the change (Sec. 38).

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5. Change in capital clause

For change in the capital clause which involves increase, reduction or reorganisation of capital, refer to Chapter on "share Capital".

2.9 DOCTRINE OF ULTRA VIRES

A company has the power to do all such things as are:

(1) essential to the attainment of its objects specified in the Memorandum;

(2) authorized to be done by the Companies Act, 1956;

(3) reasonably and fairly incidental to its object.

The term ultra vires a company means that the doing of the act is beyond the legal power and authority of the company. The purpose of these restrictions is to protect:

(1) creditors by ensuring that the company's funds are not wasted in unauthorised activities; and

(2) investors in the company so that they may know the object in which their money is to be employed.

Ultra vires the directors. If an act or transaction is ultra vires 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 the shareholders.

Ultra vires the Articles. If an act or transaction is ultra vires 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.

Effects of Ultra Vires Transactions

1. **Injunction.** Whenever a company does or proposes to do something beyond the scope of its activities or objects as laid down in the Memorandum, any of its members can get an injunction from the Court restraining the company from proceeding with the ultra vires act.
2. **Personal liability of directors.** Any member of a company can maintain an action against the directors of the company to compel them to restore to the company the funds of the company that have been employed by them in ultra vires transactions. This is because it is one of the duties of the directors of the company to ensure that the funds of the company are used for the achievement of the objects for which the company is incorporated. If any funds of the company are misapplied (*i.e.*, spent on

ultra vires transactions), the directors are personally liable to the company for breach of trust.

3. **Breach of warranty of authority.** When an agent exceeds his authority, he is personally liable for breach of warranty of authority in a suit by the third party. The directors of a company are its agents and as such they must act within the limits of the company's powers. If they induce, however innocently, an outsider to enter into a contract which is ultra vires the company, they will be personally liable to the third party for his loss for breach of warranty of authority.
4. **Ultra vires contracts.** A contract of a company which is ultra vires the company is void ab initio and of no legal effect. Neither the company nor the other contracting party can enforce the ultra vires contract. The company may, however, alter the objects clause for the future, but such alteration will not validate the past ultra vires acts done.
5. **Ultra vires acquired property.** Although ultra vires transactions are void, yet if a company has acquired some property under an ultra vires transaction it has the right to hold that property and protect it against damage by other persons. The property which is legally transferred to the company is in law duly vested in such company even though the company was not empowered to acquire such property.
6. **Ultra vires torts.** A company is not liable for torts (civil wrongs) committed by its agents or servants during the couse of ultra vires transactions. This may result in injustice to the third party who has been the victim of an ultra vires tort. A company is, however, liable for a tort if it can be shown that the activity in the course of which tort was committed falls within the scope of the Memorandum and the agent or servant committed the tort within the course of his employment.

2.10 ARTICLES OF ASSOCIATION

'Articles' mean "the Articles of Association of a company as originally framed or as altered from time to time in pursuance of this Act. They include the regulations contained in Table A in Schedule I to the Act, in so far as they apply to the company [Sec. 2 (2)].

Next in importance to Memorandum. The Articles are next in importance to the Memorandum of Association which contains the fundamental conditions upon which alone a company is allowed to be incorporated.

Must not violate the Memorandum and the Act. Articles of a company care must be taken to see that regulations framed do not go beyond the powers of the company itself as contemplated by the Memorandum of Association.

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CONTENTS OF ARTICLES

Articles usually contain provisions relating to the following matters :

(1) Share capital, rights of shareholders, variation of these rights, payment of commissions, share certificates.
(2) Lien on shares.
(3) Calls on shares.
(4) Transfer of shares.
(5) Transmission of shares.
(6) Forfeiture of shares.
(7) Conversion of shares into stock.
(8) Share warrants.
(9) Alteration of capital.
(10) General meetings and proceedings thereat.
(11) Voting rights of members, voting and poll, proxies.
(12) Directors, their appointment, remuneration, qualifications, powers and proceedings of Board of directors.
(13) Manager.
(14) Secretary.
(15) Dividends and reserves
(16) Accounts, audit and borrowing powers.
(17) Capitalisation of profits.
(18) Winding up.

MODEL FORM OF ARTICLES

Schedule I to the Act gives various model forms of Memorandum of Association and Articles of Association of various types of companies. The Schedule is divided into Table which serve as a model for various companies.

Table **A** deals with regulations for management of a company limited by shares.

Table **B** contains a model form of Memorandum of Association of a company limited by shares.

Table **C** gives model forms of Memorandum and Articles of Association of a company limited by guarantee and not having a share capital.

Table **D** gives model forms of Memorandum and Articles of Association of a company limited by guarantee and having a share capital. The Articles of such a company contain in addition to the information about the number of members with which the company proposes to be registered, all other provisions of Table **A**.

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Table E contains the model forms of Memorandum and Articles of Association of an unlimited company.

A public company may have its own Articles of Association. If it does not have its own Articles, it may adopt Table A given in Schedule I to the Act.

Regulations required in case of an unlimited company, a limited company by guarantee and a private company *(Sec. 27).*

1. Unlimited company. In the case of an unlimited company, the Articles shall state:

(a) the number of member with which the company is to be registered, and

(b) if it has a share capital, the amount of share capital with which the company is to be registered.

2. Company limited by guarantee. In the case of a company limited by guarantee, the Articles shall state the number of members with which the company is to be registered.

3. Private company. In the case of a private company having a share capital, the Articles shall contain provisions which:

(a) restrict the right to transfer shares,

(b) limit the number of its members to 50 (not including employee-members), and

(c) prohibit any invitation to the public to subscribe for any share in, or debentures of, the company.

In the case of any other private company, the Articles shall contain provisions relating to matters specified in Clauses *(b)* and *(c)* given above.

Adoption and application of Table A (Sec. 28)

There are 3 alternative forms in which a public company may adopt Articles:

1. It may adopt Table A in full.
2. It may wholly exclude Table A and set out its own Articles in full.
3. It may frame its own Articles and adopt part of Table A.

In other words, unless the Articles of a public company expressly exclude any or all provision of Table A, Table A shall automatically apply to it.

Form and signature of Articles (Sec, 30) The Articles shall be:

Printed, divided into paragraphs, and signed by each subscriber of the Memorandum (who shall add his address, description and occupation, if any) in the presence of at least 1 witness who will attest the signature and likewise ass his address, description and occupation, if any.

The Articles of Association printed on computer laser printer should be accepted by the Registrar for registration of a company.

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2.11 ALTERATION OF ARTICLES

The right to alter the Articles is so important that a company cannot in any manner, either by express provision in the Articles or by an independent contract, deprive itself of the power to alter its Articles. Any clause in the Articles that restricts or prohibits alteration of Articles is invalid.

Procedure of alteration (Sec. 31)

By passing a special resolution, a company may, alter its Articles any time Again any Articles may be adopted which could have been lawfully included originally. A copy of every special resolution altering the Articles shall be filed with the Registrar within 30 days of its passing and attached to every copy of the Articles issued thereafter. Any alteration so made in the Articles shall be as valid as if originally contained in the Articles.

Limitations to alteration

1. Must not be inconsistent with the Act.
2. Must not conflict with the Memorandum.
3. Must not sanction anything illegal.
4. Must be for the benefit of the company.
5. Must not increase liability of members (Sec. 38).
6. Alteration by special resolution only.
7. Approval of Central Government when a public company is converted into a private company.
8. Breach of contract.
9. Must not result in expulsion of a member.
10. No power of the Tribunal to amend Articles.
11. Alteration may be with retrospective effect.

2.12 ARTICLES AND MEMORANDUM – THEIR RELATION

1. The Articles are subordinate to Memorandum. The object of the Memorandum is to state the purpose for which the company has been established, while the Articles provide the manner in which the internal management of the company is to be carried. The Articles cannot give powers to a company which are not conferred by the Memorandum nor can they purport to create rights which are inconsistent with the Memorandum.

"The Memorandum is, as it were, the area beyond which the actions of the company cannot go : inside the area, the shareholders may make such regulations for their own governance as they think fit."

2. The Memorandum must be read in conjunction with Articles. This is the case when it is necessary:

(a) to explain any ambiguity in the terms of the Memorandum, or

(b) to supplement the Memorandum upon any matter about which it is silent except as regards matters which must by Statute be provided by the Memorandum.

3. The terms of the Memorandum cannot be modified or controlled by the Articles.

ARTICLES AND MEMORANDUM — DISTINCTION

Memorandum of Association	Articles of Association
1. It indicates the nature of its business, its nationality, and its capital. defines the company's relationship with outside world.	1. They are the regulation for the internal management of it also the company.
2. It defines the scope of the activities of the company, or the area beyond which the actions of the company cannot go.	2. They are the rules for carrying out the objects of the company as set out in the Memorandum.
3. Every company must have its own Memorandum.	3. A company limited by shares need not have Articles of its own. In such a case, Table A applies.
4. Any act of the company which is ultra vires the Memorandum is wholly void and cannot be ratified even by the whole body of shareholders.	4. Any act of the company which is ultra vires the Articles (but is intra vires the Memorandum) can be confirmed by the shareholders.
5. It, being the charter of the company, is the supreme document.	5. They are subordinate to the Memorandum. If there is a conflict between the Articles and the Memorandum, the latter prevails.

2.13 LEGAL EFFECT OF MEMORANDUM AND ARTICLES

When registered, the Memorandum and Articles, bind a company and the members thereof the same extent as if they – contained covenants by the company and each member to observe all the provision of the Memorandum and of the Articles and had been signed by the company and each member.

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The legal implications of these documents may be discussed as to how far these documents bind:

1. members to the company,
2. company to the members,
3. members *inter se*,
4. company to the outsiders.

1. Members to the company

The Memorandum and the Articles constitute a binding contract between the members and the company. The effect of this is that each member is bound to the company as if each member has actually signed the Memorandum and the Articles.

But an alteration of the Memorandum or the Articles which requires a member to take or subscribe for more shares or increases his liability to contribute to the share capital of the company shall not be binding on him unless he agrees in writing before or after the alteration (Sec. 38).

2. Company to the members

A company is bound to the individual members in terms of their ordinary rights as members, *e.g.*, the right to receive notice of general meetings, the right to receive dividend, etc. The company can exercise its rights, as against any member, only in accordance with the provisions in the Memorandum and the Articles. A member can obtain an injunction restraining the company from doing an ultra vires act.

3. Members *inter se*

The Memorandum and the Articles constitute a contract between the members and are also binding on each member as against the other or others. Such a contract can, however, be enforced through the medium of the company.

4. Company to the outsiders

The Articles do not constitute any binding contract as between a company and an outsider. An outsider cannot take advantage of the Articles to found a claim against the company. This is based on the general rule of law that a stranger to a contract cannot acquire any right under the contract. Thus, if a right is conferred by the Articles on a person in any capacity other than that of the member, it cannot enforced against the company.

It the Articles provide that the company on incorporation shall purchase certain property and appoint the vendor as one of the directors, the vendor, on becoming a shareholder, cannot sue the company for breach of the contract in not appointing him as a director on the basis of the Articles.

