INDEX

CHAPTER 1
INTRODUCTION TO COMPANY LAW

The word 'company' is derived from the Latin word (Com-with or together; Panis - bread),

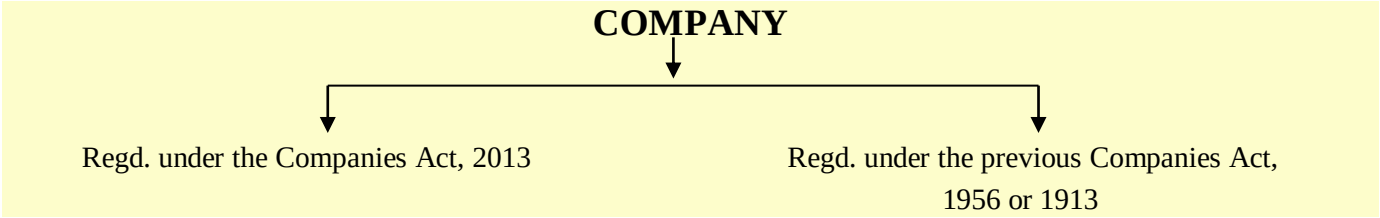
And it refers an association of persons who took their meals together.

The concept of 'Company' or 'Corporation' in business is not a new phenomenon, but was dealt with, in 4th century BC itself during 'Arthashasthra' days.

Company is an association of both natural & artificial persons incorporated under the existing law of a country for the purpose of making profit.

COMPANY

Section - 2(20): 'Company' means a company incorporated under this Act or under any previous company law.



Lord Justice Lindley defines a company means an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share the profit and loss arising there from.

In simple words, an individual/association shall be treated as a company provided it is registered under the current companies or previous companies Act and has obtained a certificate of registration from the competent authority (i.e. Registrar of Companies).

APPLICABILITY:

According to section 1 of the Companies Act, 2013, the Act extends to whole of India and the provisions of the Act shall apply to the following:-

(a) Companies incorporated under this Act or under any previous company law;

(b) Insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 (4 of 1938) or the Insurance Regulatory and Development Authority Act, 1999

(c) Banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949

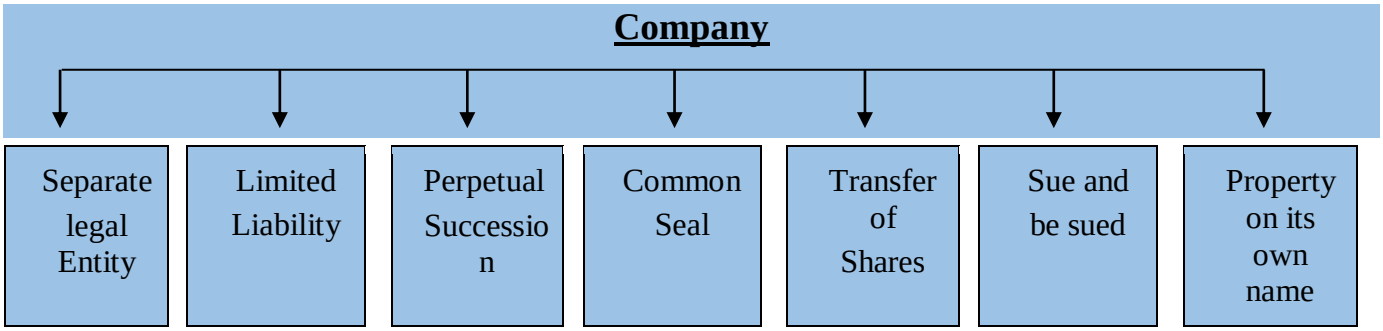
(d) Companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003

(e) Any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; and

(f) Such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.

CHARACTERISTICS OF A COMPANY

A company is a voluntary association of persons registered with the Registrar of Companies (ROC) and has the following characteristics:



Separate Legal Entity:[Company alag hai]

A registered company is regarded as legal entity separate from its members.

As it is a separate legal entity it carries its own name and also acts under same name.

It has a seal of its own.

Its assets are separate and distinct from those of its members.

Now, a Single member can also form a company i.e. One Person Company (OPC) for doing business on its own name.

Case Law: **Salomon v. Salomon and Co. Ltd**.

Facts: Salomon had a prosperous business of leather and boot. He formed a limited liability company i.e. Salomon and Co. Ltd. and shareholders of the company are:

(a) Salomon himself,

(b) His wife

(c) His daughter and his four sons.

All shareholders were holding 1 share each and rest all shares were held by Salomon. He sold his business to the company for £38,782/- and the company had issued shares in favour of Salomon as purchase consideration.

The purchase consideration was as follows:

Shares - £20,000 Debentures - £10,000 And Balance Paid in Cash

Salomon was the MD and two of his sons were other directors of the Company. After one year, the company ran into financial difficulties and the debenture holders appointed a receiver and the company went into liquidation. The assets of the company were not even sufficient to discharge the secured debentures which were held by the Salomon and nothing was left for unsecured creditors. The unsecured creditors claimed that the Company was a mere agent for Salomon and they were entitled to the payment of their unsecured debts in priority to the debenture holders.

They also pleaded that Salomon as primary beneficiary, was ultimately responsible for all the debts.

Judgment: The House of Lords held that:

(a) The said company comes into existence after its registration under the existing law.

(b) The company had been validly constituted as per the requirement of the existing law like 7 members were required to form a company.

Therefore, the company has its own existence or personality separate and distinct from its members and, as a

result, a shareholder cannot be held liable for the acts of a company.

Case Law: **Lee v. Lee's Air Farming Ltd**.

Facts: Lee, a qualified pilot, formed a company "Lee's Air Farming Ltd." and was holding all shares except one. He was also the MD and got himself appointed as chief pilot at salary.

He had full and unrestricted control over the affairs of the Company. While piloting the company's plane, he was killed in an air crash.

As the workers of the company were insured, workers were entitled for compensation on death or injury. His wife filed a claim for insured amount for the death of her husband in the course of his employment.

The question was while holding the position of MD, could Lee be treated as an employee for the purpose of insurance claim?

Judgment: It was held that: "Lee was a separate person from the company he formed and his widow was held entitled to get the compensation.

In effect the magic of corporate personality enabled him (Lee) to be the master and servant at the same time and enjoy the advantages of both."

Limited Liability[Isse jyada nahi dunga]

A Company may be limited either limited by shares or by guarantee.

Limited Liabilities

- Limited by shares
- Limited by Guarantee

In case of Company limited by shares, the liability of the members shall be limited to the extent of unpaid money on shares held by him.

Example: If face value of a share is Rs.100/- and a member has already paid Rs.50/-, then he cannot be called upon to pay more than Rs.50/- per share.

In case of Company limited by guarantee, the liability of the members is limited to the extent of an amount as undertaken by the members, in the event of company's winding-up.

Perpetual Succession[muje koi maar nahu sakta]

An incorporated company never dies except when it is wound up as per law.

A company, being a separate legal entity is unaffected by death or departure of any member or the change of members.

Even the death of all shareholders cannot end the life of a company, which is validly constituted under the law.

Accordingly, a Company is a juristic person and its life does not depend on the life of its members.

Therefore, "Members may come and go, but the company goes on forever.

In other words, Perpetual succession means the existence of a company does not come to an end due to:

- any change in membership of a company
- Death, insolvency, insanity etc. of any member of a company accordingly, the life of a company does not

depend upon the life of its members.

• Any change in the directorship.

Note: A company can be treated as dead if it is declared by the law by way of winding up or liquidation of a company.

Common Seal[mera autograph]

Since company has no limbs or mind like human being, therefore a common seal is required to authenticate the documents executed for and on behalf of company.

In other words, Common seal is the official signature of a company.

The common seal should be kept in the safe custody of a responsible official and such official should be authorized by the Board of Directors.

As per the Companies (Amendment) Act, 2015, the requirement of having a common seal has been made optional.

In case a company does not maintain a common seal, the documents shall be issued and executed by any 2 directors and the Company Secretary of the Company, if any.

A document does not bear common seal of the company is not authentic and such document has no legal force.

The name of the company must be engraved on its common seal.

A rubber stamp does not serve the purpose.

Transfer of Shares[mere shares ko transfer ksr sakte ho]

The shares of any company (private or public) are transferable.

Public Company: A member of a public company may sell freely and realize the money invested by him. A public company may be a listed company or unlisted company.

The Stock Exchanges provide trading facilities to the listed companies for the sale and purchase of their shares.

Private Company: The shares of a private company are also transferable with some restriction (i.e. approval of Board of Directors).

SeparateProperty[meri property alag hai]

The Company being a separate legal entity, it can buy any property in its own name.

Further, a company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name.

Therefore, "No member can claim himself to be the owner of the company's property during the existence of the Company".

Case Law: **R.F. Perumal v. H. John Deavin**

It was held that no member can claim himself to be the owner of the company's property during its existence or in its winding-up. A member does not even have an insurable interest in the property of the company.

Case Law**:** **Mrs. Bacha F. Guzdar v. The Commissioner of Income Tax, Bombay**

Facts: The plaintiff (Mrs. Guzdar) received certain amounts as dividend in respect of shares held by her in a tea company.

The Agricultural income is exempted from payment of income-tax. As income of a tea company is partly agricultural (60%) and partly from manufacture and sale (40%), and therefore, liable to pay tax to the extent of income from manufacture and sale.

The plaintiff claimed that the dividend income in her hands should be treated as agricultural income up to 60%.

Judgment: The Supreme Court held that, though the income of a tea company is entitled to be exempted from Income-tax up to 60% being partly agricultural, the same income when received by a shareholder in the form of dividend cannot be regarded as agricultural income for the assessment of income-tax.

It was further observed by the Supreme Court that a shareholder does not treat as the part owner of the company or its property.

Capacity to Sue and Be Sued[case file kar sakat hu]

A company being a body corporate can sue and be sued in its own name.

To sue means to institute/file legal proceedings against or to bring a suit in a court of law.

All legal proceedings against the company are to be instituted in its own name and the company may also bring an action against anyone in its own name.

Contractual Rights[can enter into a contract]

A company is a separate legal entity and it is different from its members.

A company can enter into contracts for carrying business on its own name.

Similarly, a member of a company cannot sue in respect of torts committed against the company, nor can he be sued for torts committed by the company.

Limitation of Action[power given in MoA]

A company derives powers from the Memorandum of Association (MOA) which is registered with the Registrar of the Companies.

Company is supposed to work within the limit as stated in the registered MOA.

In other words, the actions and objects of the company are limited within the scope of its Memorandum of Association (MoA).

Q1. Six persons are the only members of Tab (Pvt.) Ltd. All of them went to USA on a pleasure trip by airplane. On the way, the plane crashed and all the six members died. Does Tab (Pvt.) Ltd. still exist? Decide.**(Dec, 2016)**

A1.

- A company is brought into existence by a process of law and can be terminated or wound up or brought to an end only by a process of law. Its life is not impacted by the death, insolvency or retirement of any or all shareholder(s) or director(s).
- It is due to the perpetual existence of a company. In the present case, Tab Pvt. Ltd. does not cease to exist even by the death of all its shareholders.

LIFTING OF CORPORATE VEIL [Galat kaam karoge toh, Parda uth jayega]

After incorporation of a company, it enjoys the benefits of separate personality.

Such benefits are only available for legitimate business.

Example: ABC Ltd. had been registered by the Registrar of Companies (ROC) on 1st Jan., 2015. At the time of registration 7 members subscribed their names to fulfil the statutory requirement for incorporation. After registration, ABC Ltd. shall be held responsible for acts on behalf of the company, members and directors of the company shall not be held responsible for any acts of the ABC Ltd.

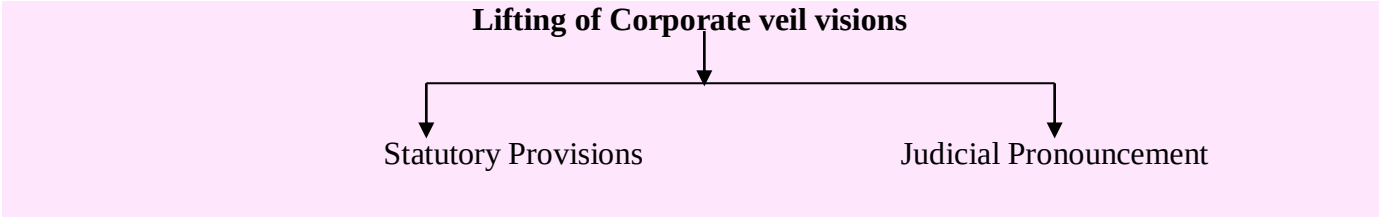
In reality, sometime the members of the companies misuse the advantage of separate personality of a company for their fraudulent and dishonest intention.

In such a situation, the members and directors of the company shall be held personally responsible.

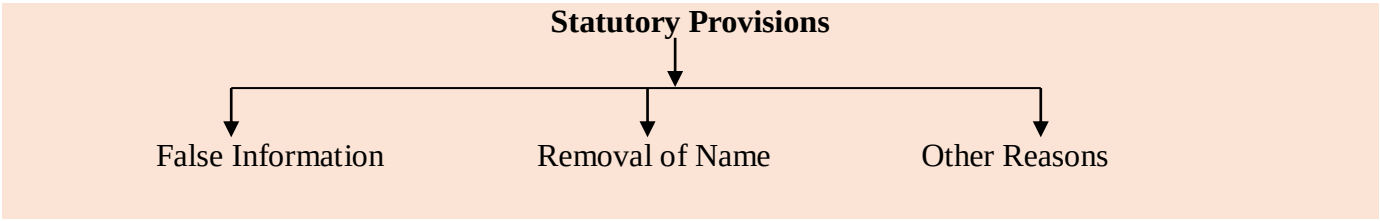
In other words, where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality.

The Court will break through the corporate shell and apply the principle of that is known as **"lifting of corporate veil."**

The Court will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company.



1. **Under Statutory Provisions:** The veil of corporate personality can be lifted under the following provisions of the Companies Act, 2013:



Submission of False Information [Sec.7(7)][Galat information diya]

The members become personally liable where a company has been got incorporated by furnishing any false or incorrect information or by suppressing any material fact in any documents or

declaration filed at the time of incorporation with ROC.

NCLT may pass the following orders in this regard:

- Pass any order as it may think fit, for regulation of the management of the company in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- Direct that liability of the members shall be unlimited; or
- Direct removal of the name of the company from the register of companies; or
- Pass an order for the winding-up of the company; or
- Pass such other orders as it may deem fit.

Fraudulent application for removal of the name of Company [Sec.251(1)][Object fraud karne ka hai]

Where it is found that an application by a company has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall be

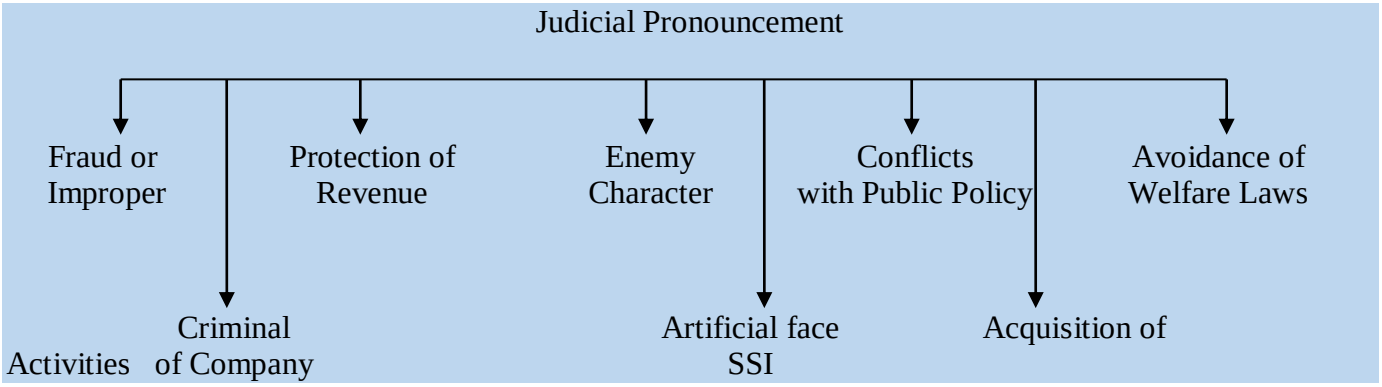
- Jointly and severally liable to any person or persons who had incurred loss or damage; and
- Punishable for fraud.

Other reasons [Sec. 339]

Every person shall be personally liable for fraudulent conduct of the business during the course of winding-

up.

2. Under Judicial Pronouncements: The Court may lift the corporate veil in the following situations:



1. Prevention of Fraud or Improper Conduct[me ayai hu fraud karne]

If a company has been incorporated only for the purpose for commission of fraud or improper conduct, in such cases, Courts may lift the veil and look at the realities of the situation.

Case Law: **Jones v. Lipman (1962)**

Facts: A agreed to sell certain land to B. Pending completion of formalities of the said deal, A sold and transferred the land to a company which he had incorporated with a nominal capital of £100 and of which he and a clerk were the only shareholders and directors. This was done in order to escape a decree for specific performance in a suit brought by B.

Judgment: The Court held that the company was the creature of A and a mask to avoid recognition and that in the eyes of equity A must complete the contract, since he had the full control of the

limited company in which the property was vested, and was in a position to cause the contract in question to be completed.

Case Law: **Gilford Motor Co. Ltd. v. Horne**

Facts: A former employee of the Gilford Motors Ltd. was subject to a covenant not to solicit its customers. A former employee formed a company to carry business which for purpose to solicit the customers of Gilford Motors Ltd.

Judgment: The Court gave the injunction order against both i.e. Former Employee and the Company formed by him to restrain from carrying business.

2. Protection of Revenue[me tax chura lungi]

Where the corporate has been used only for evasion of taxes and duties, the court may lift the corporate veil to look at the real transactions.

Case Law: **Sir Dinshaw Maneekjee Petit**

Facts: The assessee was a wealthy man enjoying large dividend and interest income. He formed four private companies and agreed with each to hold a block of investment as an agent for it.

Income received was credited in the accounts of the company but the company handed back the amount to him as a pretended loan. This way he divided his income in four parts in a bid to reduce his tax liability.

Judgment: The Court held that the company was formed by the assessee purely and simply as a means of avoiding super-tax and the company was nothing more than the assessee himself.

It did no business, but was created simply as a legal entity to apparently receive the dividends & interests and to hand them over to the assessee as pretended loans.

Accordingly, the Court decided to disregard the corporate entity as it was being used for tax evasion.

3. Determination of the Enemy Character of a Company[me enemy se mili hui hu]

Company being an artificial person cannot be enemy or friend.

But during war or war like situation, it may become necessary to lift the corporate veil and see the persons behind as to whether they are enemies or friends.

Case Law: **Daimler Co. Ltd. v. Continental Tyre & Rubber Co.**

Facts: A Company was incorporated in England by a German Company for the purpose of selling tires in England which were manufactured in Germany.

The Germany Company virtually held the entire share capital in the English Company.

All Directors were the resident of Germany. During the 1st World War.

The English company commenced an action for recovery of a trade debt from another English Company.

Judgment: It was held that a company will be regarded as having enemy character, if the persons

having de facto control of its affairs are resident in an enemy country and therefore the Company was not allowed to proceed with the action.

4. Conflicts with Public Policy[mene public policy k against kaam kiya hai]

Where the doctrine of any company conflicts with public policy, the court may lift the corporate veil for protecting the public policy.

Case Law: **Connors Bros. v. Connors (1940)**

Facts: This principle was applied against the managing director who made use of his position contrary to public policy.

Since the persons who were de facto in control of its affairs, were residents of Germany, which was at war with England at that time.

The alien company was not allowed to proceed with the action, as that would have meant giving money to the enemy, which was considered as against the public policy.

Judgment: In this case the House of Lords determined the character of the company as "enemy company".

SPACE FOR CLASS NOTES

5. Avoidance of Welfare Legislation [me law ko avoid karungi]

Where a company was formed only for reducing the statutory liabilities (like payment of bonus, PF & ESIC), the Court may lift the corporate veil to look at the real transactions.

Case Law: **The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar v. The Associated Rubber Industries Ltd., Bhavnagar and another.**

Facts: A new company was created wholly by the principal company with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company i.e. only for the purpose of splitting the profits into two hands and thereby reducing the obligation to pay bonus.

Judgment: The Supreme Court of India held that the new company was formed as a device to reduce the gross profits of the principal company and thereby reduce the amount to be paid by way of bonus to workmen. The amount of dividends received by the new company should, therefore, be taken into account as assessing the gross profit of the principal company.

6. Where the corporate facade (Artificial face) is really only as an agency and an instrument [me agent hu]

Where a company works like an agent of other company then the court may lift the corporate veil.

Case Law: **R.G. Films Ltd.**

Facts: An American company produced a film in India technically in the name of a British Company, 90% of whose capital was held by the President of the American company which financed the production of the film.

Judgment: The Board of Trade refused to register the film as a British film which stated that English company acted merely as the nominee of the American corporation.

7. Acquisition of Small Scale Industry for taking benefits & exemption [mujhe ssi ka benefit chaaiye]

Where a small scale industry is owned and controlled by the Companies or persons for availing the benefits or exemptions (i.e. excise & VAT), the Court may lift the corporate veil.

Case Law: **Inalsa Ltd. v. Union of India**

Facts: In this case, A small scale industry (SSI) was owned and controlled by some group of persons or companies for availing benefits or exemptions.

Judgement: In this case, it was held to lift the corporate veil of the company to see whether the SSI was the subsidiary of another company or not.

8. Concealment of criminal activities [crime karunga]

Where the corporate structure is used as a device to conceal the criminal activities (i.e. evasion of customs and excise duties), the Court may lift the corporate veil and treat the assets of the company as the realisable property of the shareholder.

Case Law: **H. and Others (Restraint Order: Realisable Property)**

Facts: In a case, 3 defendants had been charged with evasion of Excise Duty and they caused loss to the exchequer in excess of £100 million. They owned & controlled 100% issued share capital of two family

companies through which it was alleged the fraud had been committed.

Judgment: The Court held that the defendants had used the corporate structure as a device or facade to conceal the criminal activities. In this case, the court lifted the corporate veil and treated the assets of the company as the realisable property of the defendants.

Q2. Rani is a wealthy lady enjoying large dividend and interest income. She has formed three private companies and agreed with each of them to hold a block of investment as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to her as a pretended loan. This way, she divided her income in three parts in a bid to reduce her tax liability. Discuss the legality of the purpose for which the three companies were formed. (5 marks) CS Exe.- June, 2010

A2. Hint: refer case — Sir Dins haw Maneekjee Petit

Q3. Some of the creditors of Get Rich Quick Ltd. have complained that the company was formed by the promoters only to defraud the creditors and circumvent the compliance of legal provisions of the Companies Act, 2013. In this context they seek your advice as to the meaning of corporate veil and when the promoters can be made personally liable for the debts of the company. (4 marks) CAIPCC Nov, 2004

A3. Corporate Veil: The company has its own existence and as a result the shareholders cannot be held liable for the acts of the company even though they hold the entire share capital of the company. In the following circumstances, corporate veil can be lifted by the courts and promoters can be held personally liable for the debts of the company.

- Trading with enemy country.
- Evasion of taxes.
- Forming a subsidiary company to act as its agent.
- The benefit of limited liability is destroyed by reducing the number of members below 7 in the case of public company and 2 in the case of private company for more than six months.
- Under law relating to exchange control.

Device of incorporation is adopted to defraud creditors or to avoid legal obligations Also refer case — Jones v. Lipman

CITIZENSHIP STATUS OF A COMPANY [me citizen nahi hu]

Only a natural person can get Citizenship under the Indian Citizenship Act, 1955 or the Constitution of India.

Therefore, a company being an artificial person cannot become citizen under the Constitution of India or the Citizenship Act, 1955.

The Supreme Court in the matter "State Trading Corp. of India Ltd. v. CTO held that a corporation cannot have the status of a citizen under the Constitution of India.

Therefore, a company has no fundamental rights which are expressly available to the citizen of India.

A company can claim the certain fundamental rights which are available to all persons whether citizen or not like the right to own property.

NATIONALITY AND RESIDENCE STATUS OF A COMPANY [nationality aur residential status diya hai]

Though it is an established fact that a company cannot be a citizen, yet it has nationality, domicile and residence.

It was suggested that a body corporate has no domicile.

It is quite true that a body corporate cannot have a domicile in the same sense as an individual.

A company resides where its place of incorporation is, where the meetings of the whole company or those who

represent it are held and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the Articles of Association.

ILLEGAL ASSOCIATION [association me50 se zyada person hai aur registrationbhi nahi kiya hai]

An association or a partnership firm which is not registered under the Companies Act, 2013, consists of more than 50 persons, shall be treated as illegal association.

Section 464, "No association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force.

PROVIDED that the number of persons which may be prescribed under this sub-section shall not exceed 100.

Exception: This section does not apply to:

(a) Hindu Undivided Family or

(b) An association or partnership formed by professionals who are governed by special Acts like LLP.

As per rule 10 of Companies (Miscellaneous) Rules, 2014, as notified on Ist April, 2014 prescribes 50 persons.

Therefore, any unregistered association shall be treated as illegal association provided such association has more than 50 members.

Maximum Number of a Partnership Firm:

The Companies Act, 2013 prescribes maximum number of partners (i.e. 50) for a partnership formed under the Partnership Act, 1932 other than LLP. No limit for partners in the "Limited Liability Partnership (LLP)".

As per the Companies Act, 2013, no separate limit specified for Banking or other business.

Earlier, this limit was 10 in case of Banking Business and 20 in case of other Business in accordance with the erstwhile Companies Act, 1956.

Special Note: If two or more joint Hindu family firms carry on business together and the combined number of major members exceeds 50, then their association will become illegal.. In computing the number for illegal association, minor members of joint families are to be ignored. If by reason of minor members of such joint families on attaining majority, the number of persons exceeds the statutory limit, it will become an illegal association.

An Illegal Association has the following drawbacks:

1. An illegal association cannot enter into any contract;
2. An illegal association cannot sue any member, or outsider, not even if the company is subsequently registered;
3. An illegal association cannot be sued by a member, or an outsider for recovery of any debts;
4. An illegal association cannot be wound up by order of Court.

Moreover, the Court will not entertain a petition for its winding-up as an unregistered company but an illegal association is liable to be taxed.

Liabilities and Punishments for Members of Illegal Association: [gunaho ki saza]

Every member of an above association or partnership carrying on business in contravention of the above section shall be punishable with fine which may extend to Rs. 1 lakh and shall also be personally liable for all liabilities incurred in such business.

Q4. The United Traders Association was constituted by two Joint Hindu Families consisting of 51 major and 5 minor members. The Association was carrying the business of trading as retailers with the object for acquisitions of gain. The Association was not registered as a company under the Companies Act or

other law.

State whether United Traders Association is having any legal status? Will there be any change in the status of this Association if the members of the United Traders Association is subsequently reduced to 45. (Nov, 2009) OR

The XYZ Traders Association was constituted by four joint Hindu families consisting of 605 major and 10 minors members. The Association was carrying on the business of trading as retailers with the object for acquisition of gains. The Association was not registered as a company under the Companies Act, 2013 or any other law.

State whether the XYZ Traders Association is having any legal status?

Will there be any change in the status of this Association if the members of the XYZ Traders Association subsequently were reduced to 40? (Nov. 2014) (Modified)

A4. ■ In given case, the number of adult members exceeds 50 so United Traders Association is an illegal association.

■ Any subsequent reduction in number of members would not make any change in the

status of United Traders Association, since on illegal association continues to be an illegal association.

BODY CORPORATE:

Section - 2(11): Body Corporate or Corporation includes a company incorporated outside India, but does not include:

(i) A co-operative society registered under any law relating to co-operative societies; and

(ii) Any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

In other words, all foreign companies incorporated outside India or corporation formed under any foreign laws shall be treated as Body Corporate or corporation.

KEY CONCEPT:

The 2013 Act has introduced several new concepts and has also tried to streamline many of the requirements by introducing new definitions.

Some of the concepts are discussed here in brief.

1. **One-person company**: The 2013 Act introduces a new type of entity to the existing list i.e. apart from forming a public or private limited company, the Act enables the formation of a new entity a 'one-person company' (OPC).
   An OPC means a company with only one person as its member (section 3(1)).
2. **Private company:** The 2013 Act introduces a change in the definition for a private company, 22 EP-CL inter-alia; the new requirement increases the limit of the number of members from 50 to 200. [Section 2(68)].
3. **A small company** has been defined as a company, other than a public company.
   (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
   (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:
   Provided that nothing in this clause shall apply to—
   (A) a holding company or a subsidiary company;
   (B) a company registered under section 8; or
   (C) a company or body corporate governed by any special Act; (section 2(85)).
4. **Dormant company**: A company formed and registered under this 2013 for a future project or to hold an asset or intellectual property and has no significant accounting transaction such a company or an inactive

company may make an application to the Registrarfor obtaining the status of a dormant company.(Section 455)

5. **Nidhi company:** Nidhi Company means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. (section 406)

DISTINCTIONS

Distinction between Company & HUF

Basis	Company	Hindu Undivided Family
Members	A company consists of any one (i.e. heterogeneous) as members.	A HUF Business consists of family members (homogenous members).
Contract	A company can enter into a contract on its own name after its registration.	In a HUF business the Karta has the sole authority to contract debts for the purpose of the business, other coparceners cannot do so.
Acquisition of membership	The membership in a company can be acquired by way of transfer or transmission of shares.	A person becomes a member of a HUF business by virtue of birth.
Registration	Registration of a company is compulsory.	No registration is compulsory for carrying on business for gain by a HUF even if the number of members exceeds 50.