2.14 PROSPECTUS

After the certificate of incorporation has been obtained, the promoters and directors of a public company, if unable to raise the necessary capital for the company, invite the public to subscribe to its shares or debentures. This is done by issuing of a document called "Prospectus". The object of a prospectus is to arouse the interest of the potential investors in the company and induce them to invest in its shares or debentures.

Definition of Prospectus

Section 2(36) defines the temm 'prospectus' in these words : "a prospectous means any document described or issued as a prospectus and includes any notice, circular, advertisement, or other document inviting offers from the public for the subscription or purchase of any shares in, or debentures of a company." The term 'prospectus', therefore, includes any document, however informal, which invites deposits from the public or offers shares or debentures of a company for subscription to the public.

Issue of Prospectus

The legal requirements as to the issue of a prospectus are as follows :

(1) Consent of the Controller of Capital Issue must have been obtained for the proposed capital issue, if it exceeds rupees one crore during a year, unless the issue fulfils the conditions of exemption as laid down in the Capital issue (Exemption) Order, 1969, and a statement to that effect must be made in the prospectus.

(2) A copy of the prospectus, duly dated and signed by all the directors, must have been registered with the Registrar. The copy for registration must be accompanied with.

(a) the consent in writing of the expect if his report is to published in the prospectus. The expect should be unconnected with the formation or management of the company;

(b) a copy of every material contract and of every contract relating to appointment and remuneration of managerial personnel;

(c) a written statement relating to adjustment, if any, made by the auditors or accountants in their reports relating to profits and losses, assets and liabilities or the rates of dividends, etc.;

(d) the consent in writing of auditors, legal advisor, banker and broker, etc., of the company to act in that capacity. (Sec. 60).

(3) The prospectus must be issued within 90 days of the date on which a copy thereof is delivered for registration. If it is not issued within this period, it shall be deemed to be a prospectus, a copy of which has not

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been delivered to the Registrar. The reason for imposing the time limits is that if the issue of the prospectus is delayed too long, conditions may alter and what is stated in the prospectus may no longer be valid. The company and every person who is knowingly a party to the issue of the prospectus without registration shall be punishable with fine upto ₹. 5,000. (Sec. 60).

CONTENTS OF PROSPECTUS

Prospectus is the only window through which the potential investor can look into the soundness of the company's venture. Hence the Companies Act intends to secure the fullest disclosure of all material and essential particulars in a prospectus. The Act provides that every prospectus issued by or on behalf of a company must state the matters and set out the reports specified in "Schedule II" given at the end of the Companies Act, 1956.

Matters to be specified. Briefly stated, as per "Schedule II", a prospectus must contain at least the following particulars :

(1) Company's name and address of its registered office.

(2) The main objects of the company, with the names, addresses and occupations of the signatories to the memorandum and the number of shares subscribed for by them.

(3) The number and classes of shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

(4) The details about the redeemable preference shares intended to be issued, if any, *i.e.,* the date and mode of redemption, etc.

(5) Qualification shares of directors, if any

(6) Any provision in the articles as to the remuneration of the directors, managing directors or otherwise.

(7) The names, addresses, descriptions and occupations of the directors, managing director or manager, if any, or any of these proposed persons.

(8) Contents of the articles or of any contract relating to the appointment of the managing director or manager, the remuneration payable to him or them and the compensation, if any, payable to him or them for loss of office.

(9) The "minimum subscription", that is, the minimum amount which, in the opinion of directors or the signatories of the memorandum, must be raised by the issue of shares in order to provide the sums in respect of each of the following heads (distinguishing the amount required under each head) :

(i) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

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(ii) *(a)* any preliminary expenses payable by the company; and *(b)* any commission (underwriting or otherwise) payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(iii) the repayment of any money borrowed by the company in respect of any of the foregoing matters;

(iv) working capital; and

(v) any other expenditure, stating the nature and purpose thereof and the estimated amount in each case where any amount is to be provided otherwise than out of the proceeds of the issue, the sources out of which it is to be provided, must also be stated.

(10) The time of the opening and closing of the subscription list.

(11) The amount payable on application and allotment of each share.

(12) The particulars of contracts which give any option or preferential right to any person to subscribe for any shares or debentures of the company – all relevant facts relating to the grant of such right must be stated.

(13) The amount of premium, if any, on each share which is to be issued and, if some shares are to be issued at a premium and other shares of the same class at a lower premium or at par or at discount, the reasons for the differentiation and how any premiums so received are to be disposed of.

(14) Where any issue of debentures or shares is underwritten, the names and addresses of underwriters, underwritten amount, underwriting commission and opinion of directors regarding resources of underwriters, must be stated.

(15) Particulars of any property to be acquired by the company and the price whereof is to be paid out of the proceeds of the issue, together with the names, addresses, etc, of the vendors, the purchase price and the mode of payment.

(16) The amount of estimated amount of preliminary expenses and the expenses of the issue and the persons by whom any of those expenses have been paid or are payable.

(17) Names and addresses, etc., of company promoters and the amount of benefit intended to be paid or given to them.

(18) The particulars of every material contract in brief.

(19) The names and addresses of the auditors, if any, of the company.

(20) Detailed particulars of the nature and extent of the interest of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company.

(21) Rights, privileges and restrictions attached to several classes of shares.

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(22) Restrictions, if any, relating to membership rights, *i.e.*, right to vote, right to attend and speak at meetings of the company, right to transfer shares, etc.

(23) A reasonable time and place at which copies of all balance sheets and profit and loss accounts, if any, on which the report of the auditors is based, may be inspected.

(24) The name(s) of the stock exchange (or stock exchanges) to which application has been made for permission to deal in and for official quotation for the shares and debentures offered thereby (Sec. 73).

STATEMENT IN LIEU OF PROSPECTUS (SEC. 70)

A public company having a share capital may sometimes decide not to approach the public for securing the necessary capital because it may be confident of obtaining the required capital privately. In such a case it will have to file a 'statement in lieu of prospectus' with the Registrar instead of a prospectus. A 'statement in lieu of prospectus' must be drafted in accordance with the particulars set out in Schedule III of the Act. This document contains information very much similar to a prospectus. It must be duly signed by all the directors and a copy thereof must be filed with the Registrar at least three days before the allotment of the shares. Liability for misrepresentation of any material fact therein is the same as in the case of a prospectus.

Let us not forget that a private company is free from filing either a prospectus or a statement in lieu of prospectus with the Registrar.

2.15 SUMMARY

- With or without limited liability, any 7 or more persons (2 or more in case of a private company) associated for any lawful purpose may form an incorporated company.
- A promoter is a person who does the necessary preliminary work incidental to the formation of a company.
- 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.
- 'Articles' mean "the Articles of Association of a company as originally framed or as altered from time to time in pursuance of this Act. They include the regulations contained in Table A in Schedule I to the Act, in so far as they apply to the company [Sec. 2 (2)].

2.16 REVIEW QUESTIONS

1. How is a company formed under the Companies Act, 1956? Enumerate the various documents to be filed with the Registrar.

2. Briefly describe the documents to be filed with the Registrar of Companies prior to incorporation.
3. Who is a promoter? Discuss his legal position in relation to a company which he promotes.
4. What do you mean by 'Article of Association'?
5. Discuss the relation of Articles and Memorandum.

2.17 FURTHER READINGS

- Dr. Singh, Avtar, ***Introduction to Company Law***, 2006, Eastern Book Co. India.
- Gogna, P.P.S., ***A Textbook of Company Law***, 2004, S. Chand Publication, New Delhi.

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UNIT– III

MEETINGS

STRUCTURE

3.1 Learning Objectives
3.2 Introduction
3.3 Types of General Meetings
3.4 *Statutory Meeting*
3.5 Annual General Meeting
3.6 Extraordinary General Meeting
3.7 Summary
3.8 Review Questions
3.9 Further Readings

3.1 LEARNING OBJECTIVES

After going through this unit, students will be able to :

- state the fundamental concept of meeting;
- know the relevance and objects of statutory meeting;
- discuss the content and objects of annual general meeting and extraordinary general meetings.

3.2 INTRODUCTION

We are here concerned with general meetings of members/shareholders. The general meetings of members are of vital importance in the working of a company. It is fair to provide an opportunity to the shareholders to come together and review the working of the company. Hence, the Companies Act has provided for various types of meetings of the shareholders of a company.

3.3 TYPES OF GENERAL MEETINGS

There are three types of general meetings of shareholders:

(1) Statutory meeting.

(2) Annual general meetings.

(3) Extraordinary general meetings.

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3.4 STATUTORY MEETING

It is the first official general meeting of the shareholders. All public companies having a share capital except unlimited companies are required to hold a statutory meeting compulsorily.

It implies that private companies, unlimited companies and companies limited by guarantee but not having a share capital are not required to hold such a meeting. Statutory meeting must be held after one month but within six months of obtaining the certificate to commence business *[Sec. 165(1)]*. Unlike other types of general meetings, this meeting is held only once in the lifetime of a company.

The object of the statutory meeting is to provide an opportunity to the members, as early as possible, of acquainting themselves with the assets and properties acquired so far and to discuss the success of the flotation. The members are free to discuss any matter relating to the formation of the company or arising out of the statutory report. But they cannot pass any resolution without previous notice of at least 21 days *[Sec. 165(7)]*.

Statutory Report

The Board of directors shall, at least 21 days before the day on which the meeting is to be held, forward a report, called the 'statutory report', to every member of the company. If the report is forwarded later than 21 days before the day of the meeting, it shall be deemed to have been duly forwarded if it is so agreed to by all the members entitled to attend and vote at the meeting. The notice of the meeting shall mention that the meeting is a statutory meeting.

Contents of the statutory report : The statutory report of a company contains all the necessary information relating to the formational aspect of the company. It sets out the following information :

(a) *Total shares allotted* – the total number of shares allotted, distinguishing shares allotted as fully or partly paid-up otherwise than in cash and stating in the case of shares partly paid-up, the extent to which they are do paid-up, and in either case, the consideration for which they have been allotted.

(b) *Cash received* – the total amount of cash received by the company in respect of all shares allotted, distinguished as aforesaid.

(c) *Abstract of receipts and payments* – an abstract of the receipts and of the payments made up to a date within 7 days of the report.

The abstract shall exhibit under distinctive headings *(i)* the receipts of the company from shares and debentures and other sources, *(ii)* the payments made thereout, *(iii)* the balance of cash in hand, and *(iv)* an account or estimate of the preliminary expenses of the company, showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures.

(d) *Directors and auditors* – the names, addresses and occupations of the directors, auditors, and manager and secretary, and the changes which have occurred in such names, addresses and occupations since the date of the incorporation of the company.

(e) *Contracts* – the particulars of any contract which is to be submitted to the meeting for its approval or modification.

(f) *Underwriting contract* – the extent to which any underwriting contract has not been carried out and the reasons therefore.

(g) *Arrears of calls* – the arrears due on calls from every director and from the manager.

(h) *Commission and brokerage* – the particulars of any commission or brokerage in connection with the issue or sale of shares and debentures to any director or to the manager.

Certification of report : The statutory report shall be certified as correct by not less than 2 directors of the company. One of these directors shall be a managing director, if there is one. After the statutory report has been certified, the auditors of the company shall also certify it as correct as regards its first 3 contents.