Distinction between Company & Partnership Firm

Basis	Company	Partnership Firm
Separate Legal Entity	A company is a distinct legal person.	A partnership firm is not distinct from the several persons who compose it.
Property	The property of the Company belongs to the company and not to the individuals comprising it.	The property of the firm is the property of the individuals comprising it.
Filing of suit	The creditors of a company can precede lawsuit only against the company and not against its members.	Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally.
Transfer of shares	A company's share can ordinarily be transferred.	A partner cannot transfer his share without the consent of the other partners.
Limited Liability	Shareholder may be limited either by shares or a guarantee.	A partner's liability is always unlimited.
Perpetual Succession	A company has perpetual succession.	Death or insolvency of a partner dissolves the firm.
Number of Members	Public Company: No limit Private Company: Not more than 200.	A partnership firm cannot have more than 50 partners.

Chapter 2.1
SHARES & SHARE CAPITAL
(Meaning and types of share capital)

INTRODUCTION

A company can choose the source of capital depending on the nature of business demand which has widened the financing options for companies.

The sources of capital include various modes of raising finance, which may be by invitation through prospectus or through private placement.

As regards regulatory aspects with reference to rising of finance by listed companies, SEBI Regulations and Companies Act would become applicable.

As regards unlisted companies, rules framed by MCA and Companies Act are to be complied with.

MEANING AND CLASSIFICATION OF CAPITAL

Capital means an amount which is required to start a business and it is a long-term borrowing to the company.

The word 'Capital' means the share capital either equity or preference.

CLASSIFICATION OF CAPITAL

(a) **Nominal or Authorised or Registered Capital:** [maximum share capital]

[Section 2(8) of the Companies Act, 2013] Registered Capital means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

The authorised capital of a company is the maximum amount of share capital that the Company is authorised to issue to the shareholders.

In other words, authorised capital means the maximum amount of share capital which is registered with the Registrar of Companies and a company cannot issue shares above the limit of authorised share capital.

(b) **Issued Capital:** [company issue karti hai]

[Section 2(50) of the Companies Act, 2013] Issued capital means such capital as the company issues from time to time for subscription.

It is that part of the authorised capital which the company issues for the time being for public subscription and allotment.

(c) **Subscribed Capital:**[public ne apply kiya]

[Section 2(86) of the Companies Act, 2013] Subscribed capital means such part of the capital which is for the time being subscribed by the members of a company.

It is that portion of the issued capital which has been subscribed by the subscribers of shares in the company.

(d) **Called-Up Capital:** [joh public se mangwati hai]

[Section 2(15) of the Companies Act, 2013] Called-up capital means such part of the capital, which has been called for payment.

It is that portion of the subscribed capital which has been demanded by the Company for payment of remaining portion of share.

(e) **Un-Called Capital:** [joh nahi mangwaya]

It is the total amount not yet demanded by the company on the shares subscribed, which the shareholders are liable to pay as and when called.

(f) **Paid-Up Capital:** [joh paise mil chuke hai]

[Section 2(64) of the Companies Act, 2013] Paid-up share capital means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued

And also includes any amount credited as paid-up in respect of shares of the company,

But does not include any other amount received in respectof such shares, by whatever name called.

It is the part of the total called up amount which is actually paid by the shareholder.

Capital Reserve:

Capital Reserve is created out of profits.

As opposed to revenue reserve, Capital reserve is not ordinarily available for distribution among the share holders of the company as dividend and it can also utilise for issue of Bonus Shares.

Reserve Capital: [emergency wale paise]

It is that part of the uncalled capital of a company which the limited company has decided by special resolution, not to call except in the event and for the purpose of the company being wound up.

Example: A company raises fund via an IPO and the company fixed the face of shares (Rs.10/- each). As per the resolution of the company, the company kept Rs.5 as reserve capital.

In this case, the company can demand the balance Rs.5 per share from the subscribers at the time of winding-up.

Publication of Subscribed and Paid up capital along with authorised capital

Section 60 of the Act lays down that if the Company states its authorised capital in any document whether it is notice, advertisement or other official publication, or any business letter, billhead, etc it shall also state the amount of the subscribed capital and the paid-up capital, at prominent position and in equally conspicuous characters.

In case of default, the company shall be liable to pay a penaltyRs. 10,000/- and every officer of the company who are in default shall be liable to pay a penalty of Rs. 5,000/- for each default.

SHARE AND TYPES QF SHARE CAPITAL

Section 2(84) of the Companies Act, 2013: Share means a share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied.

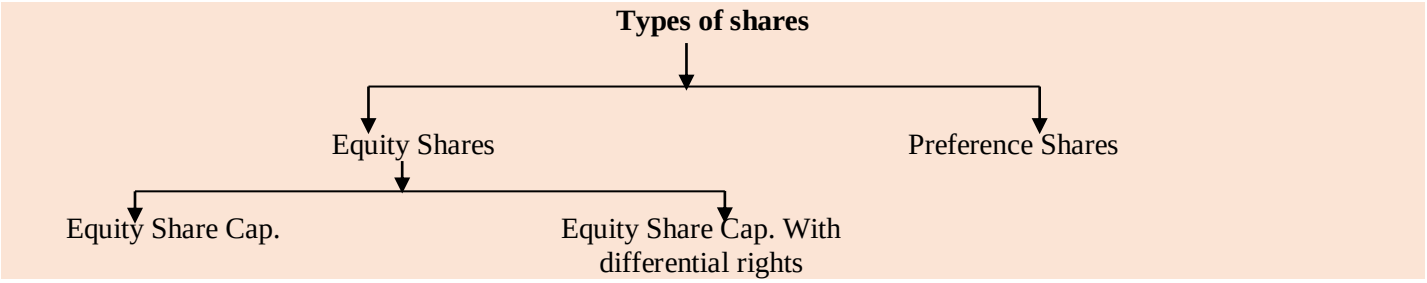
A share thus represents such proportion of the interest of the shareholders as the amount paid-up thereon bears to the total capital payable to the company.

It is a measure of the interest in the company's assets to which a person holding a share is entitled.

In other words, it represents the interest of a shareholder in the company, measured for the purposes of liability and dividend.

It attaches various rights andliabilities.

KINDS OF SHARES



Equity Share Capital [Explanation to section 43]:

Equity share capital with reference to any company limited by shares means all share capital which is not preference share capital.

The difference in voting rights can be achieved by reducing the degree of voting power.

It is ideal for long-term investors, typically small investors who seek higher dividend and are not necessarily interested in taking a voting position.

- **Characteristics:**
  1. Equity shares carry voting rights at the general meetings of the company and have the right to control the management of the company.
  2. Equity shares carry the right to share in the profits of the company in the form of distribution of dividend and bonus shares.
  3. In the event of winding-up of the company, equity share capital is repayable only after repayment of the claims of the creditors and preference share capital.
  4. Equity shareholders enjoy various rights as members, which include, inter alia, the following rights:
     (a) Right of pre-emption in the matter of fresh issue of capital.
     (b) Right to apply to the Tribunal to have any variation of their rights set aside.
     (c) Right to receive a copy of the statutory report.
     (d) Right to apply to Central Government to call an AGM when the company fails to call such a meeting.
     (e) Right to apply to Tribunal for calling an extraordinary general meeting of the company.
     (f) Right to receive copies of annual accounts along with auditor's report.

- **Kinds of Equity Shares**

  Equity share capital may be divided into;

  > Equity share capital with voting right; or

  > Equity share capital with differential rights.

  The differential rights may have difference related to dividend, voting or otherwise in accordance with rules.

  The term otherwise bring scope of various inclusions.

  It may be difference related to managing control, power to appoint director, or power to appoint proxy etc.

Preference Share Capital (Explanation to the Section 55 of the Companies Act, 2013) [ladies first]

Preference Share Capital means a share capital which has preferences over equity shares in respect of dividend and capital.

Preference shareholder has two types of preference over equity shares:

(i) Payment of Dividend

(ii) Payment of Capital at the time of Liquidation

- **Kinds of Preference Shares**

  > **Cumulative Preference Shares:** [purana dividend bhi lunga]

  Preference shares shall be treated as cumulative or non-cumulative with regard to the payment of dividends.

  A cumulative preference share confers a right on its holder to claim fixed dividend of the past and the current year(s) and out of future profits.

  The dividend keeps on accumulating until it is fully paid.

> **Non-Cumulative Preference Shares:** [raat gayi baat gayi]

A non-cumulative preference share gives right to its holder to receive dividend out of the current financial year profits.

If no profits are available in current financial year, the preference shareholders get nothing and they cannot claim unpaid dividend in subsequent year.

> **Participating Preference Shares:** [mera leke tera bhi lunga]

Participating preference shares are those shares which are entitled to a fixed preferential dividend and, in addition, they carry a right to participate in the surplus profits along with equity shareholders after dividend at a certain rate has been paid to equity shareholders.

In event of winding-up, if after paying back both the preference and equity shareholders there is still any surplus left then the participating preference shareholders get additional share in the surplus assets of the company.

> **Non-Participating Preference Shares:** [sirf near dedo]

Non-participatory preference shares who have no other right in addition to the fixed dividends are called as non-participating preference shares.

> **Redeemable Preference Shares:** [meri life limited hai (20 years)]

If the articles of association of a company provide, the redeemable preference shares can be issued subject to the following conditions:

(i) These preference shares are redeemable after a specific period and money is returned to shareholders.

(ii) A Company cannot issue preference shares which are irredeemable.

(iii) The Company can issue preference shares which are redeemable not later than 20 years.

Note: A Company engaged in infrastructure projects can issue shares redeemable exceeding 20 years.

> **Convertible preference shares:** [converted into equity shares]

The holder of these shares is given the right of conversion of his shares into equity shares at a later date.

> **Non-convertible preference shares:** [me convert nahi hone wala]

Here the preference shareholder is not given the right of conversion of his shares into equity shares. If the articles are silent, all preference shares are deemed to be non-convertible unless provided otherwise.

> **Cumulative Convertible Preference Shares (CCP):** [convert bhi honunga aur pura dividend bhi lunga]

The objects of the issue of the instrument should be for setting up new projects, expansion or diversification of existing projects, capital expenditure for modernisation and working capital requirements.

The amount of issue of Cumulative Convertible Preference shares will be to the extent the company would be offering equity shares to the public for subscription.

These shares are deemed to be equity issue for the purpose of calculating debt-equity ratio.

DISTINCTION BETWEEN PREFERENCE AND EQUITY SHARES

Basis	Preference shares	Equity Shares
Rate of Dividend	Preference shares are entitled to a fixed rate of dividend as agreed by the Company at time of issue.	The rate of dividend on equity shares depends upon the amount of profit available and the funds requirements of the company for future expansion etc.
Payment of dividend	Dividend on the preference shares is paid in preference to the equity shares.	The dividend on equity shares is paid only after the preference dividend has been paid.
Payment of capital in case of winding-up	In case of winding-up, preference share holder gets preference with regard to the payment of capital over equity shareholders.	In case of winding-up, equity shareholder gets payment of capital after preference shareholders.
Voting Rights	The preference shareholders have restricted voting rights. Preference shareholders can vote only with regard to their special rights like payment of dividend, payment of capital in case of winding-up or their dividend has not been paid for a period of 2 years or more.	An equity shareholder can vote on all the matters.
Issue of Bonus Shares	No bonus shares/right shares are issued to preference shareholders.	A company may issue rights shares or bonus shares only to its existing equity shareholders.
Redemption of shares	Redeemable preference shares can be redeemed by the company.	Equity shares cannot be redeemed except in case of reduction of capital or buy-back shares by the company.

CHAPTER 2.2
SHARES & SHARE CAPITAL
Concept of Issue and Allotment

CONCEPT OF ISSUE AND ALLOTMENT

A company may allot shares when it is first set up or at any time during its lifetime in order to raise share capital and/or introduce new shareholders.

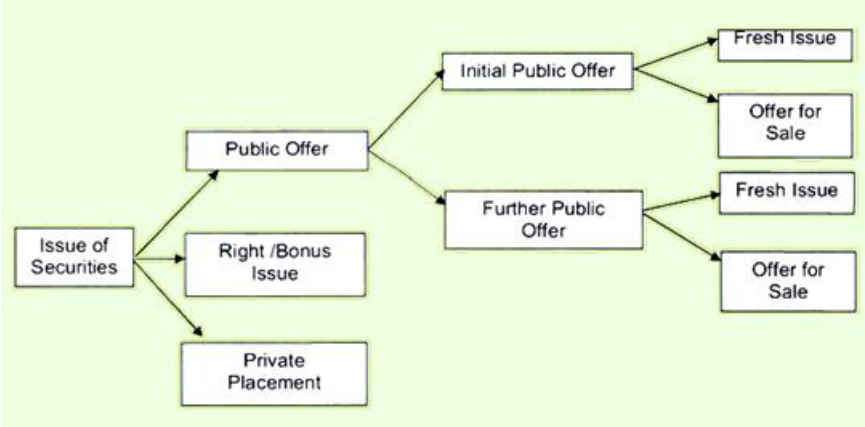
A private company may issue securities

> By way of rights issue or bonus issue in accordance with the provisions of the Companies Act; or
> Through private placement.

A public company may issue securities:

> To public through prospectus; or
> Through private placement; or
> Through a rights issue or a bonus issue as per the provisions of the Companies Act, 2013 and in case of a listed company or a company which proposes for public issue also comply with the provisions of the SEBI Act, 1992 and its rules and regulations.

Note: Public offer includes initial public offer or further public offer of securities to the public by a company, or an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus.



PROSPECTUS [offer document- muje dekho fir shares kharido]

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

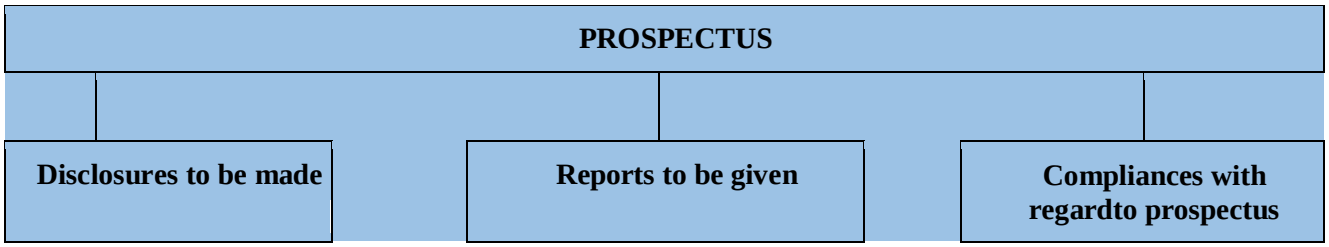
Sec. 2(70) of the Companies Act, 2013: Prospectus means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate;

On the basis of above definition, a document should have following ingredients to constitute a prospectus:

> There must be an invitation to the public.