A copy of the report to be sent to the Registrar : The Board shall deliver a copy of the certified statutory report to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company.

OBJECT OF THE MEETING AND REPORT

1. To put the members of the company in possession of all the important facts relating to the company, what shares have been taken up, what money received, what contracts entered into, and what sums spent on preliminary expense, etc.
2. To provide the members an opportunity of meeting and discussing the management, methods and prospects of the company.
3. To approve the modification of the terms of any contract named in the prospectus.

Ans-7

3.5 ANNUAL GENERAL MEETING

Every company must in each year hold in addition to any other meeting a general meeting as its annual general meeting *[Sec. 166(1)]*. It is the most important meeting of the members of a company. It is held each year with a view to reviewing and evaluating the overall progress of the company during a year. The annual general meeting is sometimes called ordinary general meeting as usually it deals with the so called 'ordinary business'.

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The Companies Act, imposes the following obligations on every company, public or private, as regards convening of annual general meetings :

(1) The first annual general meeting of a company must be held within 18 months from the date of its incorporation, and if such general meeting is held within that period, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year. It may be noted that there can be no extension of period beyond 18 months in case of this meeting even by the Registrar [Sec. 166(1)].

(2) Subsequent annual general meeting must be held each year within six months of the end of the company's financial year [Sec. 210(3)(b)], but the interval between any two annual general meetings must not be more than fifteen months. The Registrar may, however, for any special reason extend the above time by a period not exceeding three months [Sec. 166(1)].

(3) The annual general meeting must be held on a working day during business hours at the registered office of the company or at some other place within the city where the registered office of the company is situated [Sec. 166(2)].

(4) At least twenty-one days written notice to call an annual general meeting must be given to every shareholder, directors and auditors of the company, and to every such person on whom the shares of any deceased or insolvent member may have devolved (Secs. 171(1) and 172(2)]. The meeting may be held with a shorter notice, if it is so agreed unanimously by all members entitled to vote in such a meeting [Sec. 171(2)]. An independent private company may, however, by its articles make its own regulations as regards length of period of notice and to whom it should be given [Sec. 170(1)(ii)].

A copy of Directors' Report, audited Annual Accounts and Auditor's Report must be annexed to evey such notice [Sec. 219(1)].

The holding of annual general meeting is also governed by Section 171 to 186 which contain provisions relating to convening and conducting of all types of general meeting under the Act.

Consequences of failure to hold annual general meeting. If a company fails to hold an annual general meeting:

(1) any member can apply, under Sec. 167, to the Tribunal or Central Government for calling the meeting.

(2) the company and every officer who is in default shall be punishable with fine.

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IMPORTANCE OF ANNUAL GENERAL MEETING

It is only at the annual general meeting of a company that the shareholders can exercise any control over the affairs of the company. They can confront the directors, their elected representatives, at least once a year. They also get an opportunity to discuss the affairs and review the working of the company. They can also take the necessary steps for the protection of their interests. They may, for example, refuse to re-elect a director whose actions and policy they disapprove. They can also take up any other business relating to the affairs of the company for discussion. Appointment of auditors is also made at the annual general meeting. Annual accounts are presented for the consideration of shareholders and dividends are declared in the annual general meeting.

3.6 EXTRAORDINARY GENERAL MEETING

All general meetings other than the statutory and annual general meetings are called extraordinary general meetings. Regulation 47 of 'Table A' defines: "All general meetings other than annual general meetings shall be called extraordinary general meetings". These meetings may be convened by the company at any time. The business transacted at an extraordinary general meeting comprises anything which cannot be postponed till the next Annual General Meeting, *e.g.*, changes in memorandum and articles of association, reduction and reorganisation of share capital, issue of debentures, etc. All business transacted at this meeting is called 'special business' [Sec. 173(1)(b)].

WHO MAY CALL SUCH MEETINGS ?

Extraordinary general meetings may be called:

(1) **By the directors.** The directors, may, whenever they think fit, convene an extraordinary general meeting by passing a resolution to that effect in the Board's meeting.

(2) **By the directors on requisition** (Sec. 169). The directors must convene an extraordinary general meeting on the requisition (written demand) of members holding not less than 1/10th of the total voting right on the matter of requisition. The requisition must state the matters for the consideration of which the meeting is to be called. It must be signed by the requisitionists and deposited at the registered office of the company. The directors should, within 21 days from the date of the deposit of a valid requisition, move to call a meeting and should give 21 days notice to members for calling such a meeting and the meeting should actually be held within 45 days from the date of the requisition.

It may be noted that the requisitionists are not bound disclose reasons for the resolution they propose to move at the meeting (Life Insurance Corporation vs. Escorts Ltd.). Further, no business other than the business

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for which the meeting has been expressly convened can be transacted at the requisitioned meeting.

(3) **By the requisitionists themselves** (Sec. 169). If the directors fail to call the meeting within aforementioned time limits, the requisitionists, or such of the requisitionists as represent not less than 1/10th of the total voting rights of all the members, may themselves convene a meeting within three months of depositing the requisition. Such a meeting should be called in the same manner, as nearly as possible, as that in which meetings are called by the Board. Any reasonable expenses incurred by the requisitionists must be repaid to them by the company, and any sum so paid shall be retained by the company out of any sums due or likely to become due to the directors in default.

(4) **By the Company Law Board** (Sec. 186). If for any reason it is impracticable to call or conduct an extraordinary general meeting, the Company Law Board may, either of its own motion or on the application of any director or any member who would be entitled to vote, order a meeting to be called, held and conducted in such directions in such manner as the Company Law Board thinks fit and may give such directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

It may be noted that unlike an annual general meeting an extraordinary general meeting can be convened on a public holiday and at a place other than the registered office of the company or the city in which the registered office is situated.

3.7 SUMMARY

- Statutory meeting is the first official general meeting of the shareholders. All public companies having a share capital except unlimited companies are required to hold a statutory meeting compulsorily.
- Every company must in each year hold in addition to any other meeting a general meeting as its annual general meeting *[Sec. 166(1)]*. It is the most important meeting of the members of a company.
- All general meetings other than the statutory and annual general meetings are called extraordinary general meetings. Regulation 47 of 'Table A' defines: "All general meetings other than annual general meetings shall be called extraordinary general meetings".

3.8 REVIEW QUESTIONS

1. What are the contents of statutory report?
2. Define annual general meeting.

3. What are the statutory requirements of annual general meeting?
4. What are the important features of extraordinary general meeting?

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3.9 FURTHER READINGS

- Dr. Singh, Avtar, *Introduction to Company Law*, 2006, Eastern Book Co. India.
- Gogna, P.P.S., *A Textbook of Company Law*, 2004, S. Chand Publication, New Delhi.

UNIT– IV

LEGAL ISSUES

STRUCTURE

4.1 Learning Objectives
4.2 Introduction
4.3 Power of Company Law Board to Order Calling on Extraordinary General Meeting
4.4 *Requisites of* a Valid Meetings and Other Kinds of Meeting
4.5 Notice of General Meeting
4.6 Proxy
4.7 *Quorum*
4.8 Voting and Demand for Poll
4.9 Motion and Amendment
4.10 *Kinds of* Resolutions
4.11 Circulation of Member's Resolution
4.12 Registration of Resolutions and Agreements
4.13 *Adjournment* and Dissolution
4.14 Minutes of Proceedings of Meetings
4.15 Transfer of Shares
4.16 *Transmission*
4.17 Summary
4.18 Review Questions
4.19 *Further* Readings

4.1 LEARNING OBJECTIVES

After going through this unit, students will be able to :

- state the power of company law board to call meeting;
- know the requisition of valid meeting, voting, resolution etc.;
- discuss the method of transfer and transmission of shares.

4.2 INTRODUCTION

A company is an association of several persons. Decisions are made according to the view of the majority. Various matters have to be discussed and decided upon. These discussions take place at the various meetings which take place between members and between the directors. Needless to say, the importance

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of meetings cannot be under-emphasised in case of companies. The Companies Act, 1956 contains several provisions regarding meetings. These provisions have to be understood and followed.

For a meeting, there must be at least 2 persons attending the meeting. One member cannot constitute a company meeting even if he holds proxies for other members.

4.3 POWER OF COMPANY LAW BOARD TO ORDER CALLING OF EXTRAORDINARY GENERAL MEETING

If for any reason, it is impracticable to call a meeting of a company, other than an annual general meeting, or to hold or conduct the meeting of the company, the Company Law Board may, either *(i)* on its own motion, or *(ii)* on the application of any director of the company, or of any member of the company, who would be entitled to vote at the meeting, order a meeting to be called and conducted as the Company Law Board thinks fit, and may also give such other ancillary and consequential directions as it thinks fit expedient. A meeting so called and conducted shall be deemed to be a meeting of the company duly called and conducted.

Procedure for Application under Section 186

An application by a director or a member of a company for this purpose is required to be made to the Regional Bench of the Company Law Board before whom the petition is to be made in Form No 1 specified in Annexure II to the CLB Regulations with a fee of ₹. 200. The petition must be accompanied with the following documents :

(a) Evidence in proof of status of the applicant.

(b) Affidavit verifying the petition.

(c) Bank draft evidencing payment of application fee.

(d) Memorandum of appearance with copy of the Board's resolution or executed vakalat nama, as the case may be.

4.4 REQUISITES OF A VALID MEETINGS AND OTHER KINDS OF MEETING

The following conditions must be satisfied for a meeting to be called a valid meeting :

1. It must be properly convened. The persons calling the meeting must be authorised to do so.
2. Proper and adequate notice must have been given to all those entitled to attend.
3. The meeting must be legally constituted. There must be a chairperson.

The rules of quorum must be maintained and the provisions of the Companies Act, 1956 and the articles must be complied with.

4. The business at the meeting must be validly transacted. The meeting must be conducted in accordance with the regulations governing the meetings.

Meeting of Debenture Holders

A company issuing debentures may provide for the holding of meetings of the debentureholders. At such meetings, generally matters pertaining to the variation in terms of security or to alteration of their rights are discussed. All matters connected with the holding, conduct and proceedings of the meetings of the debentureholders are normally specified in the Debenture Trust Deed. The decisions at the meeting made by the prescribed majority are valid and lawful and binding upon the minority.

Meeting of Creditors

Sometimes, a company, either as a running concern or in the event of winding up, has to make certain arrangements with its creditors. Meetings of creditors may be called for this purpose. *Eg U/s 393*, a company may enter into arrangements with creditors with the sanction of the Court for reconstruction or any arrangement with its creditors. The court, on application, may order the holding of a creditor's meeting. If the scheme of arrangement is agreed to by majority in number of holding debts to value of the three-fourth of the total value of the debts, the court may sanction the scheme. A certified copy of the court's order is then filed with the Registrar and it is binding on all the creditors and the company only after it is filed with Registrar.

Similarly, in case of winding up of a company, a meeting of creditors and of contributories is held to ascertain the total amount due by the company and also to appoint a liquidator to wind up the affairs of the company.

4.5 NOTICE OF GENERAL MEETING

A meeting cannot be held unless a proper notice has been given to all persons entitled to attend the meeting at the proper time, containing the necessary information. A notice convening a general meeting must be given at least 21 clear days prior to the date of meeting. However, an annual general meeting may be called and held with a shorter notice, if it is consented to by all the members entitled to vote at the meeting. In respect of any other meeting, it may be called and held with a shorter notice, if at least members holding 95 per cent of the total voting power of the Company consent to a shorter notice.

Notice of every meeting of company must be sent to all members entitled to attend and vote at the meeting. Notice of the AGM must be given to the statutory auditor of the company.

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Accidental omission to give notice to, or the non-receipt of notice by, any member or any other person on whom it should be given will not invalidate the proceedings of the meeting. The notice may be given to any member either personally or by sending it by post to him at his registered address, or if there is none in India, to any address within India supplied by him for the purpose. Where notice is sent by post, service is effected by properly addressing, pre-paying and posting the notice. A notice may be given to joint holders by giving it to the jointholder first named in the register of members. A notice of meeting may also be given by advertising the same in a newspaper circulating in the neighbourhood of the registered office of the company and it shall be deemed to be served on every member who has to registered address in India for the giving of notices to him.

A notice calling a meeting must state the place, day and hour of the meeting and must contain the agenda of the meeting. If the meeting is a statutory or annual general meeting, notice must describe it as such. Where any items of special business are to be transacted at the meeting, an explanatory statement setting out all materials facts concerning each item of the special business including the concern or interest, if any, therein of every director and manager, is any, must be annexed to the notice. If it is intended to propose any resolution as a special resolution, such intention should be specified.

A notice convening an AGM must be accompanied by the annual accounts of the company, the director's report and the auditor's report. The copies of these documents could, however, be sent less than 21 days before of the date of the meeting if agreed to by all members entitled to vote at the meeting.

4.6 PROXY

In case of a company having a share capital and in the case of any other company, if the articles so authorise, any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of himself. Every notice calling a meeting of the company must contain a statement that a member entitled to attend and vote is entitled to appoint one proxy in the case of a private company and one or more proxies in the case of a public company and that the proxy need not be member of the company.

A member may appoint another person to attend and vote at a meeting on his behalf. Such other person is known as "Proxy". A member may appoint one or more proxies to vote in respect of the different shares held by him, or he may appoint one or more proxies in the alternative, so that if the first named proxy fails to vote, the second one may do so, and so on.

The member appointing a proxy must deposit with the company a proxy form at the time of the meeting or prior to it giving details of the proxy appointed.

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However, any provision in the articles which requires a period longer than forty eight hours before the meeting for depositing with the company any proxy form appointing a proxy, shall have the effect as if a period of 48 hours had been specified in such provision.

A company cannot issue an invitation at its expense asking any member to appoint a particular person as proxy. If the company does so, every officer in default shall be liable to fine up to ₹.1,000. But if a proxy form is sent at the request of a member, the officer shall not be liable. Every member entitled to vote at a meeting of the company, during the period beginning 24 hours before the date fixed for the meeting and ending with the conclusion of the meeting may inspect proxy forms at any time during business hours by giving 3 days notice to the company of his intention to do so.

The proxy form must be in writing and be signed by the member or his authorised attorney duly authorised in writing or if the appointer is a company, the proxy form must be under its seal or be signed by an officer or an attorney duly authorised by it.

The proxy can be revoked by the member at any time, and is automatically revoked by the death or insolvency of the member. The member may revoke the proxy by voting himself before the proxy has voted, but once the proxy has exercised the vote, the member cannot retract his vote. Where two proxy forms by the same shareholder are lodged in respect of the same votes, the last proxy form will be treated as the correct proxy form.

A proxy is not entitled to vote except on a poll. Therefore, a proxy cannot vote on show of hands.

4.7 QUORUM

Quorum refers to the minimum number of members who must be present at a meeting in order to constitute a valid meeting. A meeting without the minimum quorum is invalid and decisions taken at such a meeting are not binding. The articles of a company may provide for a quorum without which a meeting will be construed to be invalid. Unless the articles of a company provide for larger quorum, 5 members personally present (not by proxy) in the case of a public company and 2 members personally present (not by proxy) in the case of a private company shall be the quorum for a general meeting of a company.

It has been held by Courts that unless the articles otherwise provide, a quorum need to be present only when the meeting commenced, and it was immaterial that there was no quorum at the time when the vote was taken. Further, unless the articles otherwise provide, if within half an hour from the time appointed for holding a meeting of the company, a quorum is not present in the person, the meeting:

(a) if called upon the requisition of members, shall stand dissolved;

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(b) in any other case, it shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and time as the Board of Directors may determine.

If at the adjourned meeting also, the quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall a quorum.

In case the Company Law Board calls or directs the calling of a meeting of the company, when default is made in holding an annual general meeting, the government may give directions regarding the quorum including a direction that even one member of the company present in person, or by proxy shall be deemed to constitute a meeting. Similarly the Company Law Board may, direct a meeting of the company (other than an annual general meeting) to be called and held where for any reason it is impracticable to call a meeting and direct that even one member present in person or by proxy shall be deemed to constitute a meeting.

4.8 VOTING AND DEMAND FOR POLL

Generally, initially matters are decided at a general meeting by a show of hands. If the majority of the hands raise their hands in favour of a particular resolution, then unless a poll is demanded, it is taken as passed. Voting by a show of hands operates on the principle of "One Member-One Vote". However, since the fundamental voting principle in a company is "One Share-One Vote", if a poll is demanded, voting takes place by a poll. Before or on declaration of the result of the voting on any resolution on a show of hands, the chairman may order *suo motu* (of his own motion) that a poll be taken. However, when a demand for poll is made, he must order the poll be taken. The chairman may order a poll when a resolution proposed by the Board is lost on the show of hands or if he is of the opinion that the decision taken on the show of hands is likely to be reversed by poll. When a poll is taken, the decision arrived by poll is final and the decision on the show of hands has no effect.

A poll is allowed only if the prescribed number of members demand a poll. A poll must be ordered by the chairman if it is demanded :

(a) in the case of a public company having a share capital, by any member or members present in person or by proxy and holding shares in the company:

(i) which confer a power to vote on the resolution not being less than one-tenth of the total voting power in respect of the resolution, or

(ii) on which an aggregate sum of not less than fifty thousand rupees has been paid up.

(b) in the case of a private company having a share capital, by one member having the right to vote on the resolution and present in person or by

proxy if not more than seven such members are personally present, and by two such members present in person or by proxy, if more than seven such members are personally present.

(c) in the case of any other, by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution.

4.9 MOTION AND AMENDMENT

Motion means a proposal to be discussed at a meeting by the members. A resolution may be passed accepting the motion, with or without modifications or a motion may be entirely rejected. A motion, on being passed as a resolution becomes a decision. A motion must be in writing and signed by the mover and put to the vote of the meeting by the chairman. Only those motions which are mentioned in the agenda to the meeting can be discussed at the meeting. However, motions incidental or ancillary to the matter under discussion may be moved and passed. Generally, a motion is proposed by one member and seconded by another member.

Amendment means any modification to a motion before it is put to vote for adoption. Amendment may be proposed by any member who has not already spoken on the main motion or has not previously moved an amendment thereto. There can be an amendment to an amendment motion also. A motion must be in writing and signed by the mover and put to the vote of the meeting by the chairman. An amendment must not raise any question already decided upon at the same meeting and must be relevant to the main motion which it seeks to amend. The chairman has the discretion to accept or reject an amendment on various grounds such as inconsistency, redundancy, irrelevance, etc. If the amendment is adopted on a vote by the members, it is incorporated in the body of the main motion. The altered motion is then discussed and put to vote and if passed, becomes a resolution.

4.10 KINDS OF RESOLUTIONS

Resolutions mean decisions taken at a meeting. A motion, with or without amendments is put to vote at a meeting. Once the motion is passed, it becomes a resolution. A valid resolution can be passed at a properly convened meeting with the required quorum. There are broadly three types of resolutions :

Ordinary Resolution

An ordinary resolution is one which can be passed by a simple majority. *i.e.* if the votes (including the casting vote, if any, of the chairman), at a general meeting cast by members entitled to vote in its favour are more than votes cast against it. Voting may be by way of a show of hands or by a poll provided 21 days notice has been given for the meeting.

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Special Resolution

A special resolution is one in regard to which is passed by a 75% majority only *i.e.*, the number of votes cast in favour of the resolution is at least three times the number of votes cast against it, either by a show of hands or on a poll in person or by proxy. The intention to propose a resolution as a special resolution must be specifically mentioned in the notice of the general meeting. Special resolutions are needed to decide on important matters of the company. Examples where special resolutions are required are :

(a) To alter the domicile clause of the memorandum from one state to another or to alter the objects clause of the memorandum.

(b) To alter / change the name of the company with the approval of the central government.

(c) To alter the articles of association.

(d) To change the name of the company by omitting "Limited" or "Private Limited". The Central Government may allow a company with charitable objects to do so by special resolution under section 25 of the Companies Act, 1956.

Resolution Requiring Special Notice

There are certain matters specified in the Companies Act, 1956 which may be discussed at a general meeting only if a special notice is given regarding the proposal to discuss these matters at a meeting. A special notice enables the members to be prepared on the matter to be discussed and gives them time to indicate their views on the resolution. In case special notice of resolution is required by the Companies Act, 1956 or by the articles of a company, the intention to propose such a resolution must be notified to the company at least 14 days before the meeting. The company must within 7 days before the meeting give the notice of the proposed resolution to its members. Notice of the resolution is required to be given in the same way in which notice of a meeting is given, or if that is not practicable, the company may give notice by advertisement in a newspaper having an appropriate circulation or in any other manner allowed by the articles, not less 7 days before the meeting.

The following matters requiring Special Notice before they are discussed before the meeting :

(a) To appoint at an annual general meeting appointing an auditor a person other than a retiring auditor.

(b) To resolve at an annual general meeting that a retiring auditor shall not be reappointed.

(c) To remove a director before the expiry of his period of office.

(d) To appoint another director in place of removed director.

(e) Where the articles of a company provide for the giving of a special notice for a resolution, in respect of any specified matter or matters.

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Please note that a resolution requiring special notice may be passed either as an ordinary resolution (Simple majority) or as a special resolution (75% majority).

4.11 CIRCULATION OF MEMBER'S RESOLUTION

Generally, the Board of Directors prepare the agenda of the meeting to be sent to all members of the meeting. A member, by himself has very little say in deciding the agenda. However, there are provisions in the Companies Act which enable members to introduce motions at a meeting and give prior notice of their intention to do so to all other members of the company. If members having one twentieth of the total voting rights of all members having the right to vote on a resolution or if 100 members having the right to vote and holding paid-up capital of ₹.1,00,000 or more, require the company to do so, the company must :

1. Give to the members entitled to receive notice of the next annual general meeting, notice of any resolution which may be properly moved and is intended to be moved at that meeting; and
2. Circulate to members entitled to have notice of any general meeting sent to them, any statement of not more than 1,000 words with respect to the matter referred to in any proposed resolution, or any business to be dealt with at that meeting.