> The invitation must be made by or on behalf of the company or in relation to an intended company.
> The invitation must be to subscribe or purchase.
> The invitation must relate to any securities of the company.

CONTENTS OF PROSPECTUS



Disclosures to be made in Prospectus

(a) General Information about the Company i.e. name, registered address and list of the Directors, officers (CS, CFO), Intermediaries & advisors (Merchant Bankers, Auditors, legal advisors, bankers, underwriters).

(b) Dates of opening and closing of the issue.

(c) Details of Separate Bank Account i.e. ESCROW Account.

(d) Capital Structure of the company i.e. authorised, issued, paid-up share capital

(e) Resolution for authorising public issue.

(f) Minimum subscription.

(g) Main objects and present business of the Company including its location and timeline for implementation of the project.

(h) Matters relating to terms and conditions of all term loans which have been availed by the Company.

(i) The aggregate number of securities of the issuer company and its subsidiary companies purchased or sold by the promoter group and by the director of the Company.

(j) The related party transactions (i.e. transaction between the relative of directors and the Company) entered during the last five financial years.

(k) Summary of reservations or qualifications or adverse remarks of auditors in the last five financial years.

(L) Inquiry, inspection or investigation initiated or conducted under the Companies Act, 2013 or any previous company law in the last five years.

(m) Fines imposed, if any

Reports to be set out in the Prospectus

(a) Audit Reports by statutory auditors of the company

(b) Reports relating to profit and loss for each of 5 financial years immediately preceding the issuing financial year.

(c) Reports made by auditors upon the profit and losses of business of the company for each of five financial year immediately preceding issue and assets and liabilities of the business on the last date to which the accounts of the business were being made up but not more than 180 days.

(d) Reports about the Business or transactions to which the proceeds of the securities are to be applied directly or indirectly.

Other compliances with regard to prospectus

(a) Prospectus shall be dated and signed.

(b) It should state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government.

(c) On or before the date of publication the company shall register a copy of prospectus with Registrar.

(d) Expert's statement to be included in prospectus.

(e) Prospectus filed with ROC is valid for 90 days from the date of its filing with ROC.

The advertisement of prospectus shall specify the following details:

(a) Contents of memorandum, capital, objects and liability of members.

(b) Name of signatories to memorandum and number of shares issued to them.

(c) Its capital structure.

Civil Liabilities for Mis-Statement in the Prospectus: [gunaho ki saja]

The promoters & Company shall be liable to pay for compensation to every person who has sustained losses or damages due to any misstatement in the prospectus.

Criminal Liability for Mis-statement in the prospectus [Section 34]:

The promoters are criminally liable for untrue or misleading statements in the prospectus if such statement is likely to mislead or induce any person in connection with obtaining capital.

For untrue statement, a promoter can be punished for not less than 6 months but not more than 10 years and with fine not less than the amount involved but which may extend to 3 times the amount involved.

Q1. Transparency Ltd. issued a prospectus. All the statements given in the prospectus were true. It also stated that the Company had paid dividend for past few years but did not disclose the fact that the dividends were paid out of capital profits and not trading profits.

An allottee wanted to repudiate the contract on the ground that the prospectus was false. (4 marks) CA

IPCC May, 2004, May 2013

A1. Non-disclosure of the fact that the dividends were paid out of past years' profit and that the Company was incurring losses gave a false impression that the Company is earning profits.

The suppression of such facts is material as the investor's decision might be to buy shares must have been affected due to this.

Therefore the allottee has a right to rescind the contract of allotment of shares as he has acted on the misleading information.

Q2. Peak Ltd. issued prospectus to invite the investors. The said prospectus contained false information. Mr. X purchased some shares of the Company in good faith on the Stock Exchange. Subsequently Mr. X sued the directors for mi- statement. Will he succeed?

A2. No, Mr. X will not succeed as Mr. X did not subscribe for shares on the faith of misleading prospectus rather he bought it from the Stock Exchange.

So there is no cause of action. Original Allottee will succeed in this case.

Q3. A deceitful prospectus was issued by the directors on behalf of the company, Pawan received a copy of it, but did not take any shares in the company. The allotment of shares to applicants was completed. Several months later, Pawan bought 2000 shares of that company from the stock market. He proceeded with a suit against the director for issuing deceitful prospectus. Will he succeed? (Dec 2013) 4 marks

A3. The right to claim compensation for any loss or damage sustained by reason of any untrue statement in a prospectus is available only to a person who has "subscribed" for securities on the faith of the prospectus containing untrue statement.

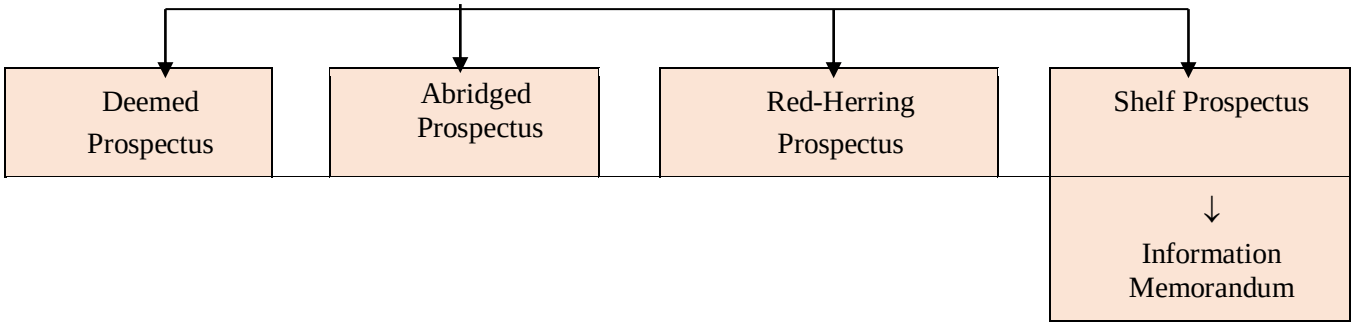
The word "subscribed" denotes that the shares were acquired directly from the company by way of allotment.

A subsequent purchaser of shares in the open market has no remedy against the company or the directors or promoters.

In the given situation, Pawan bought the shares from the open market (stock market).

It means at the time of buying shares, he did consider contains of prospectus and therefore, he will not succeed to make claim against the company for any loss or damage sustained by reason of any untrue statement in a prospectus.

CLASSIFICATION OF PROSPECTUS



- **Deemed Prospectus/ Offer for Sale (Section 25 of the Companies Act, 2013)** [lo maan liya humne, ho prospectus tum bhi]

  If a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus.

  The document "Offer for sale" is an invitation to the general public to purchase the shares of a company through an intermediary, such as an issuing house or a merchant bank.

  In short, any document issued on behalf of the company for the purpose to sale securities to the public shall be treated as deemed prospectus.

  Such a document shall be treated as a prospectus (unless the contrary is proved) where:

  1. An offer of all or any of the securities for sale to the public was made within 6 months after the allotment or agreement to allot; or
  2. At the date when the offer for sale to the public was made, the company had not received the whole consideration in respect of the said shares or debentures.

  The following **additional information** is required to be given in the deemed prospectus:

  1. The net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates;

2. The place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

It is sufficient if the prospectus is signed on behalf of the company or firm by 2 directors of the company or by not less than one-half of the partners in the firm, as the case may be, either themselves or by their agents authorised in writing.

Further **Section 28** permits certain members of a company, in consultation with Board of Directors, to offer the whole or a part of their holdings of shares to the public.

The document by which the offer of sale to the public is made shall be deemed as prospectus issued by company.

Provisions of Prospectus and Allotment of Securities and rulers made there under shall be applicable to an offer of sale referred to in section 28 **except** for the following, namely:-

a) The provisions relating to minimum subscription;
b) The provisions for minimum application value;
c) The provisions requiring any statement to be made by the Board of Directors in respect of the utilization of money; and
d) Any other provision or information which cannot be complied or gathered by the offeror, with

detailed justifications for not being able to comply with such provisions.

Further the rules provide that such offer document or prospectus issued under the section shall disclose the name of the entity bearing the cost of making the offer for sale along with reasons.

- **Abridged Prospectus (Sections 2(1) & 33 of the Companies Act, 2013)** [chota wala prospectus]

Abridged Prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the SEBI by making regulations in this behalf.

In other words, abridged prospectus means a summarised version of a prospectus and contains all the salient features of a prospectus.

Section 33 of the Companies Act, 2013: The form of application for purchase of any of the securities of a company shall be issued along with an abridged prospectus.

It means no application form canbe issued for shares or debentures unless accompanied by a memorandum containing salient features of the prospectus.

In the following cases, abridged prospectus does not apply:

(a) Underwriting Agreement: Where the offer is made in connection with the bona fide invitation to a person to enter into an underwriting agreement with respect to such securities;
(b) No offer to the Public: Where the securities are not offered to the public;
(c) Rights Issue: Where the offer is made only to the existing members or debenture holders of the company with or without a right to renounce;
(d) Uniform shares: Where the shares or debentures offered are in all respects uniform with shares or debentures already issued and quoted on a recognised stock exchange.

Penalties: If a company makes any default, it shall be liable to a penalty of Rs.50,000/- for each default.

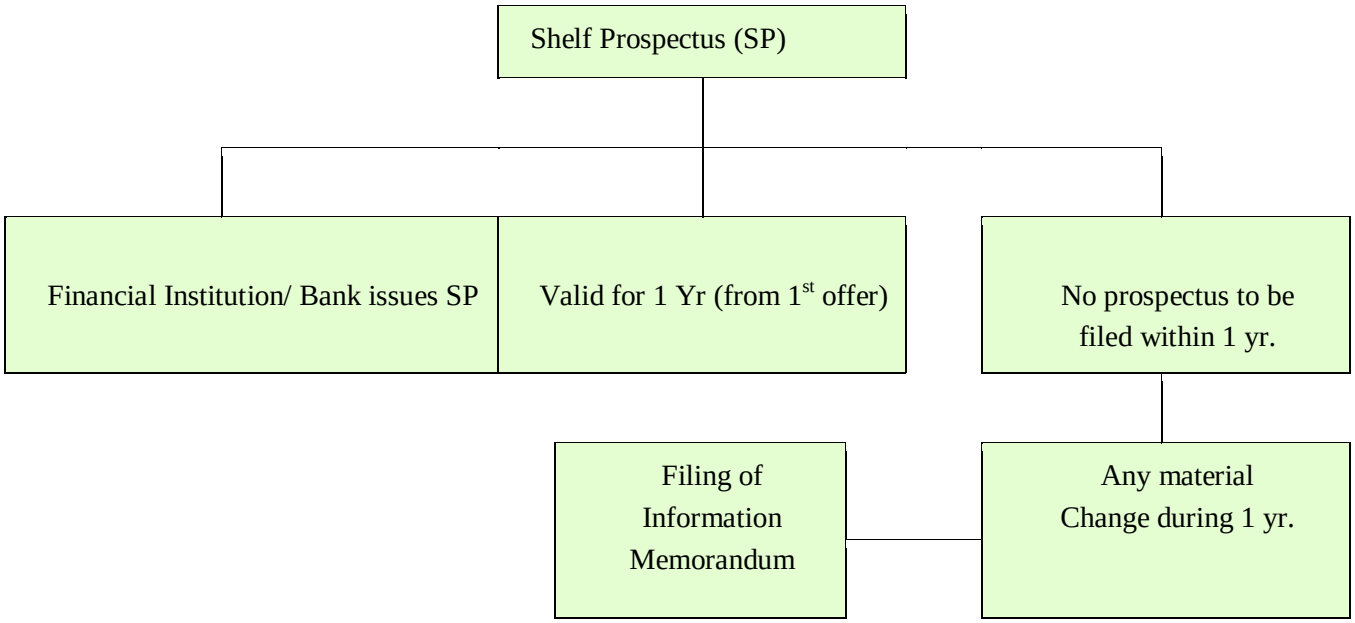
- **Shelf Prospectus (Section 31 of the Companies Act, 2013)** [validity wala prospectus]

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

In other words, shelf prospectus means a prospectus issued by any financial institution or bank for one or more issues of securities specified in the prospectus.

The concept of shelf prospectus has been introduced to save expenditure and time of the companies in issuing a new prospectus every time.

Conditions for Shelf Prospectus



(a) Eligibility for issue of Shelf Prospectus:

Any class of companies (i.e. Any public financial institution, public sector bank or scheduled bank whose main object is financing), as prescribed by the Securities and Exchange Board may file a shelf prospectus with the ROC at the stage of the first offer of securities.

(b) Validity Period:

The shelf prospectus shall not be valid for more than 1 year from the date of opening of the first offer of securities under the shelf prospectus.

Further, in respect of a second or subsequent offer issued during the period of validity of shelf prospectus, no further prospectus is required.

(c) No requirement of filing fresh prospectus within 1 year:

A company filing a shelf prospectus with the Registrar shall not be required to file prospectus afresh at every stage of offer of securities by it within the validity period of 1 year from the date of opening of the 1st issue of securities.

(d) Changes in the Material Information:

A company filing a shelf prospectus shall be required to file an information memorandum in respect of

any change in material facts i.e. Creation of new charges, changes in the financial position occurred between the first offer of securities or the previous offer of securities and the succeeding offer, with the ROC prior to second or subsequent issue.

(e) Refund of Money without filing Information Memorandum:

If a company has received application for the allotment of securities along with advance payments before filing the required changes with ROC.

If the applicants express a desire to withdraw their application, the company shall refund subscription within 15 days from the date of his withdrawal application.

(f) Filing with ROC:

Any class or classes of companies as may be prescribed by the SEBI, shall file a shelf prospectus with ROC

The information memorandum shall be prepared in Form PAS-2 and filed with ROC along with the fee within 1

Special Note: The information memorandum with ROC along with shelf prospectus shall be deemed to be a prospectus.

month prior to the second or subsequent issue under the shelf prospectus.

- **Red-Herring Prospectus (Section 32 of the Companies Act, 2013)** [price or quantity missing hai]

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

  In other words, Red Herring Prospectus is a prospectus, which does not have details of either price or number of shares being offered, or the amount of issue.

  Important Provisions:

  (a) **Issue of RHP prior to Prospectus**: A company proposing to issue of securities, issues a RHP prior to the issue of a prospectus.

  (b) **Filling with ROC:** A company proposing to issue a RHP shall file it with ROC at least 3 days prior to the opening of the offer.

  (c) **Variation in the RHP:** A RHP shall carry the same obligations as applicable to a prospectus.

  Any variation between the RHP and a prospectus shall be highlighted as variations in the prospectus.

  (d) **Registration of RHP (Prospectus'):** Upon the closing of the offer of securities, the prospectus must state all the details which have not been covered in the RHP shall file with the ROC and SEBI.

Note: RHP is issued when company comes with a public issue under book building process. RHP contains either the floor price of securities offered or a price band along with the range within which the Bids can move.

Special note: In the case of book-built issue which is also known as price discovery mechanism.

In this method, the price cannot be determined until the bidding process is completed.

Hence, such details are not to be shown in the Red Herring prospectus filed with ROC as per the Companies Act, 2013.

Only on completion of the bidding process, the details of the final price are included in the offer document.

The offer document filed thereafter with ROC is called a prospectus.

ISSUE OF SHARES AT A PREMIUM (Section 52 of the Companies Act, 2013) [face value se upper]

Premium means an amount collected by the company from its shareholders over the face value of securities.

Company may issue securities at a premium when it is able to sell them at a price above par or above nominal value.

The Companies Act, 2013 does not impose any conditions regulating the issues of securities by a company at a premium.

A company can receive an amount as premium and will be kept in the "Securities Premium Account".

The Securities Premium Account may be applied by the company for the following purposes:

(a) Towards the issue of fully paid bonus shares;

(b) In writing off the preliminary expenses of the company;

(c) In writing off the expenses of, or the commission paid or discount allowed on any issue of shares or debentures of the company;

(d) In providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or

(e) For buy-back of its own shares or securities.

Note: Certain class of companies (who comply with applicable accounting standard) can utilise securities premium account:

(a) In paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or

(b) In writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or

(c) For the purchase of its own shares or other securities.

Special Note: The premium cannot be treated as profit and as such the amount of premium is not available for distribution as dividend.

The amount of premium whether received in cash or in kind must be kept in a separate account, known as the "Securities Premium Account".

The amount of premium is to be maintained with the same sanctity as the share capital.

ISSUE OF SHARES AT A DISCOUNT (Section 53 of the Companies Act, 2013) [face value se kam]

When a company issues its shares at a price less than the face (nominal) value of shares, is known as "Shares issued at a discount".

As per the provision of section 53 of the Companies Act, 2013, no company can issue shares at a discount except issue of sweat equity shares.

Exception: An exception to the above provision is inserted by Companies (Amendment) Act, 2017:

A company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Note: Now, any share issued by a company at a discount except the above exception and sweat equity shall be void.

Penalties & Punishment: Fine on Company is not less than Rs.l lakh but not more than Rs.5 lakh and every officer who is in default shall be punishable with imprisonment for not less than 6 months or with fine which shall not be less than Rs.l lakh but not more than Rs.5 lakh or with both.

ALLOTMENT OF SHARES [abb shares milenge]

Allotment of shares means the act of appropriation of issue proceeds by the Board of Directors of the company.

An allotment is the acceptance of an offer to take shares by an applicant, and such acceptance must be communicated to allottees.

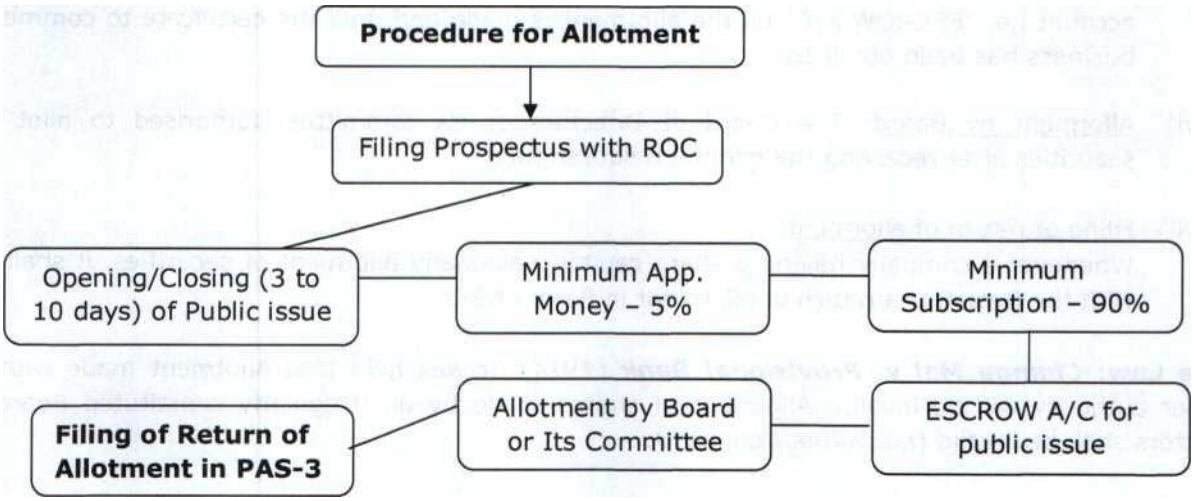
- General Principles regarding Allotment of shares
  - (i) The allotment should be made by the Board of Directors of the Company.
  - (ii) The allotment of shares must be made within a reasonable time.
  - (iii) The allotment should be absolute and unconditional: it means there is no condition for allotment of shares or securities.
  - (iv) The allotment must be communicated to all the allottees.
  - (v) The allotment shall only be made against application.
  - (vi) Allotment should not be in contravention of any other law.

Note:

Allotment made without proper authority shall be treated invalid.

- Allotment of shares made by an irregularly constituted Board shall be treated as invalid (it means quorum must be present in such Board Meeting).
- It is necessary that the Board should be duly constituted and should pass a valid resolution for allotment of shares at a valid Board meeting.

PROVISIONS FOR ALLOTMENT OF SECURITIES



Process for allotment of Securities:

(i) **Filling of prospectus/SLP with ROC:**

The issuer company shall file a prospectus or a statement in lieu of prospectus (SLP) with ROC before making an allotment.

No allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.

(ii) **Opening and closing of public issue:**

The subscription list must be kept open for at least 3 working days and not more than 10 working days.

In case of Rights issue, the SEBI ICDR Regulations provide that the issue shall remain open for atleast 15 days and not more than 30 days.

Note: If a company having paid-up share capital does not issue a prospectus, it cannot proceed with the allotment unless the Company has not filed prospectus/SLP.

(iii) **Minimum Application Money:**

The amount payable on application on every security shall not be less than 5% of the nominal amount of the security.

(iv) **Minimum Subscription:**

If minimum amount has not been subscribed and the sum payable on application is not received within 30 days from the date of issue of the prospectus, the amount so received shall be returned within 15 days from the closure of the issue.

If any such money is not so repaid within such period the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at 15% P.A.

(v) **Separate Bank Account:**

The company shall receive in cash the amount payable on application which shall not be less than 5% of the nominal value of the shares and such amount shall be kept in separate bank account i.e. "ESCROW A/C" till the allotment is made and until the certificate to commence business has been obtained.

(vi) **Allotment by Board:**

The Board of Directors or its committee authorised to allot the securities after receiving the minimum subscription.

(vii) **Filing of return of allotment:**

Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in Form PAS-3.

Case Law: **Changa Mai v. Provisional Bank (1914)**, it was held that Allotment made without proper authority will be invalid. Allotment of shares made by an irregularly constituted Board of directors shall be invalid (i.e. without quorum).

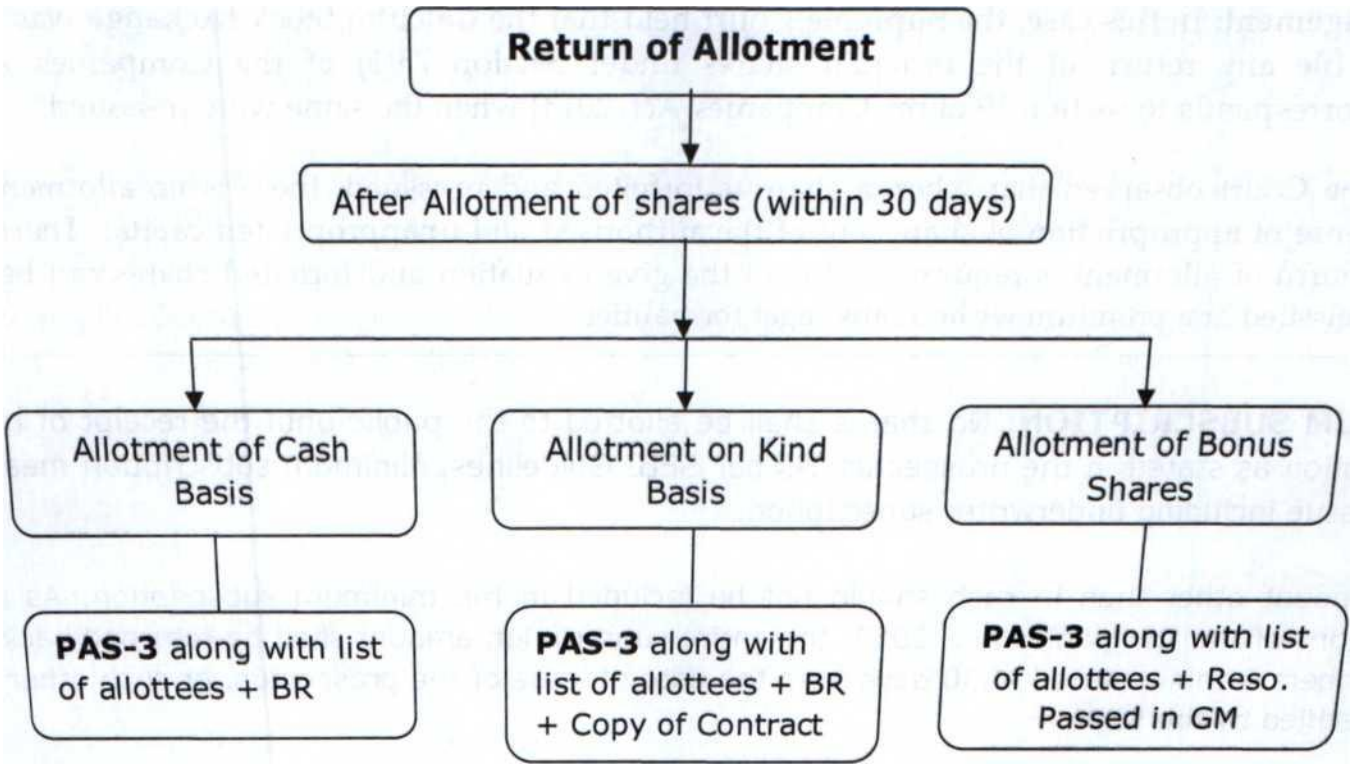
Case Law: **Homes District Consolidated Gold Mines (1888)**, it was held that it is necessary that the Board should be duly constituted and should pass a valid resolution of allotment at a valid meeting.

FILING OF RETURN OF ALLOTMENT:

Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in Form PAS-3.

Companies (Prospectus and Allotment of Securities) Rules, 2014:

Rules for allotment of securities



If a company makes any allotment of its securities, shall file a return of allotment in Form PAS-3 along with fee within thirty days from the date of allotment.

The following documents should be attached with the return of allotment:

(a) A list of allottees stating their names, address, occupation and number of securities allotted to each of the allottees.

Note: The list shall be certified by the signatory of the Form PAS-3 as being complete and correct as per the records of the company.

(b) Copy of contract in case securities allotted as fully or partly paid-up for consideration other than cash.

(c) In the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form PAS-3.

Penalty for default:

In case of any default, the company and its officer who is in default shall be liable to a penalty, for each default, of Rs.1000/- for each day during which such default continues or Rs.1,00,000/, whichever is less.

Q4. A public limited company forfeited 80 equity shares and re-issued the same which resulted in earning a surplus of Rs.2000. The company did not file return of allotment with the Registrar of Companies in respect of reissued shares. Explain whether the company has contravened any provisions of the Companies Act, 2013 by non-filing of the return. (June 2007)

A4. In given situation, public company is not required to file return of allotment of shares since it is not an allotment of shares.

It is an appropriation of shares out of the authorised and unappropriated capital.

Case Law: Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd.(1963)

Facts: In this case, Calcutta Stock Exh. (Company) did not file return of allotment after re-issue of forfeited shares with the Registrar of Companies.

Judgment: In this case, the Supreme Court held that the Calcutta Stock Exchange was not liable to file any return of the forfeited shares under Section 75(1) of the Companies Act, 1956 [Corresponds to section 39 of the Companies Act, 2013] when the same were re-issued.

The Court observed that when a share is forfeited and re-issued, there is no allotment, in the sense of appropriation of shares out of the authorised and un-appropriated capital.

Therefore, no return of allotment is required to file in the given situation and forfeited shares can be further reissued at a premium without any legal formalities.

MINIMUM SUBSCRIPTION: [kam se kam itna to subscribe karo]

No shares shall be allotted to the public until the receipt of minimum subscription as stated in the prospectus.

As per SEBI Guidelines, Minimum subscription means 90% of the issue including underwriter subscription.

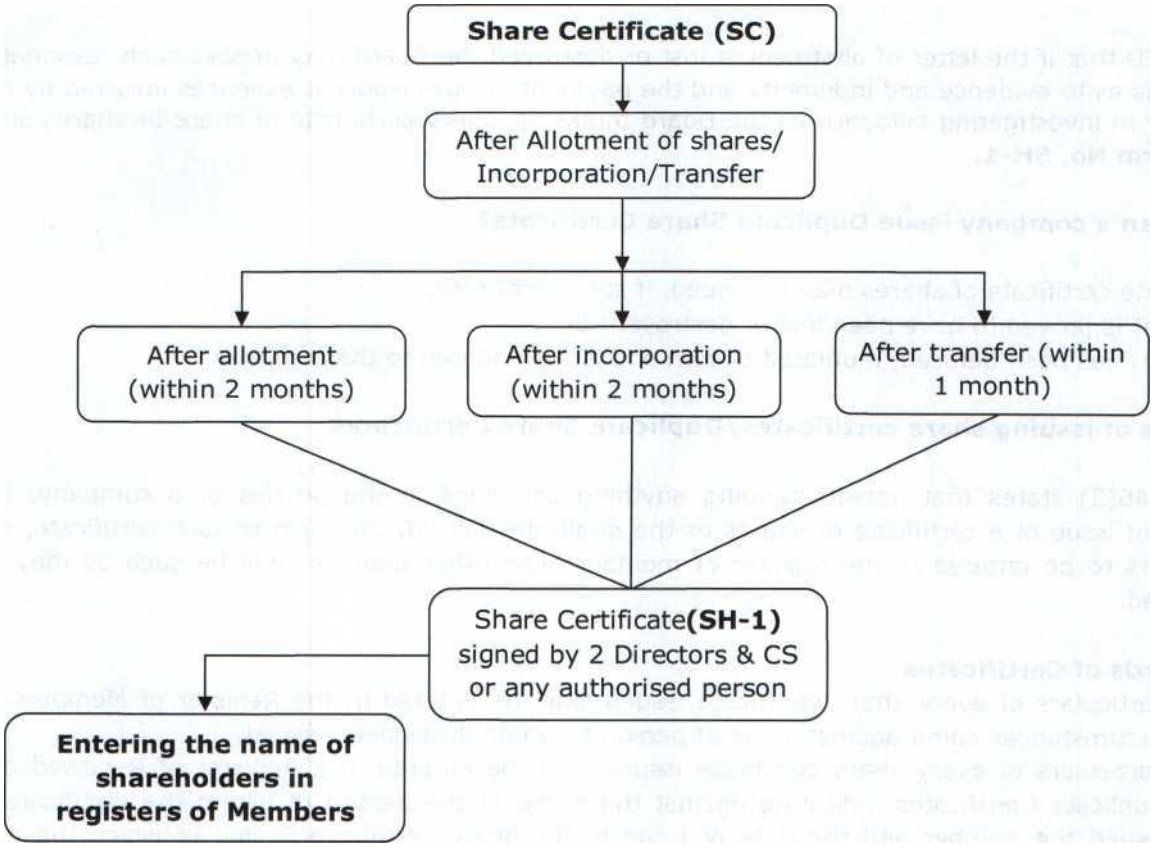
Any amount other than in cash should not be included in the minimum subscription.