The expenses for this purpose must be borne by the requisitionists and must be tendered to the company. The requisition, signed by all the requisitionists, must be deposited at the registered office of the company at least 6 weeks before the meeting in the case of resolution and not less than 2 weeks before the meeting in case of any other requisition together with a reasonable sum to meet the expenses. However, where a copy of the requisition requiring notice of resolution has been deposited at the registered office of the company and an annual general meeting is called for a date six weeks or less after the requisition is deposited, the copy though not deposited within the prescribed time is deemed to have been properly deposited.

The company is required to serve the notice of resolution and/or the statement to the members as far as possible in the manner and so far as practicable at the same time as the notice of the meeting ; otherwise as soon as practicable thereafter.

However, a company need not circulate a statement if the Court, on the application either of the company or any other aggrieved person, is satisfied that the rights so conferred are being abused to secure needless publicity or for defamatory purposes. Secondly a banking company need not circulate such statement, if in the opinion of its Board of directors, the circulation will injure the interest of the company.

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4.12 REGISTRATION OF RESOLUTIONS AND AGREEMENTS

A copy of each of the following resolutions along with the explantory statement in case of a special business and agreements must, within 30 days after the passing or making thereof, be printed or typewritten and duly certified under the signature of an officer of the company and filed with the Registrar of Companies who shall record the same :

1. All special resolutions.
2. All resolutions which have been unanimously agreed to by all the members but which, if not so agreed, would not have been effective unless passed as special resolutions.
3. All resolutions 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.
4. All resolutions or agreements which have been agreed to by all members of any class of members but which, if not so agreed, would not have been effective unless passed by a particular majority or in a particular manner and all resolutions or agreements which effectively bind all members of any class of shareholders though not agreed to by all of those members.
5. All resolutions passed by a company conferring power upon its directors to sell or dispose of the whole or any part of the company's undertaking; or to borrow money beyond the limit of the paid-up share capital and free reserves of the company; or to contribute to charities beyond ₹. 50000 or 5 per cent of the average net profits.
6. All resolutions approving the appointment of sole selling agents of the company.
7. All copies of the terms and conditions of appointment of a sole selling agent or sole buying or purchasing agent.
8. Resolutions for voluntary winding up of a company.

4.13 ADJOURNMENT AND DISSOLUTION

Adjournment means suspending the proceedings of a meeting for the time being so that the meeting may be continued at a later date and time fixed in that meeting itself at the time of such adjournment or to decided later on. Only the business not finished at the original meeting can be transacted at the adjourned meeting.

The majority of members at a meeting may move an adjournment motion at a meeting. If the chairman adjourns the meeting, ignoring the views of the majority, the remaining members can continue the meeting. The chairman cannot

adjourn the meeting at his own discretion without there being a good cause for such an adjournment. Where the chairman, acting bona fide within his powers, adjourns the meeting as per the view of the majority, the minority members cannot to continue with such meeting and, if they do the proceedings there will be null and void.

An adjourned meeting is merely the continuation of the original meeting and therefore, a fresh notice is not necessary, if the time, date and place for holding the adjourned meeting are decided and declared at the time of adjourning it. If a meeting is adjourned without stipulation as to when it will be continued, fresh notice of the adjourned meeting must be given.

POSTPONEMENT

Postponement of a meeting means defering the holding of the meeting itself at a later date. Postponement is done by the Board of Directors or by the person convening the meeting. In case of adjournment, it is the decision of the majority of the members present at the meeting itself.

DISSOLUTION

Dissolution of a meeting means termination of a meeting. The meeting no longer exists once it has been dissolved. If within half an hour after the time appointed for holding a general meeting; the quorum is not present, the meeting shall stand dissolved if it was called on requisition by members.

4.14 MINUTES OF PROCEEDINGS OF MEETINGS

Every company must keep minutes of the proceedings of general meetings and of the meetings of board of directors and its committees. The minutes are a record of the discussions made at the meeting and the final decisions taken thereat.

Every company must keep minutes containing details of all proceedings at the meetings. The pages of the minute books must be consecutively numbered and the minutes must be recorded therein within 30 days of the meeting. They have to be written directly on the numbered pages. Pasting or attaching of papers is not allowed. Each page of every such minutes books must be initialed or signed and last page of the record of proceedings of each meeting in such books must be dated and signed by :

(a) in the case of the meeting of the Board of directors or committee thereof, by the chairman of that meeting or that of the succeeding meeting, and

(b) in the case of a general meeting, by the chairman of the same meeting within the aforesaid 30 days or in the event of the death or inability of that chairman within the period, by a director duly authorised by the Board of directors for the purpose.

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The Company Law Board, however, may not object if minutes are maintained in loose leaf form provided all other procedural requirements are complied with and all possible safeguards against manipulation or interpolation of the minutes are ensured. The loose leaves must be bound at reasonable intervals. Entering the minutes in a bound minute book by a chemical process, which does not amount to attachment to any book by pasting or otherwise is permissible provided on the mechanical impression of the minutes, the original signatures of the Chairman are given on each page. All appointments of officers made at any of the meetings must be included in the minutes of the meeting. In the case of a meeting of the Board of directors or its Committee, the minutes must also state the names of directors present at the meeting and the names of directors, if any, dissenting from, or not concurring with a resolution passed at the meeting.

The chairman may exclude from the minutes any matters which are defamatory, irrelevant or immaterial or which are detrimental to the interests of the company. The discretion of the Chairman with regard to the inclusion or exclusion of any matter is absolute and unfettered.

Where minutes of the proceedings of any meeting have been kept properly, they are, unless the contrary is proved, presumed to be correct, and are valid evidence that the meeting was duly called and held, and all proceedings thereat have actually taken place, and in particular, all appointments of directors or liquidators made at the meeting shall be deemed to be valid.

The minute books of the proceedings of general meetings must be kept the registered office of the company. Any member has a right to inspect, free of cost during business hours at the registered office of the company, the minutes books containing the proceedings of the general meetings of the company. Further, any member shall be entitled to be furnished, within 7 days after he has made a request to the company, with a copy of any minutes on payment of Rupee One for every hundred words or fraction thereof. If any inspection is refused or copy not furnished within the time specified, every officer in default shall be punishable with fine up to ₹. 500 for each offence. The Company Law Board may also by order compel an immediate inspection or furnishing of a copy forthwith. But the minutes books of the board meetings are not open for inspection of members.

4.15 TRANSFER OF SHARES

Transfer of shares is a voluntary act of members and it is the method of transferring the ownership rights of the shares from one person to another.

Free Transferability of Securities of Public Companies

With a view to ensuring the free transferability of the securities of all the public companies, the Depositories Act, 1996 inserted a new Section, namely,

Section 111A in the Companies Act. This Section, as amended by the Depositories Related Laws (Amendment) Act, 1997, provides as follows:

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1. The shares and debentures of a public company, whether listed or not, shall be freely transferable.
2. The Board of Directors of the company or the concerned 'depository' does not have discretion to refuse or withhold transfer of any security.
3. The transfer has to be effected by the company immediately as soon as it receives instrument of transfer, if the securities are outside the depository mode.
4. When securities are in the depository mode the transfer shall be effected by the depository automatically on the receipt of the intimation in appropriate form from the 'participants'.
5. Under both the cases, namely, non-depository mode or depository mode, the transferee shall be entitled to all the rights including voting rights associated with the security as soon as intimation about the transaction is received by the company or depository.

However, if it is felt that any transfer of securities is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992, or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985, or any other law for the time being in force, the company, 'depository', 'participant', investor, or SEBI can, within 2 months from the date of transfer in the depository or from the date on which the instrument of transfer or the intimidation of transmission was delivered to the company, move an application to the Company Law Board (CLB) to determine if the alleged contravention has taken place.

After enquiry if the CLB is satisfied of the contravention, it can direct the company/depository to make rectification in the ownership records.

Pending the completion of enquiry, the CLB can suspend the voting rights in respect of securities so transferred. However, the transferee in such cases will enjoy the economic rights attached to the security, as also the right to further transfer the security to another person.

Even if the transfer of securities is in contravention of any law, the transfer is the be effected subject to subsequent rectification by the direction of CLB.

Restrictions on Transfer

The right of transfer must necessarily be restricted by the Articles, the case of a private company or deemed public company because of the legal requirement to that effect. Any type of restrictions may be there in an effort to maintain personal contact among members. One of the common restrictions is the pre-emption clause which states that the intending transferor must first offer the shares to the

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existing members of the company, so long as the member can be found to purchase them at a fair price.

Absolute restriction on the right of transfer, contained in the Articles, shall be ultra-virus the Act. Usually the Articles empower the directors to reject transfer of shares on the following grounds:

(a) where partly paid up shares are to be transferred to a pauper or a minor;

(b) where the transferee is person of unsound mind;

(c) where a call is unpaid against the shares to be transferred;

(d) where the company has a lien on the shares because the transferor is indebted to it;

(e) where there is a personal animosity between the directors and the proposed transferee or the transferee would harass the management;

(f) where the instrument of transfer contains some apparent irregularity, *e.g.*, not signed or stamped properly.

The power to refuse registration of transfer is available only to a private company [New sub-section (14) inserted in Section 111 by the Depositories Act, 1996].

The directors are bound to state the grounds on which they refuse registration of transfer. Moreover, a formal active exercise of the power to refuse is required; mere failure, due to deadlock or something, to pass a resolution is not a formal active exercise of the right to decline, and therefore, the applicant will be entitled to be registered as a member of the company.

Notice of the refusal must state the reasons for such refusal and must be sent to both the transferor and the transferee within 2 months after the instrument of transfer was lodged with the company [Sec. 111 (2)]. So long as the directors act within the scope of the articles, their decision cannot be challenged except on the ground of bad faith.

Where it is proved that they have not exercised their power of refusal in good faith for the benefit of the company, the court may set aside the decision of the directors and order for the registration of the transferee's name as a member of the company. In addition, the transferee will also be entitled to damages which will be equal to the fall in the market price of shares between the date of refusal and the date of the court's decision.

Right of Appeal

As per Section 111, as amended by the Depositories Act, 1996, if a private company refuses, on any ground not stated in the restrictions contained in its Articles of Association, to register the transfer of any shares, the transferor or transferee may prefer an appeal to the CLB against the refusal.

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The appeal must be filed within 2 months of the receipt of the notice of such refusal or, where no notice has been sent by the company, within 4 months from the date on which the instrument of transfer was delivered to the company.

The appeal shall be made be a petition in writing and shall be accompanied by the prescribed fee.

After receiving the petition, the CLB shall issue notices to the company, the transferor and the transferee in order to provide them an opportunity to make their representations.

On the consideration of the whole case, if the refusal does not seem justified, the CLB will issue an order to the company to register the transfer, which must be given effect to, within 10 days of the receipt of the order.

The CLB may also make such consequential orders regarding payment of dividend or the allotment of bonus or right shares as it thinks fit and just.

If default is made in giving effect to the orders of the CLB, fines and penalties are to be imposed on the company and on every defaulting officer upto ₹. 10,000 with a further fine extending to ₹. 1,000 for every day during which the default continues.

The Right of Appeal is not available in the case of a private company.

The provisions of Section 111 apply to transfer of debentures as also to transmission of shares and debentures.

Position of Transferee, if His Appeal Fails

The ordinary result of a refusal to register a transfer of shares is that the transferor will be the trustee for the transferee, in respect of the rights relating to the shares or if the transferee so chooses he may sue the transferor for return of the consideration for the transfer under Section 65 of the Indian Contract Act.

Where a transfer of shares is refused the transferor continues to be the legal owner thereof so far as the company is concerned.

Restrictions upon Acquisition or Transfer of Shares in Certain Cases

Section 108A to 108I deal with restrictions on the acquisition or transfer of shares in certain cases with a view to preventing or regulating transfer of shares so as to ensure that by such transfer of shares, management does not pass into the hands of undesirable persons, thereby adversely affecting the interests of non-controlling shareholders and public financial institutions.

Applicability

It is applicable to the acquisition of transfer of shares by, or to, an individual, firm, group, constituent of group, body corporate or bodies corporate under the sane management who or which :

(a) is the owner in relation to a dominant undertaking, or

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(b) would be, as a result of such acquisition or transfer, the owner of a dominant undertaking.

Exemptions

The restrictions contained in Section 108A (except sub-section 2 thereof) shall not apply to the transfer of any shares to, and the restrictions contained in Sections 108B to 108D shall not apply to the transfer of any shares by :

(a) Any Government company;

(b) Any corporation established by or under any Central Act, and

(c) Any financial institution.

Restrictions

1. Restriction on the acquisition of shares.
2. Restrictions on transfer of shares.
3. Restriction on the transfer of shares of foreign companies.
4. Power of Central Government to direct companies not to give effect to the transfer.

Procedure for the Transfer of Shares

When a share warrant to bearer has been issued, no procedure for transfer of such shares is to be followed.

In the case of registered shares for which a share certificate has been issued, certain legal requirements have to be complied with,

Share can be transferred by a person, whose name appears in the Register of Members; but a legal representative of a deceased member, can also transfer shares.

Oral transfers are not recognised by the Act.

Transfers made during winding up are void unless sanctioned by the Liquidator (in case of voluntary winding up) or by the Court (in other types of winding up).

In addition to complying with the provisions of the Articles relating to transfer of shares the following procedure must be followed:

1. An instrument of transfer should be executed in the 'form' prescribed by the Government, and before it is signed by the transferor and before any entry is made in it, it should be presented to the prescribed authority, who will stamp the date of presentation thereon.
2. The instrument of transfer must be duly filled and signed by the transferor and the transferee. It must also be duly dated and stamped and the relative share certificate must be attached to it. If no such certificate has yet been issued, the letter of allotment must be attached to the transfer form.
3. The completed transfer form along with the registration fee, if any, should

be delivered at the company's head office, for registration, either by the transferor or the transferee,

(a) In case of quoted shares on the stock exchange, before the first closure of the register of members after the stamped date, or within 12 months from the date of such presentation, whichever is later;

(b) In the case of unlisted shares, within 2 months from the date of presentation to the prescribed authority.

The Central Government may extend these time periods on application to avoid hardship. The application should be made to the Regional Director of the CLB by the purchaser or his broker. These time limits have been prescribed to do away with the evil of Blank Transfers.

4. Next, in case the application is made by the transferor and relates to partly paid-up shares, the company must give notice of the application to the transferee and register the transfer only if the transferee makes no objection to transfer within 2 weeks from the receipt of the notice.

   No response from transferee shall be presumed his consent for registration. No such consent need be given where the application for registration of transfer is made by the transferee himself, but in order to be sure that the instrument of transfer is genuine, a notice should be sent to the transferor, informing him about the lodgement of the instrument of transfer and stating that if no objection is raised within the specified time, the company will proceed to register the transfer.

5. If no objection is received either from the transferor or transferee within the specified time, then the work of registration of transfer is taken up. Now the secretary enters the details of the transfer in the Register of Transfers.

6. The secretary then convenes a meeting of the Board of Directors and places before it the Instruments of Transfer along with the share certificates and the Register of Transfers for their approval. If satisfied, the Board passes a resolution approving the transfer(s).

7. After all the steps have been duly complied with, the company registers the transfer by striking off the transferor's name from the Register of Members and entering the name of the transferee in its place. An endorsement is made on the back of the share certificate, recognising the transferee as the new holder for it and the same is issued to the transferee within 2 months of the date of lodgement of the transfer. A listed company is, required to issue Certificates within 1 month.

The procedural requirements associated with transfer, shall not apply to the transfer effected by the transferor and transferee who have availed the services of 'depository' since there is no need of executing a transfer deed.

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SECRETARIAL DUTIES FOR TRANSFER OF SHARES

1. The secretary has to ascertain that there is adequate provision regarding transfer of shares in the Articles of Association of the company.
2. On receipt of proper instrument of transfer, called the 'Transfer Deed' duly stamped and executed by the transferor and the transferee together with the transfer fee, if payable, he has to see that it is accompanied by a share certificate in the name of the transferor or the transfer should be a 'certified' one and that it is submitted within the prescribed limit as required under Section 108.
3. It is the responsibility thereafter to scrutinise the instrument of transfer and the relevant share certificate, giving particular attention to the following points:

(a) The signature of the transferor must tally with the specimen signature as recorded with the company, if the transferor is the registered holder of the shares; otherwise the signature should be verified from the previous Transfer Deed where the present transferor is the owner of shares earlier transferred to him by the registered shareholder. If the transfer has been executed by an attorney, the registration of the power of attorney should be verified. If transferor is a company, the transfer should be executed under the common seal.

(b) The details of the transferee have been correctly completed.

(c) The signature and address of the witness are in order.

(d) The stamp of the delivering broker and the lodging agent (if this is not the same as the delivering broker).

(e) Any alteration in the 'Transfer Deed' is properly initialled by both the transferor and transferee.

(f) The distinctive numbers of shares both in the Instrument of Transfer and the Share Certificate agree.

(g) The consideration for the transfer as shown in the 'Transfer Deed' is reasonable.

(h) Share transfer stamps have been affixed on the Transfer Deed at the rate 50 paise for every ₹. 100 or part thereof calculated on the amount of consideration.

(i) The fact that there is no restraint on transfer or that no duplicate share certificate has been issued must be checked from the Register of Members.

4. If the transferee is a company incorporated under the Companies Act, the secretary must confirm that the company is authorised to acquire shares by its Memorandum and Articles of Association.
5. In the case of transfer of shares of Indian companies by persons resident outside India, or by foreign nationals, to other persons whether resident

in India or outside India, and in the case of transfer of shares to any person, whether Indian or foreigner, whether resident or non-resident, the secretary should also see that the necessary approval of the Exchange Control Department, Reserve Bank of India, under the Foreign Exchange Management Act, 1999, has already been obtained by the transferor or transferee before effecting any transfer or sale of shares.

6. If everything is well after the scrutiny of 'Transfer Deed' etc., the secretary should issue 'Notices of Lodgement of Transfer' to the transferee and transferor and wait for at least a fortnight to see whether any objections are received from them.
7. If no objection is received, all transfers must then be recorded in the Transfer Register.
8. The secretary should convene a Board meeting to pass the necessary resolution for the registration of transfers.
9. After the resolution is passed, the secretary must see that the name of the transferee is recorded in the Register of Members and the name of the transferor is removed therefrom. Necessary endorsement is made on the back of the share certificate(s) and the same is issued to the transferee.

Certification of Transfer

When a company certifies on the instrument of transfer that the relative share certificate of the shares proposed to be transferred, has been lodged with it, it is called 'certificate of transfer.' Certification of transfer is necessary when there is a part disposal of shares or there are multiple purchasers.

The company issues only 1 share certificate for the whole lot of shares standing in the name of 1 person.

For a valid transfer, relevant share certificate must be attached to the instrument of transfer.

In view of these facts, there a arises a problem in case the shareholder wants to sell only a part of his shareholding or there are 2 more buyers.

There are 2 alternatives open to such a transferor to solve this problem:

(a) He may request the company to cancel the original certificate and in exchange to issue the new split certificates of desired denomination.

(b) He may send his share certificate, together with the instruments of transfer, to the company for certification purposes.

The company usually takes time in issuing 'split certificates' which causes inconvenience to both the transferor and transferee and therefore, in practice, generally, 'certification of transfer' is considered desirable.

On all stock exchanges, 'certified transfer' is recognised as equivalent to a 'transfer form' plus the relative share certificate.

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Such certification would not in any way guarantee the title of the transferor, but the company shall be responsible to the third party, acting bona fide on the certification of transfer, for damages, if it was issued by the company negligently or fraudulently.

Under Section 112(3)

(a) An instrument of transfer shall be deemed to be certified if it bears the words 'Certificate Lodged' or words to that effect.

(b) The certification of an instrument of transfer shall be deemed to be made by a company, if:

(i) the person issuing the certificated instrument is a person authorised to issue such instruments of transfer on the company's behalf; and

(ii) the certification is signed by any officer or servant of the company or any other person authorised to certificate transfers on the company's behalf, or if a body corporate has been authorised, by any officer or servant of that body corporate.

(c) A certification shall be deemed to be signed by the person whose signature appears on the instrument unless it is shown that the signature was placed there neither by himself nor by any other person authorised to use the signature for the purpose of certificating transfers on behalf of the company.

Procedure

1. For certification of transfer, the transferor executes the instrument of transfer and presents it along with the relevant share certificate to the company.
2. After a preliminary scrutiny, the secretary stamps the instrument of transfer with a rubber Certification Stamp in the left hand corner, and puts his signature.
3. At the same time he cancels the original share certificate by affixing a rubber stamp bearing the word, 'Cancelled' on the face of it and makes a note of the relevant facts, namely, date of certification, name of transferee, number of shares transferred, etc., on the back of the cancelled share certificate.
4. These particulars of the certified transfer are also entered in a 'Register of Certified Transfers'.
5. After certification of transfer, the secretary sends the Certified Transfer Form(s) and a Balance Ticket (for the balance of shares not to be transferred) to the transferor.
6. In case the shareholder disposes of the whole of his holdings to two or more transferees, no 'Balance Ticket' is issued.

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7. The transferor retains the 'Balance Ticket' and forwards the 'Certified Transfer Form' to the transferee, who then signs it and delivers the same to the company's registered office for registration.
8. In the due course, after observing the necessary formalities as mentioned earlier, the secretary's office will prepare 2 share certificates which will be issued to the transferor and the transferee.

Splitting of Joint Holdings of Shares

If the joint shareholders want splitting of their joint holding of shares and registering them in their individual names, they have to follow the procedure prescribed for transfer of shares.

An instrument of transfer properly stamped and completed is necessary for registering the transfer in each case, as converting a joint holding into a separate holding is essentially a transfer from joint ownership into individual ownership.

The instrument of transfer will have to be executed by all the joint holders as transferors and by the individual in whose name the shares are to be registered as the transferee.

Effect of Transfer Before its Registration

As regards the rights and the liabilities of the transferor of shares, Lindley, L.J., observed "when a member transfers his shares, he transfers all his rights and obligations as a shareholder as from date of the transfer. He does not transfer the dividends already announced nor does he transfer his liability in respect to the calls already made; but he transfers his rights to future payments and in respect of future calls."

But with concern to the company, transfer does not take effect unless it is registered during the period when transfer exists and if registration is not done, the transferee is liable to indemnify the transferor against future calls paid by him in respect to the shares and the transferor must pay any dividend to the transferee he may have received.