As per the provisions of the Companies Act, 2013, the entire subscription amount shall be returned back to the subscribers within a period of 30 days from the date of issue of the prospectus, or such other period as specified by the SEBI.

Note: 15 days' period is available for the refund the application money from the closure of the issue if the company does not receive minimum subscription. If the company fails to refund within 15 days, the company shall be liable to Interest at the rate of 15% P.A.

SHARE CERTIFICATE [proof of oenership]

Section 46 of the Companies Act, 2013



A share certificate is a certificate issued to the members by the company under its common seal specifying the number of shares held by him and the amount paid on each share.

The certificate is the only documentary evidence of title in the possession of the shareholder.

Every share in a company having share capital shall be distinguished by distinctive number.

Note: This section does not apply to shares held by a person as a beneficial owner in depository (i.e. shares in demat account).

In case, the shares are held in dematerialised form the record of the depository is the prima facie evidence of the interest of the beneficial owner.

- **Time of Issue of Share Certificate**: A Company must deliver share certificate to the shareholders:

  Within 2 months from the date of allotment; or

  Within 2 months from the date of incorporation for subscribers to the memorandum; or

  Within 1 month from the date of receipt by the company for transfer.

- **Significance of Share Certificate**: A certificate of shares is evidence to the effect that the allottee is holding a certain number of shares of the company showing their nominal and paid-up value and distinctive numbers.

- **Issue of Share Certificates**

  When a company issues any capital, no share certificate shall be issued, except:

  (i) In pursuance of a Board resolution and;

  (ii) On surrender to the company of its letter of allotment or its fractional coupons of requisite value, save in cases of issues against letters of acceptance or of renunciation, or in cases of issue of bonus shares;

  PROVIDED that if the letter of allotment is lost or destroyed the Board may impose such reasonable conditions as to evidence and indemnity and the payment of out-of-pocket expenses incurred by the company in investigating evidence as the Board thinks fit. Every certificate of share or shares shall be in Form No. SH-1.

When can a company issue Duplicate Share Certificate?

A duplicate certificate of shares may be issued, if such certificate:

(a) is proved to have been lost or destroyed; or

(b) has been defaced, mutilated or torn and is surrendered to the company.

Methods of issuing share certificates/Duplicate Share Certificates

Section 46(3) states that notwithstanding anything contained in the articles of a company, the manner of issue of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members and other matters shall be such as may be prescribed.

- **Records of Certificates**

(i) Particulars of every share certificate issued shall be entered in the Register of Members as circumstances admit against name of person to whom it has been issued.

(ii) Particulars of every share certificate issued shall be entered in a Register of Renewed and Duplicate Certificates indicating against the name of the person to whom the certificate is issued the number and the date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members.

(iii) All entries made in the Register of Members or the Register of Renewed and Duplicate Certificates shall be authenticated by the secretary or such other person as appointed by the Board for the purpose of sealing and signing the share certificate.

- **Sealing and Signing of Certificate**

Every share certificate shall be issued under common seal, if any, of the company, which shall be affixed in the presence of:

(i) 2 directors or persons acting on behalf under a duly registered power of attorney; and

(ii) The secretary or person appointed by the Board for the purpose. The 2 directors or their attorney/attorneys and the secretary or other person shall sign the share certificates:

PROVIDED that if the composition of the Board permits, at least 1 of the aforesaid two directors shall be a person other than the managing or whole-time director.

Note: In case a company does not have a common seal, the share certificate shall be signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

In case of an OPC (One Person Company), every share certificate shall be issued under the common seal, if any, of the company, which shall be affixed in the presence of and signed by one director or a person authorised by the Board of Directors of the company and the Company Secretary, or any other person authorised by the Board for the purpose, and in case OPC does not have a common seal, the share certificate shall be signed by the persons in the presence of whom the seal is required to be affixed.

Special Note: As per the Companies (Amendment) Act, 2015, Common seal is optional to use on shares certificate.

- **Legal Effect of Share Certificate** [shares mere hai]

A share certificate once issued by the company binds it in two ways, namely: —

> **Estoppel as to Title:**

A share certificate once issued binds the company in two ways.

In the first place, it is a declaration by the company to the entire world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company.

In other words, the company is estopped from denying his title to the shares.

> **Estoppel as to Payment:**

If the certificate states that on each of the shares full amount has been paid, the company is estopped as against a bona fide purchaser of the shares, from alleging that they are not fully paid.

If a person knows that the statements in a certificate are not true, he cannot claim an estoppel against the company.

Despite everything, a certificate must be issued by someone who has the authority.

Further a certificate is not evidence as to the equitable interest in shares.

Also, where an individual is aware of the false statements in a certificate, he will not be entitled to claim an estoppel.

Q5. Teji Pvt. Ltd. received a cheque ofRs.10 lacs towards the shares application money from Vinod on 31st March, 2005. On the same day, the Board of Directors allotted the shares, filed necessary returns and issued the share certificate. The cheque was subsequently deposited with the bank which bounced. Advise the company. (June 2005)

A5. A company has no right to withdraw amount mentioned on the shares certificate.

Moreover, when the company issues a certificate, it holds out to the world that the facts contained therein are true.

Any person acting on the faith of the share certificate of the company, can compel the company to pay compensation for any damage caused by reason of any misstatement in the share certificate as the company is bound by any statements made in the certificate.

Case Law: Bloomenthal v. Ford (1897)

In this case, it was held that the company cannot dispute the amount mentioned on the certificate as already paid.

Accordingly, in the given situation, Teji Pvt. Ltd. cannot withdraw share certificate.

It is the responsibility of Board of Directors to make sure that the application money must be received before allotment of shares and issue of share certificate in this regard.

The Board of Directors who made the allotment of shares shall be liable to the company for such lapse.

CHAPTER 2.3
SHARES & SHARE CAPITAL
Issue of Securities

Issue of Securities

Finance being life blood of any organization is needed both at the time of starting the business as well as for running the business.

This chapter deals with various ways through which the Company can raise fund by issue of securities.

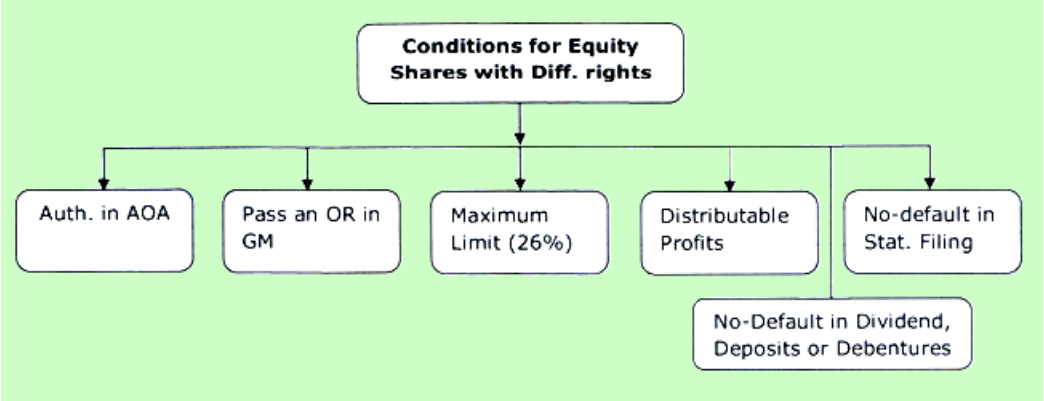
By the end of this chapter we will be able to raise fund through:

- Issue of Equity Shares with differential rights
- Issue and Redemption of Preference Shares
- Further Issue of Shares
- Private Placement
- Issue of Bonus shares
- Issue of Sweat Equity shares

ISSUE OF EQUITY SHARES WITH DIFFERENTIAL RIGHTS

[Hum tumse alag hai]

Section 43 of the Companies Act, 2013 & Rule 4 of Companies (Share Capital and Debentures) Rules, 2014



No company (whether unlisted or listed public company) shall issue equity shares with differential rights as to dividend, voting or otherwise, unless it complies with the following conditions:

(a) Authorisation in the Articles of Association (AQAI):

The AOA of the company authorizes the issue of shares with differential rights.

(b) Shareholder's Approval:

The issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders.

Note: In case of listed companies, the issue of such shares shall be approved by the shareholders through postal ballot.

(c) Maximum Limit:

The shares with differential rights shall not exceed 26% of the total post- issued paid-up equity share capital including equity shares with differential rights issued at any point of time.

(d) Distributable Profits:

The Company having consistent track record of distributable profits for the last 3 years.

(e) No default in Statutory Filling:

The Company has not defaulted in filing financial statements and annual returns for 3 financial years immediately preceding the financial year in which it is decided to issue such shares.

(f) No Default in the Payment of Dividend, Deposits or Debentures etc.

(g) The Company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend.

(h) No Penalty:

The Company has not been penalized by Court or NCLT during the last three years of any offence under the RBI Act, 1934, the SEBI Act, 1992, the Securities Contracts Regulation Act, 1956, the FEMA Act, 1999 or any other special Act.

Conversion of existing equity share capital into differential voting rights and vice-versa not possible

The company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice versa.

Procedure of Issue of Equity Shares with differential rights

Check authority in AOA, if Articles do not authorize, first amend the AOA
↓
Hold BM to call a GM and issue notice of GM.
↓
Check whether all the conditions relating to issue are met
↓
Listed Company shall inform the decision at BM to Stock Exchange (SE) within 15 minutes
↓
Hold GM and pass Ordinary Resolution at GM.
↓
Allot the shares and file Return of allotment in PAS- 3 within 30 days of allotment.
↓

Listed Company shall send copy of proceedings of the GM to SE within 24 hours of event
↓
If shares held in Dematerialized form, inform depositories about allotment.
↓
Update Member Register by making allotment entries. Issue Share Certificates

ISSUE AND REDEMPTION OF PREFERENCE SHARES

Section 55 of the Companies Act, 2013: A Company Limited by shares may issue redeemable preference shares subject to the provisions in the AOA, for a period not exceeding 20 years from the date of its issue.

Conditions for Issue of Preference shares:

A company may issue preference shares subject to the fulfilment of the following conditions:

(a) The Preference Shares may be issued only after passing a special resolution;

(b) No default made in respect of redemption of preference shares or payment of dividend.

Special Note: In case a company engaged in the setting up and dealing with of infrastructural projects may issue preference shares for a period exceeding 20 years but not exceeding 30 years, subject to the redemption of a minimum 10% of such preference shares per year from the 21st year onwards or earlier, on proportionate basis, at the option of the preference shareholders.

Timeline for Redemption of Preference shares

A company may redeem its preference shares only on the terms on which they were issued and the preference shares may be redeemed:

(a) at a fixed time or on the happening of a particular event;

(b) any time at the company's option; or

(c) any time at the shareholder's option.

The explanatory statement to the Special Resolution must contain the following information:

(a) The size of the issue and number of preference shares to be issued and nominal value of each share;

(b) The nature of such shares i.e. cumulative or non-cumulative, convertible or non-convertible etc.;

(c) The objectives of the issue, the manner of issue of shares;

(d) The price at which such shares are proposed to be issued;

(e) The basis on which the price has been arrived at;

(f) The terms of issue, including terms and rate of dividend on each share, etc.;

(g) The terms of redemption, including the tenure of redemption, redemption of shares at premium and if the preference shares are convertible, the terms of conversion;

(h) The manner and modes of redemption;

(i) The current shareholding pattern of the company;

(j) The expected dilution in equity share capital upon conversion of preference shares. Conditions for redemption

(i) Redemption out of profits or issue Proceeds: A Company can redeem preference shares in the following two ways:

i. Redemption of preference shares out of the profits which is available for dividend.

ii. Redemption of preference shares out of the proceeds of a fresh issue of shares made for the purposes of such redemption.

Note: A Company can only redeem those Preference shares which are fully paid-up.

(k) Creation of Capital Redemption Reserve: A company which has issued redeemable preference shares, shall transfer a sum equal to the nominal amount of the shares to be redeemed, to a "Capital Redemption Reserve Account".

The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Inability to redeem (Section 55(3) of the Companies Act. 2013)

In case, a company is not in a position to redeem any preference shares or to pay dividend on such shares as per the terms of issue.

Under such circumstance, a company may with the consent of 3/4th preference shareholders in value subject to the approval of the NCLT, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed.

Note: The issue of further redeemable preference shares or the redemption of preference shares shall not be deemed to be an increase or, a reduction, in the share capital of the company.

Procedure of Issue of Preference Shares

Check authority in AOA, if Articles do not authorize, first amend the AOA
↓
No subsisting default in the payment of dividend and redemption of preference shares earlier
↓
Check whether all the conditions relating to issue are met
↓
Hold BM and Issue Notice to call GM along with Explanatory statement
↓
Hold GM and pass Special Resolution at GM.
↓
File the Special Resolution so passed with ROC in MGT 14 within 30 days of passing the SR
↓
Allot the shares and file Return of allotment in PAS- 3 within 30 days of allotment.
↓

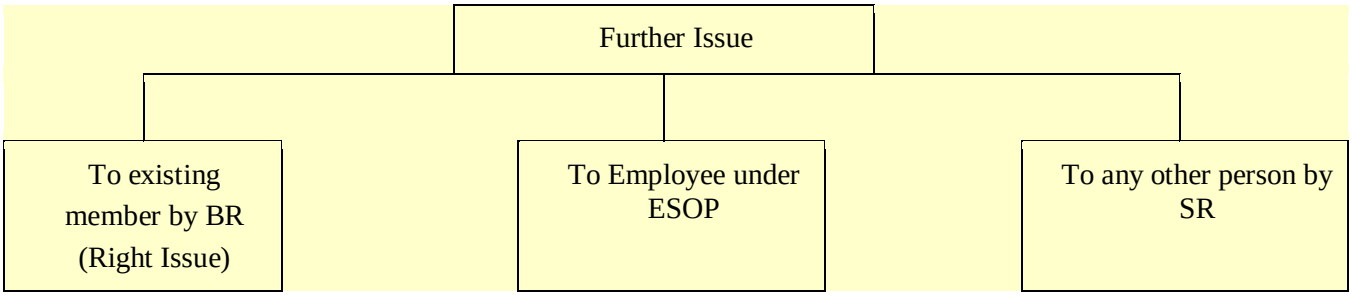
If shares held in Dematerialized form, inform depositories about allotment.
↓
Update Member Register by making allotment entries. Issue Share Certificates

Procedure of Redemption of Preference Shares

The redemption should be as per the agreed terms at the time of issue and amended later.
↓
Hold BM and pass Board Resolution for approval of Redemption of Preference Shares.
↓
The notice of redemption to be filed by the company with the ROC in Form SH-7

FURTHER ISSUE OF SHARES (Section 62 of the Companies Act, 2013)

When the directors feel the requirement of additional funds for expansion or diversification or for any other reason, they may issue further shares.