The party can modify this by agreeing to transfer the shares "cum" (with) dividend or "ex" (without) dividend.

The provisions of Section 27 of the Securities Contracts (Regulation) Act, 1956 states that it shall be lawful for the person whose name appears in the books of the company as the holder of the securities to receive any dividend declared by the company in respect thereof for any year, even if the transfer of shares has already taken place, unless the transferee who claims the dividend from the transferor, has lodged the security and all other documents relating to the transfer with the company for registered within 15 days of the due date of the dividend.

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Right to Dividend to be held in abeyance pending Registration of Transfer of Shares

With a view to protect the investors a new Section 206A has been inserted in the Companies (Amendment) Act, 1988. This new Section provides that in case of share transfers pending registration, the dividend accruing on such shares shall be transferred to the "Unpaid Dividend Account" (referred in Section 205A) unless the transferor authorises the company in writing to pay the same to the transferee specified in such instrument of transfer. The company shall also keep in abeyance in relation to such shares the offer of "right shares" and issue of fully paid bonus shares until the transfer is registered.

BLANK TRANSFER

When the instrument of transfer duly signed and completed by the transferor, but leaving the name and signature of the transferee blank, is delivered to the transferee along with the relevant share certificate, it is called a "blank transfer."

In order to curb the abuse inherent in the system of blank transfers, Section 108 (1-A) of the Amending Act, 1965, has the following procedure for transfer of shares with respect to restrict the period of currency of blank transfers:

1. Every instrument should be in the prescribed form and is to be presented to the Registrar of Companies before it is signed by the transferor or any entry is made therein, who will stamp thereon the date of presentation.
2. The instrument so stamped, after it is completed in all other respects by the transferor and transferee, be delivered to the company for registration within the period stated below:

(a) In the case of shares dealt in or quoted on a recognised stock exchange, at any time before the first closure of the Register of Members after the stamped date, or within 12 months from the date of such presentation, whichever is later; and

(b) In the case of unlisted shares, within 2 months from the date of presentation to the prescribed authority.

Exceptions

The restriction of the time limits given in the previous slide does not apply to the transfer of following shares [Sec. 108(1-C) & (1-D)]:

1. Any shares: (i) which are held by a company in the name of a director or nominee in pursuance of Section 49(2) & (3), or (ii) which are held by a corporation, owned and controlled by the Government, in the name of a director or nominee, if the following conditions are fulfilled:

(a) The company or corporation, as the case may be, stamps on the form of

transfer in respect of such shares, the date on which it decides that such shares shall not be held in the name of the director or nominee; and

(b) The instrument of transfer, duly completed in all respects, is delivered to the company concerned for registration within 2 months of the date so stamped.

2. Any shares deposited by any person with (i) State Bank of India, or (ii) any scheduled bank, or (iii) any other banking company or financial institution, or (iv) the Government or a corporation owned and controlled by the Government, by way of security for the repayment of any loan or advance to, or for the performance of any obligation undertaken by, such person, if the following conditions are fulfilled:

(a) The depositee stamps on the form of transfer of such shares (i) the date on which such shares are returned by it to the depositor, or (ii) in the case of default on the part of the depositor, the date on which such shares are released for sale, or (iii) where the depositee intends to get such shares registered in its own name, the date on which the instrument of transfer relating to such shares is executed by it; and

(b) The instrument in such form, duly completed in all respects, is delivered to the company for registration within 2 months of the date so stamped.

3. Any shares which are held by the Central or State Government in the name of its nominee, except that every instrument of transfer in respect of any such shares shall be in the prescribed form.

The Central government may on application extend the periods mentioned above by such further time as it may deem fit.

It must be noted that the blank transfers are not negotiable instrument, and therefore, a bona fide purchaser of shares from a person who is in possession of them by fraud, does not acquire a good title to them.

Forged Transfer

When a instrument of transfer bears a forged signature of the rightful owner, it is called a *'forged transfer'. It is null and void even if it is registered by the* company. But if in the meantime, that share certificate is transferred subsequently to another person, who acquires the shares in good faith, for value and under a genuine transfer, by the first transferee, and the company registers this and issues a new certificate to him, the company is stopped from denying the title, since the share certificate is prima facie evidence of the title.

Company's Action on the Fraud

The company is in two minds now since on one hand the company on discovery of the fraud has to restore the name of the true owner and on the other it has to compensate the subsequent transferee, who was acting on genuine

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transfer. The damages will be the market value of that shares at that time. The company can claim the indemnity from the defrauded transferee. Any person claiming damages must prove that he sustained losses by acting on faith of a share certificate issued by the company.

Depository System

In order to do away with theft, mismatch of signature, huge paperwork and other irregularities, the Government of India enacted the Depositories Act, 1996 to provide for legal framework to set up depositories to record the ownership details of securities and effecting the transfer of securities through book entry only. In this system transfer does not take place physically but by mere book entry in the ledgers of the Depository.

This Act states that the agents of each depository will be called as 'participants' who will be a link between the investors and the depository. An investor will have to enter into an agreement with the depository through a participant and surrender his shares to the company concerned.

The company cancels the name of the investor and enters the name of the depository and informs the depository and on receiving this information the depository enters the name of investor as beneficial owner and so the investor enjoys all the rights and is subject to all the liability. For transfer the investor will intimate the participant who in turn informs the depository. The depository thus deletes the name of the investor and records the name of transferee. With regard to the transfer under depository system Section 108 of the Companies Act are dispensed with.

Features

1. Partial dematerialization of securities. The investor can go in for complete or partial dematerialization *i.e.* he can have a part of his securities under the depository system and the remaining part will be in the physical form.
2. Securities will be fungible. Sections 83 ,150 and 152 of the Companies Act have been amended to make the securities fungible. Now the securities held with a depository will have no distinctive identifiable numbers and all the certificates of the same security will become interchangeable.
3. It would become freely transferable. The securities issued by a public company(other than a deemed public company) have been made freely transferable under the Depositories Act. This Act has deleted Section 22A of the Securities Contracts (Regulation) Act, 1956 and by inserting Section 111A in the Companies Act.
4. No stamp duty. Within the depository system there is no stamp duty on transfer of shares but outside the depository there is.

It is claimed that this system will enhance the efficiency and also provide huge benefits to the investors as well.

4.16 TRANSMISSION

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Transmission of shares is the result of operation of Law and it takes place only on the death, insolvency or lunacy of the share holder.

Transfer Vs Transmission

Transfer	Transmission
1. By a deliberate act.	1. By the operation of law.
2. Requires the execution of formal instrument of transfer.	2. Requires an evidence showing the legal entitlement.
3. There must be adequate consideration.	3. There is no question of consideration.
4. Stamp duty is payable.	4. Stamp duty is not payable.

Procedure for Transmission

There are two alternatives open to the legal representative. Either he may get himself registered as the member or he may transfer the shares to some other person.

If he chooses the first option then the company will check the genuineness of the share certificates and the succession certificate and if satisfied the company will delete the name of the deceased member and include the name of the legal representative and issue fresh certificates to him.

If he chooses option two, he can follow the usual process for transfer of shares but he has to attach one more document with it *i.e.*, the succession certificate. If the company refuses to register the transmission then the 'Right of Appeal' to the Company Law Board is available to the legal representative.

Secretarial Duties in Connection with the Transmission of Shares

The secretarial duties in connection with transmission are :

1. The secretary has to check up that the 'Letter of Request' is a proper one. Letter of Request is the request of legal representative to register his name in place of the deceased subject to the conditions on which the deceased held the shares.
2. He has to ensure that satisfactory proof of title has been attached to the Letter of Request. He should also see the 'Letter of Probate' if the member had died testate, *i.e.*, leaving a 'will,' or the 'Letter of Administration' if the member has died intestate. In case of bankruptcy, his estate is vested to the Assignee appointed by the Court and in case of lunacy, his estate is vested to the Administrator appointed by the Court. The secretary must check that the Administrator has produced the documentary proof of their appointment from a competent Court.

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3. If the legal representative has to transfer the shares, he must attach any 'Probate', 'Succession Certificate' or 'Letter of Administration' with the 'instrument of transfer.' On receipt of proper 'instrument of transfer' the duties of a secretary are as same as while in transfer of shares.
4. Finally, the secretary should convene a Board meeting to pass the resolution and thereafter he should introduce necessary alteration in share certificates and Register of Members. He should enter the details of the Probate, Letters of Administration, Succession Certificates in the Register of Probates.

Transfer and Transmission of Debentures

All the provision of transfer and transmission of shares are same to debentures. But the difference are:

1. The transfer deed is not required to be presented to the prescribed authority for stamping and even if it is presented, it does not become out of date as in case of shares.
2. The stamp duty is calculated on the face value of the debentures and not on the amount of consideration.

Nomination of Shares and Debentures

The Companies (Amendment) Act, 1999 introduced nomination facility by inserting a new sub section (11) in Section 58A and two new Sections 109A and 109B which provides:

1. The member nominates a person to whom his shares and debentures are given in the event of the death of the member.
2. The joint holders of the shares nominates a person to whom their shares and debentures are given in the event of the death of all the members.
3. Such nomination will supersede any 'will' or disposition, whether testamentary or otherwise.
4. It can be cancelled or varied by the security holder at any time.
5. Where the nominee is a minor, the security holder nominates another person who takes care of the shares till the nominee attains majority in the event of the death of security holder during the minority of the nominee.

Procedure for Nomination

The security holder has to make nomination in Form 2B prescribed by Rule 5D of the Companies (Central Government's) General Rules And Forms, (Fourth Amendment) Rules, 2000 which states:

1. Nomination can be done only by single holder or joint holder and not by any corporate body.
2. If held jointly, all the joint holders have to sign the nomination form.

3. Nomination should be made in favour of individuals only.
4. Minor can be nominated, but during minority of the nominee, all the rights are exercised by the guardian.
5. Nomination stands rescinded upon transfer of shares or debentures.
6. The Nomination Form is filled in duplicate with the Company or Registrar and Share Transfer Agents of the Company who will return one copy to the shareholder.
7. No fee is payable to the company.

The rights of nominee after transmission are similar to the rights of legal representative after transmission.

Right of Nominee after Transmission of Shares and Debentures

On the death of the security holder, who has availed the facility of nomination, the transmission of shares and debentures to the nominee takes place. The rights of the nominee after transmission are governed by the provisions of Section 109B which are as follows:

1. The nominee may either get himself registered as the security holder or may transfer the securities to some other person. If he does not opt for any of these options the Board of Directors send a notice asking for a decision. If he does not comply within 90 days of the notice, the company may withhold the payment of dividend, bonus or any other moneys payable, until the requirements have been complied with.
2. In case the nominee elects to be registered as the security holder himself, he will send a notice in writing for the same to the company along with the relevant share/debenture and the death certificate.
3. In case the nominee opts to transfer the shares/debentures, he will have to follow the usual procedure of transfer of shares/debentures, but along with the death certificate.