1. **RIGHT ISSUE OF SHARES** [Pehle Gharwale]

   Rights offering (issue) is an issue of right to a company's existing shareholders to entitle them to buy additional shares directly from the company in proportion to their existing holdings.

   The objective is to raise fund and to ensure equal distribution of Rights.

   The Company shall offer the shares to the persons who, at the date of the offer, are holders of equity shares of the company in proportion to the paid-up share capital.

   The offer shall be made by notice specifying the number of shares offered.

   The offer shall be open not less than 15 days before and not exceeding 30 days from the date of the offer. If the offer is not accepted within the period it shall be deemed to have been declined.

> **Special Note:** In case of private limited company, time limit for acceptance of offer by existing shareholders may be less than 15 days, if 90% of the members of the company have given their consent either in writing or through electronic mode.

Note: After expiry of the offer or on receipt of decline of offer, the Board of Directors may dispose of such offered

shares in any manner which is not disadvantageous to the shareholders and the company. The notice of offer shall be sent either by registered post or speed post or by electronic mode to all the existing shareholders at least 3 days before the opening of the issue.

The provisions regarding issue of further shares do not apply to:

(a) Increase of the subscribed capital:

Increase of the subscribed capital of a company caused due to conversion of convertible debentures issued or Convertible Preference shares into shares.

(b) Conversion of Govt. Loans:

Conversion of part or whole of the debentures issued to or loans obtained from any Government in shares of the company in pursuance of a direction issued by that Government in public interest on such terms and conditions as appear to be fair and reasonable to the Government even if the terms of issue of such debentures or loans do not contain a term providing for an option for such conversion.

Case Law: **Nanalal Zaver v. Bombay Life Assurance Co. Ltd. (1950)**

Facts: Section 81 (Corresponding to section 62 of the Companies Act, 2013) is intended to cover cases where the directors decide to increase the capital by issuing further shares within the authorised limit, because it is within that limit that the directors can decide to issue further shares, unless, of course, they are precluded from doing that by the Articles of Association of the company.

Judgment: In this case, it was held that this section (62 of the Companies Act, 2013) becomes applicable only when the directors decide to increase the capital within the limit of authorised capital, by issue of further shares.

Case Law: **Mathalone (R) v. Bombay Life Assurance Co. Ltd. (1954)**

In this case, the Court held that the transferor could not be compelled by the transferee to take up on his behalf the rights shares offered to the transferor and all that he could require the transferor to do was to renounce the rights issue in the transferee's favour.

Procedure of Right Issue

Hold a BM to approve right issue including "letter of offer".
↓
Send letter of offer of the existing shareholders atleast 3 days before opening of issue.
↓
Receive acceptance or renunciation or rejection of rights within the specified time (Min:15, Max:30 days)
↓
Hold BM to allot shares
↓
File Return of allotment in PAS- 3 with ROC within 30 days of allotment.

↓
A public Company files the letter of offer in MGT 14 within 30 days of passing the BR in which it was approved.
↓
Allot the shares and file Return of allotment in PAS- 3 within 30 days of allotment.
↓
If shares held in Dematerialized form, inform depositories about allotment.
↓
Update Member Register by making allotment entries. Issue Share Certificates

Q1. DJA Co. Ltd. is holding 40% of total equity shares in MR Company Ltd. The Board of MR Company Ltd. decided to raise the paid up equity share capital by issuing further shares & also decided not to offer any shares to DJA Co. Ltd. on the ground that it was already holding a high percentage of shares. AOA of MR Co. Ltd. shares provides that shares be offered to existing shareholders. Thereafter shares were issued to all the shareholders except DJA Co. Ltd Examine the validity of the decision. (4 marks) CAIPCC May 2007, 2001

A1. The decision of the Board is invalid as refusal to offer shares on the ground that already a high percentage of shares is held by a shareholder.

Q2. The Board of Directors of Nav Avtar Ltd. passed a resolution for issue of rights shares. However, certain shareholders of the company raised an objection as to whether the company needed additional capitA1. Discuss the validity of the counter-move taken by the shareholders and resolution passed by the Board. (4 marks) June, 2012

A2. A shareholder has right to raise a question against the decision of the Board of Directors for raising fund via rights issue.

If the Board of Directors passed a resolution to raise funds via rights issue for the legitimate business requirements of the Company, then the shareholder's objections shall not be entertained by the Court/Tribunal.

In Needle Industries (India) Ltd. v. Needle Industries Neivay (India) Holding Ltd., it was held that for the benefits of the Company, the Board of Directors exercise their rights to raise fund via Rights Issue.

II. EMPLOYEE STOCK OPTION (ESOP) [aab employees ki bari]

Employees Stock Option (Section 2(37)) means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

Section 62(l)(b) provides that a company may issue further shares to its employees under a scheme of employees' stock option, subject to special resolution passed by company and subject to such conditions as may be prescribed.

In case of **private company** special resolution has been substituted by **ordinary resolution.**

Rule 12 of Companies (Share Capital and Debentures) Rules, 2014

Every company other than listed company is required to comply with the following requirements:

- Approval of Share Holders:

  The issue of Employees Stock Option Scheme has been approved by the shareholders of the company by passing a Special Resolution.

> **Special Note:** In case of Private Company, Ordinary Resolution is required in place of Special Resolution.

- Who are eligible for an ESOP Scheme?

  (a) a permanent employee of the company who has been working in India or outside India; or

  (b) a director of the company, whether a whole time director or not but excluding an independent director; or

  (c) an employee or director of a subsidiary, in India or outside India, or of a holding company of the company or of an associate company.

- Who are not eligible for an ESOP Scheme?

  (a) Promoter-cum-Employee, an employee who is a promoter or a person belonging to the promoter group; or

  (b) Director-cum-Employee, a director who either himself or through his relative or through anybody corporate, directly or indirectly, holds more than 10% of the outstanding equity shares of the company.

Disclosures in explanatory statement of Notice for passing Special Resolution

(a) total number of stock options to be granted;

(b) identification of classes of employees entitled to participate in the ESOP Scheme;

(c) the appraisal process for determining the eligibility of employees to the ESOP Scheme;

(d) the requirements of vesting and period of vesting;

(e) the maximum period within which the options shall be vested;

(f) the exercise price or the formula for arriving at the same;

(g) the exercise period and process of exercise;

(h) the Lock-in period, if any;

(i) the maximum number of options to be granted per employee and in aggregate;

(j) the conditions under which option vested in employees may lapse e.g. in case of termination of employment for misconduct;

(k) the specified time period within which the employee shall exercise the vested options in the event of a proposed termination of employment or resignation of employee; and

(L) a statement regarding the company shall comply with the applicable accounting standards.

(m) free pricing in conformity with accounting policies.

Varying the terms of ESOP requires special resolution:

The company may by special resolution, vary the terms of Employees Stock Option Scheme not yet exercised by the employees provided such variation is not prejudicial to the interests of the option holders.

The notice for passing special resolution for variation of terms of Employees Stock Option Scheme shall disclose full of the variation, the rationale therefore, and the details of the employees who are beneficiaries of such variation.

Minimum one year vesting period:

There shall be a minimum period of 1 year gap between the grant of options and vesting of option.

In a case where options are granted by a company under its Employees Stock Option Scheme in lieu of options held by the same person under an Employees Stock Option Scheme in another company, which has merged or amalgamated with the first mentioned company, the period during which the options granted by the merging or amalgamating company were held by him shall be adjusted against the minimum vesting period required.

Company has freedom to specify lock-in period:

The Company shall have the freedom to specify the lock-in period for the shares issued pursuant to exercise of option.

No right of dividend or voting till exercise of option:

The Employees shall not have right to receive any dividend or to vote or in any manner enjoy the benefits of a shareholder in respect of option granted to them, till shares are issued on exercise of option.

Forfeiture/refund:

The amount, if any, payable by the employees, at the time of grant of option:

(a) may be forfeited by the company if the option is not exercised by the employees within the exercise period; or

(b) the amount may be refunded to the employees if the options are not vested due to non- fulfilment of conditions relating to vesting of option as per the Employees Stock Option Scheme.

Note:

(a) The option granted to employees shall not be transferable to any other person.

(b) The option granted to the employees shall not be pledged, hypothecated, mortgaged or otherwise encumbered or alienated in any other manner.

(c) No person other than the employees to whom the option is granted shall be entitled to exercise the option.

Status of ESOP option in cases of Death/permanent disability/resignation of employees

(a) Death of Employee:

In the event of the death of employee while in employment, all the options granted to him till such date shall vest in the legal heirs or nominees of the deceased employee.

(b) Permanent incapacity:

In case the employee suffers a permanent incapacity while in employment, all the options granted to him as on the date of permanent incapacitation, shall vest in him on that day.

(c) Resignation of Employment:

In the event of resignation or termination of employment, all options not vested in the employee as on that day shall expire.

Disclosure in the Board's Report:

The Board of Directors shall disclose the details in the Director's Report in a particular year of the ESOP Scheme i.e. options granted, options vested, options exercised, the total number of shares arising as a result of exercise of option, options lapsed, the exercise price, variation of terms of options, money realized by exercise of options, total number of options in force, employee wise details of options granted.

Procedure of ESOP

Draft an ESOP Scheme
↓
Convene the Board Meeting and pass the scheme. And call GM to take shareholder's approval
↓
Approve the ESOP Scheme by passing a special resolution (ordinary resolution in case of Private Company)
↓
File Special Resolution with ROC in form MGT 14 within 30 days of passing SR passed.
↓
After approval of ESOP scheme, grant options to the eligible employees
↓
Vesting of Options- Minimum vesting period of 1 year.
↓
Exercise of Options by the employee
↓
Allotment of shares and filing of PAS-3 form within 30 days of allotment.
↓
If shares held in Dematerialized form, inform depositories about allotment.
↓
Maintain a Register of Employee Stock Options in form SH-6.
↓
Issue share certificates if shares issued in physical form.

III. ISSUE OF SHARES ON PREFERENTIAL BASIS [Joh karib hai unko hi milega]

PREFERENTIAL OFFER/ ISSUE (Section 62 of the Companies Act, 2013 and Rule 13 of Companies (Share Capital and Debentures) Rules, 2014)

Preferential Offer means an issue of shares or other securities,

by a company to any select person or group of persons on a preferential basis

and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

Shares or other securities mean equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

Conditions: In case of a listed company, the preferential offer of shares or other securities is made by a company in accordance with the provisions of the Companies Act, 2013 and SEBI regulations.

In case of unlisted company, the preferential offer shall be made in accordance with the provisions of the Companies Act, 2013 and its rules and subject to fulfilment of the following requirements: —

(a) The issue is authorized by its Articles;

(b) The issue has been authorized by a special resolution of the members.

The following disclosures are required in the Explanatory Statement attached to the notice of the general meeting for preferential Offer:

(a) the objects of the issue, the total number of shares or other securities to be issued;

(b) the price or price band at/within which the allotment is proposed;

(c) basis on which the price has been arrived at along with report of the registered valuer;

(d) relevant date with reference to which the price has been arrived at;

(e) the class or classes of persons to whom the allotment is proposed to be made;

(f) intention of promoters, directors or key managerial personnel to subscribe to the offer;

(g) the proposed time within which the allotment shall be completed;

(h) the names of the proposed allottees and the % of post preferential offer capital that may be held by them;

(i) the change in control in the company that would occur consequent to the preferential offer;

(j) the number of persons to whom allotment on preferential basis have already been made during the year, in terms of number of securities as well as price;

(k) the justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer;

(L) pre issue and post issue shareholding pattern of the company.

Completion Period:

The allotment of securities must be completed within 12 months from the date of passing of special resolution.

In case a Company fails to allot securities within 12 months from the date of passing of the special resolution, another special resolution shall be passed for the company to complete such allotment thereafter.

Valuation of Shares:

The price of the shares or other securities to be issued on a preferential basis, either for cash or for consideration other than cash, shall be determined on the basis of valuation report of a registered valuer.

In case of listed companies the price of shares to be issued on a preferential basis is not required to be determined by the valuation report of a registered valuer.

Rights of Convertible Securities:

The applicability of above provisions shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.

Note: The terms of issue of such debentures or loan containing such an option have been approved before the issue of such debentures or the raising of loan by a special resolution passed in general meeting.

Special Note: It is to be noted that preferential issue of shares is required to comply with section 42 also which relates to private placement.

However, in case the preferential offer is made by a company to one or more existing members only, few provisions relating to private placement in PAS-5 & offer letter in PAS-4 shall not apply.

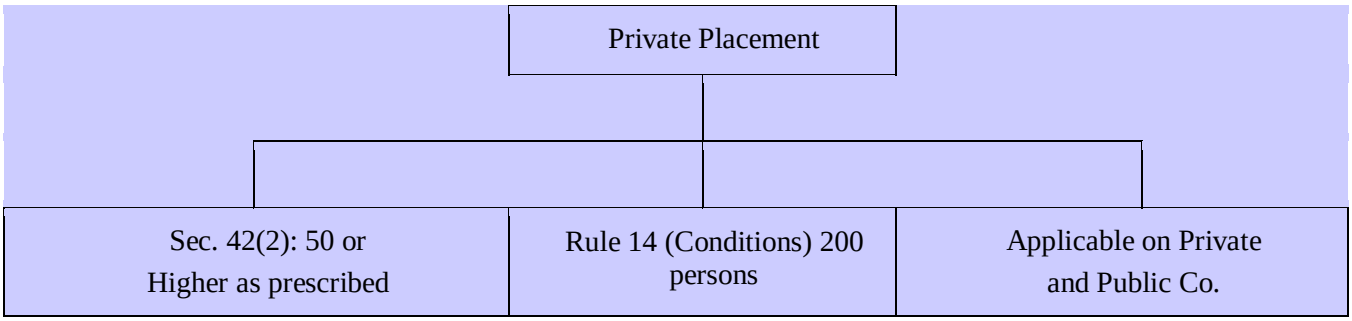
Procedure for Preferential Allotment

Check authority in Articles of Association. If no authority in AOA, first amend it.
↓
Convene the Board Meeting to issue notice to call GM to take shareholder's approval, via SR
↓
Pass a special resolution at GM
↓
File Special Resolution with ROC in form MGT 14 within 30 days of passing SR
↓
The valuation should be done by a registered valuer.
↓
Allotment of shares and filing of PAS-3 form within 30 days of allotment.
↓
If shares held in Dematerialized form, inform depositories about allotment.
↓
Update members register.
↓
Issue share certificates if shares issued in physical form.