4.17 SUMMARY

- If for any reason, it is impracticable to call a meeting of a company, other than an annual general meeting, or to hold or conduct the meeting of the company, the Company Law Board may, either *(i)* on its own motion, or *(ii)* on the application of any director of the company, or of any member of the company, who would be entitled to vote at the meeting, order a meeting to be called and conducted as the Company Law Board thinks fit, and may also give such other ancillary and consequential directions as it thinks fit expedient.
- Quorum refers to the minimum number of members who must be present at a meeting in order to constitute a valid meeting.

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- Adjournment means suspending the proceedings of a meeting for the time being so that the meeting may be continued at a later date and time fixed in that meeting itself at the time of such adjournment or to decided later on.
- Transfer of shares is a voluntary act of members and it is the method of transferring the ownership rights of the shares from one person to another.

4.18 REVIEW QUESTIONS

1. What are the primary requisites of a valid meeting?
2. What do you mean by quorum?
3. Discuss the mitunes of the proceeding of a meeting.
4. State the procedure of the transfer of shares.
5. Distinguish between transfer and trañsmission of shares.

4.19 FURTHER READINGS

- Dr. Singh, Avtar, ***Introduction to Company Law***, 2006, Eastern Book Co. India.
- Gogna, P.P.S., *A Textbook of Company Law*, 2004, S. Chand Publication, New Delhi.
- M. C. Kuchhal, *Secretarial Practice* (16th Revised Edition), Vikas Publishing House Pvt. Ltd., New Delhi.

UNIT– V

DIRECTORS

STRUCTURE

5.1 Learning Objectives
5.2 Introduction
5.3 Director
5.4 Position of Directors
5.5 Qualifications and Disqualifications of Directors
5.6 Duties of Directors
5.7 Liability of Directors
5.8 Summary
5.9 Review Questions
5.10 Further Readings

5.1 LEARNING OBJECTIVES

After going through this unit, students will be able to :

- state the rights and duties of directors;
- know the qualification and disqualification of directors;
- discuss the liabilities of directors.

5.2 INTRODUCTION

"The company itself cannot act in its own person, for it has no person; it can only act through directors.

The persons who are incharge of the management of the affairs of a company are termed as directors. They are collectively known as Board of directors or the Board.

They occupy a pivotal position in the structure of the company. They are in fact the mainspring of the company.

5.3 DIRECTOR

'Director' includes any person occupying the position of director, by whatever name called. If he performs the functions of a director, he would be termed a director in the eyes of the law even though he may be named differently. A director may, therefore, be defined as a person

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having control over the direction, conduct, management or superintendence of the affairs of a company. — **Definition** [Sec. 2(13)].

Number of Directors

Minimum number (Sec. 252). Every public company shall have at least 3 directors and every other company (*e.g.*, a private company, a deemed public company) at least 2 directors.

A public company having :

(a) a paid-up capital of ₹. 5 crore or more ;

(b) one thousand or more small shareholders,

may have a director elected by such small shareholders in the manner as may be prescribed.

5.4 POSITION OF DIRECTORS

Directors as Agents

A company, as an artificial person, acts through directors who are elected representatives of the shareholders.

> "A director is in the position of an agent of the company ; charged with the obligation of carrying on its business. The nature of his duties is determined partly by statute and partly by the law of the agency".

The directors are, however, personally liable where :

(1) the contract is in their own names.

(2) they use the company's name incorrectly, *e.g.*, by omitting the word or the words 'Limited' or 'Private Limited'.

(3) the contract is signed in such a way that it is not clear whether it is the principal (the company) or the agent who signed.

(4) they exceed the powers given to them by the Memorandum or the Articles.

Directors as Trustees

(1) Directors are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control. They have also to refund to the company any of its money or property which they have improperly paid away or transferred.

In the real sense directors are, however, not trustees because they are not vested with the ownership of the company's property. It is only as regards some of their obligations to the company and certain powers that they are regarded as trustees of the company.

(2) Also they must exercise their powers honestly and in the interest of the company and the shareholders and not in their own interest. They are, for example, trustees of the power of approving transfers of shares; of the power of allotment of shares; of the power of employing the funds of the company; of the power of making calls; of the power of forfeiting shares; and as trustees they may be rendered liable for their misuse.

5.5 QUALIFICATIONS AND DISQUALIFICATIONS OF DIRECTORS

A directors must :

(a) be an individual;

(b) be competent to contract, and

(c) hold a share qualification, if so required by the Articles.

Share Qualification of Directors (Sec. 270)

Article 66 of Table A specifically lays down that "the qualification of a directors shall be the holding of at least one share in the company." The object of provisions relating to share qualification of persons to act as directors is to ensure that they have a personal interest in the company. But the fact is that qualification holding is so small as to make little difference to the acts of a director.

When a person accepts an appointment as director of a company, he is deemed to have contracted with the company that he will within 2 months of his appointment obtain the qualification shares. This he may do either by transfer of share from the existing shareholders or by purchase from the company itself directly. But he should not obtain shares by way of gift from a promoter as this would amount to breach of trust.

Any provision in the Articles of a company requiring a person to hold the qualification shares before his appointment as a director or to obtain them within a period shorter than 2 months shall be void. The nominal value of the qualification shares shall not exceed ₹. 5,000, or the nominal value of one share where it exceeds ₹. 5,000.

If a director fails to acquire his qualification shares within 2 months of his appointment, he shall be punishable with fine which may extend to ₹. 500 for every day between such expiry and the last day on which he acted as a director.

Disqualifications of Directors (Sec. 274)

The following persons are disqualified for appointment as directors of a company :

(a) A person of unsound mind.

(b) An undischarged insolvent.

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(c) A person who has applied to be adjudicated as an insolvent and his application is pending.

(d) A person who has been convicted by a Court of any offence involving moral turpitude.

(e) A person whose calls in respect of shares of the company held for more than 6 months have been in arrear.

(f) A person who is disqualified for appointment as director by an order of the Court under Sec. 203 on the ground of fraud or misfeasance in relation to the company.

A director who has been removed from office by the Central Government shall not be a director of any company for a period of 5 years from the date of removal.

5.6 DUTIES OF DIRECTORS

The duties of directors are many and varied and difficult to describe in general terms. There are numerous statutory duties of the directors under the Companies Act on the one hand and on the other, there are duties of a general nature under the general law.

Statutory duties of directors are enumerated below :

(i) It is the duty of the Board to see that all moneys received from applicants for shares is deposited in a scheduled bank until the 'certificate to commence business' is obtained under Section 149 or the money is returned to the applicants under Section 69(5). [Sec. 69(4)].

(ii) Section 165 requires the Board of Directors to forward a copy of the Statutory Report at least 21 days before the Statutory Meeting to every member of the company and to the Registrar.

(iii) The Board is required to call, on the requisition of the specified number of members, an extraordinary general meeting of the company. [Sec. 169(1)].

(iv) At every Annual General Meeting of a company, the Board shall lay before the company a Balance sheet and a Profit and Loss Account. [Sec. 210(1)].

(v) The Board of Directors has to make a 'declaration of solvency' of the company in the case of "members voluntary winding up." (Sec. 488)

The duties of directors under the general law may briefly be put as follows:

(1) They must always act bona fide for the benefit of the company. They stand in a fiduciary relationship with the company and therefore must not make any secret profit.

(2) They must discharge their duties with such care as is reasonable in a person of their knowledge and experience.

(3) They must not be negligent. The directors must attend Board's meeting unless impossible otherwise.

(4) They must perform their duties personally. The maxim "delegates non potest delegare" (a delegate cannot delegate further) applies to them like all agents. Hence, unless permitted by the articles specifically, the directors must not delegate any of their power to some other person.

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5.7 LIABILITY OF DIRECTORS

Directors may become personally liable to make good the loss to the company :

(i) For ultra vires acts – where they enter into contracts ultra vires the memorandum or ultra vires their powers, *e.g.*, selling the whole undertaking.

(ii) For breach of trust – where they make secret profits or use company's funds for their personal use.

(iii) For acting dishonestly, *e.g.*, purchasing goods in their own name first and then selling it to the company at a higher price with intention to make profits.

(iv) For gross negligence in the performance of their duties *e.g.*, delegation of power when the articles do not permit or paying dividends when there are no profits. It is to be noted that an error of judgement will not make them liable so long as they are honest and careful.

(v) For wilful misconduct, *e.g.*, misappropriation of the company's assets wilfully.

(vi) For the acts of his co-director where he habitually absents himself from the Board meetings.

The director may also incur personal liability to third parties :

(i) For misstatements or concealments in the prospectus.

(ii) For acting in their own name, *e.g.*, signing a negotiable instrument without mentioning the name of the company.

(iii) For breach of implied warranty of authority – where they enter into any contract which is ultra vires the company or ultra vires their powers, *e.g.*, where moneys are borrowed beyond the powers of the company from a lender who advanced the loan in good faith and without knowledge that the limits imposed by the Articles had been exceeded *(Weeks vs. Propert)*.

(iv) Where their liability has been made unlimited by a provision in the memorandum.

(v) For the debts and liabilities of the company at the time of winding-up, if the court hold them so liable because of fraudulent trading by them. (Sec. 542)

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(vi) For acting fradulently they may be asked to pay damages.

CRIMINAL LIABILITY

The directors also incur criminal liability for fraud and non-compliance of the various provisions of the Act. Here they are punishable with fine or imprisonment or both under various Sections of the Act. For example, they will be liable to penalty under the following Sections of the Act :

(i) Section 63 – for misstatements in the prospectus.

(ii) Section 75 – for failure to file return as to allotments with the Registrar.

(iii) Section 95 – for failure to give notice to the Registrar of consolidation of share capital, conversion of shares into stock, etc.

(iv) Section 113 – for failure to issue certificates of shares and debentures within specified time limits.

(v) Section 142 – for default in filing with the Registrar for registration the particulars of any charge created by the company requiring registration or of any fact connected therewith.

(vi) Section 150 – for not keeping registers of members and debenture-holder.

(vii) Section 168 – for default in holding annual general meeting in accordance with Section 166.

(viii) Section 210 – for failure to lay before the company at every annual general meeting annual accounts and balance sheet.

(ix) Section 279 – for holding office as director in more than twenty companies in contravention of the provision of the Act.

(x) Section 295 – for taking loan from the company without the approval of Central Government, thus contravening the provision of this Section.

5.8 SUMMARY

- 'Director' includes any person occupying the position of director, by whatever name called. If he performs the functions of a director, he would be termed a director in the eyes of the law even though he may be named differently.
- Directors are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control.
- The directors also incur criminal liability for fraud and non-compliance of the various provisions of the Act. Here they are punishable with fine or imprisonment or both under various Sections of the Act.
- Article 66 of Table A specifically lays down that "the qualification of a directors shall be the holding of at least one share in the company." The

object of provisions relating to share qualification of persons to act as directors is to ensure that they have a personal interest in the company.

5.9 REVIEW QUESTIONS

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1. What are the important duties of a director?
2. What are the qualification of a director?
3. Discuss the liabilities of a director.

5.10 FURTHER READINGS

- Dr. Singh, Avtar, *Introduction to Company Law*, 2006, Eastern Book Co. India.
- Gogna, P.P.S., *A Textbook of Company Law*, 2004, S. Chand Publication, New Delhi.
- M. C. Kuchhal, *Secretarial Practice* (16th Revised Edition), Vikas Publishing House Pvt. Ltd., New Delhi.