Special Note: In addition to above the procedure for private placement discussed below should also be complied with.

PRIVATE PLACEMENT (Section 42(2) of the Companies Act, 2013)

Private Placement means any offer of securities or invitation to subscribe securities to a select group of persons (hereinafter called identified person) by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in section 42.



Note: A company may make private placement through issue of a private placement offer letter in Form PAS-4 to investors.

Maximum number of persons to whom private placement can be offered - Section-42(2).

Private Placement offer can be made to identified persons not exceeding 50 or such higher number as may be prescribed excluding qualified institutional buyers (QIBs) and employees of the company being offered securities under a scheme of employee's stock option, in a financial year.

Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014

Private Placement Offer shall be made to not more than 200 persons in the aggregate in a financial year.

Any offer or invitation made to qualified institutional buyers or to employees of the company under a scheme of employee's stock option shall not be considered while calculating the limit of 200 persons.

Special Note:

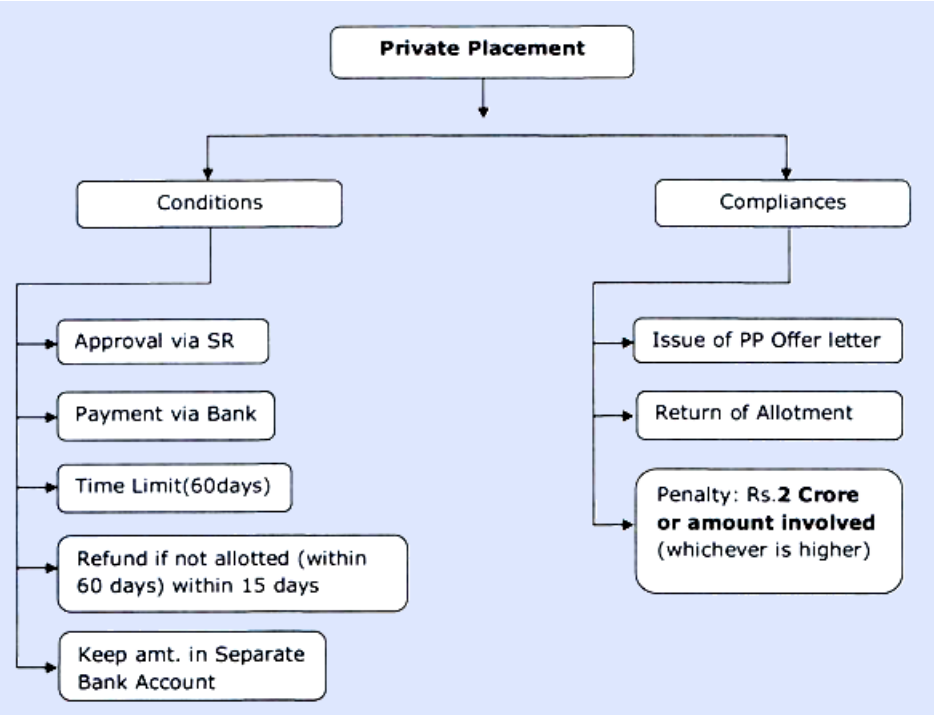
(a) **Restrictions:** The above restrictions would be considered individually for each kind of security i.e. equity share, preference share or debenture etc.

(b) **Minimum Investment Size:** The value of such offer or invitation per person shall be with an investment size of not less than Rs 20,000/-of face value of the securities.

(c) **Investment only through Bank Account:** The payment to be made for subscription to securities shall be made from the bank account of the person subscribing to such securities and the company shall keep the record of the Bank account from where such payments for subscriptions have been received.

(d) **Joint Holders:** Monies payable on subscription to securities to be held by joint holders shall be paid from the bank account of the person whose name appears first in the application.

Conditions and Compliances for Private Placement



Approvals:

The proposed offer of securities must have been previously approved by a special resolution of the shareholders of the company.

Special Note:

(a) **Explanatory Statement:** The explanatory statement to the notice in respect of special resolution for General Meeting must justify the price (including premium) at which the offer or invitation is being made.

(b) **Validity of Special Resolution for Non-convertible debentures:** In case of offer or invitation for non-convertible debentures, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

(c) **No Fresh Offer:** No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.

(d) **Public offer:** Any offer or invitation not in compliance with the provisions of the Companies Act, 2013 shall be treated as a public offer, and the Securities Contracts (Regulation) Act, 1956 and the SEBI Act, 1992 shall be required to be complied with.

1. **Mode of payment:**

   All monies payable towards subscription of securities shall be paid through cheque or demand draft or other banking channels but not by cash.

   The Company shall not utilize monies raised through private placement unless:

   - Allotment is made, and
   - Return of allotment is filed with ROC.

2. **Time limit for allotment:**

   A company making an offer or invitation shall allot its securities within 60 days from the date of receipt of the application money for such securities.

3. **Refund of subscription money:**

   If the company fails to allot the securities within 60 days, then it shall repay the application money to the subscribers within 15 days from the date of completion of 60 days and if the company would not be able to repay the application money within 15 days, then such company shall be liable to repay the subscription money along with interest @ 12% P.A. after the expiry of 60 days.

4. **Subscription money to be kept in a separate bank account:**

   The monies received as share application money shall be kept in a separate bank account in a scheduled bank and shall not be utilized for any purpose other than:

   (a) for adjustment against allotment of securities; or

   (b) for the repayment of monies where the company is unable to allot securities.

Compliances relating to Private Placement

Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014

(a) Issue of Private Placement Letter:

A private placement offer letter shall be accompanied by an application form serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in electronic mode, within 30 days of recording the names of such persons.

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

Note: No company offering securities under this section shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an offer.

(b) Return of allotment:

Whenever a company makes any allotment of securities, it shall file with the ROC a return of allotment within 15 days along with the complete list of all security- holders, with their full names, addresses, number of securities allotted and such other relevant information.

If a company defaults in filing the return of allotment within the period prescribed under sub section (8), the company, its promoters and directors shall be liable to a penalty for each default of Rs. 1000 per day during which such default continues but not exceeding Rs. 25 Lakh.

Penalty: If a company makes any default of the provisions of the Companies Act, 2013, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved or Rs.2 crores, whichever is lower, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

BONUS SHARES (Section 63 of the Companies Act, 2013) [yeh to free hai]

Bonus shares mean shares issued by the company to its existing shareholders at free of cost.

A Company may capitalize its profits by issuing fully-paid bonus shares provided the company has provisions in this regard.

When a company is prosperous and accumulates large distributable profits, it converts these accumulated profits into capital and divides the capital among the existing members in proportion to their entitlements.

Advantages:

(a) Fund flow is not affected adversely.
(b) Market value of the Company's shares comes down to their nominal value by issue of bonus shares.
(c) Market value of the members' shareholdings increases with the increase in number of shares in the company.
(d) Bonus shares are not an income. Hence it is not a taxable income.
(e) Paid-up share capital increases with the issue of bonus shares.

Sources:

A company may issue fully paid-up bonus shares to its members by utilizing the following sources:
(a) free reserves;
(b) the securities premium account; or
(c) the capital redemption reserve account.
Note: No bonus shares shall be issued by capitalising reserves created by the revaluation of fixed assets.

Conditions:

No company shall capitalize its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless—
(a) It is authorised by its articles;
(b) It has, on the recommendation of the Board, been authorised in the general meeting of the company;
(c) It has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
(d) It has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
(e) The partly paid-up shares, if any on the date of allotment, are made fully paid-up;
Note: No Bonus shares in lieu of dividend.

Special Note: As per the Companies (Share Capital and Debentures) Rules, 2014, the company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

Q3. The Board of Bloom Well Ltd. recommended bonus issue and thereafter called general meeting for the approval of the shareholders. The shareholders rejected the approvA1. Consequent to which the Board did not issue the Bonus Shares. Is the decision correct?

A3. As per the Companies (Share Capital and Debentures) Rules, 2014, the company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

Therefore once the Board recommends the Bonus issue, even the subsequent disapproval by shareholders cannot reverse it. So it is only a formality to take shareholders' approval for issue of bonus shares, and even if it is rejected or not passed by the members, the Board has to go with the decision of issue of Bonus Shares.

Procedure for Bonus Share Issue

Check authority in Articles of Association. If no authority in AOA, first amend it.
4
Convene the Board Meeting to issue notice to call GM to take shareholder's approval

↓
Ensure that all the partly paid shares are converted into fully paid
↓
Ensure that source of issue of bonus shares is from the permitted sources
↓
No default in payment of interest, principal, statutory dues, etc.
↓
Bonus issue is not made in lieu of payment of dividend.
↓
Pass an Ordinary resolution or a Special Resolution at GM (See note below)
↓
If Special Resolution is passed file it with ROC in form MGT 14 within 30 days of passing SR
↓
Allotment of shares and filing of PAS-3 form within 30 days of allotment.
↓
If shares held in Dematerialized form, inform depositories about allotment.
↓
Update members register.
↓
Issue share certificates if shares issued in physical form.

Note: Though the section read with the rules nowhere requires that the resolution will be a special resolution but surprisingly PAS-3 states that special resolution be attached to the form in case of Bonus Issue.

So if the Company passes Special Resolution, filing of MGT- 14 is mandatory.

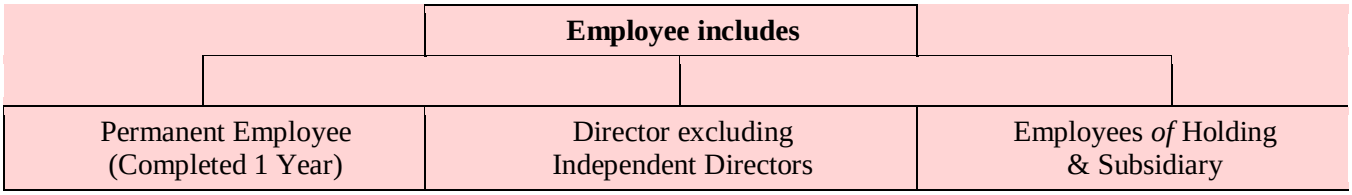
ISSUE OF SWEAT EQUITY SHARES (Section 54 of the Companies Act, 2013)

[joh bahaye pasina, usko milegi haseena]

Section 2(88) of the Companies Act, 2013:

Sweat Equity Shares means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

Who shall be eligible for Sweat Equity Shares?



Employee means:

(a) Permanent Employees: A permanent employee of the company who has been working in India or Outside India, for at least the last 1 year; or

(b) Directors: A director of the company whether a whole time director or not; or

(c) Employees of Holding & Subsidiary Companies: An employee or a director of a subsidiary or of a holding company of the company whether in India or outside India.

Section 54 of the Companies Act, 2013:

A company may issue sweat equity shares of a class of shares already issued subject to the following conditions:

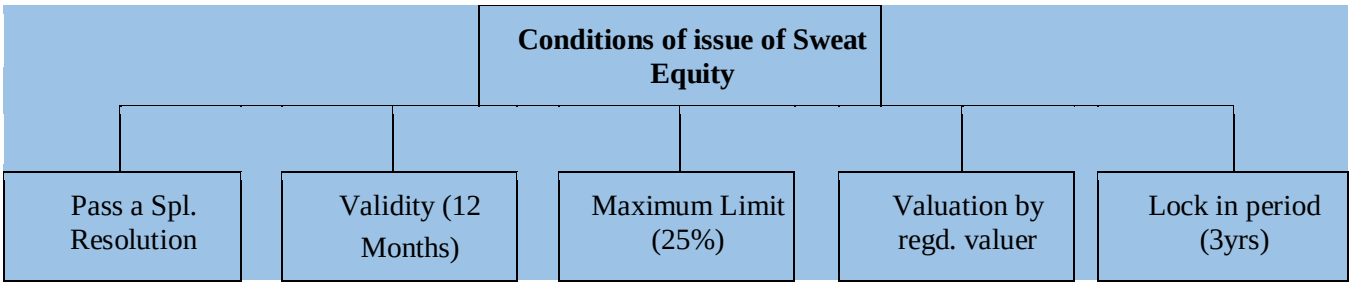
(a) The issue of Sweat Equity Shares must be authorised by a special resolution (SR).

(b) The SR carries the details like number of shares, current market price, consideration, and the class of directors or employees to whom sweat equity shares are to be issued.

(c) In case of listed company, the sweat equity shares are issued in accordance with the regulations made by SEBI and in case of unlisted company, the sweat equity shares are issued in accordance with the Companies Act and its rules.

(d) The holders of such shares shall rank pari-passu with other equity shareholders.

Rule 8 of Companies (Share Capital and Debentures) Rules, 2014



(a) Special Resolution:

Issue of Sweat Equity Shares to be authorized by special resolution at a general meeting.

Explanatory Statement to the Special Resolution:

As mentioned above, special resolution shall be passed for the purpose of issue of sweat equity share, the explanatory statement to be annexed to the Notice of the general meeting, shall contain the following details:

(a) The date of the Board meeting wherein the sweat equity shares proposal was approved.

(b) Reasons/justification for the issue of sweat equity shares.

(c) Total numbers of shares to be issued as sweat equity including the class of shares are intended to be issued.

(d) Class of directors or employees to whom such equity shares are to be issued.

(e) Principal terms and conditions on which sweat equity shares are to be issued.

(f) Time period of association of Directors or Employees with the company.

(g) The price at which the sweat equity shares are proposed to be issued.

(h) The consideration including consideration other than cash.

(i) Ceiling on managerial remuneration, if any.

(j) A statement to the effect that the company shall conform to the applicable accounting standards; and diluted Earnings per Share pursuant to the issue of sweat equity securities, calculated in accordance with the applicable accounting standards.

(b) Validity:

The special resolution shall be valid only for 12 months for allotment of sweat equity shares.

(c) Maximum Limit:

A company cannot issue sweat equity shares not more than 15% of the existing paid-up equity share capital in a year or

shares of the issue value of Rs.5 Crore, whichever is higher and

25% of the paid-up equity capital of the Company at any time.

Note: The issuance of sweat equity shares in the Company shall not exceed 25% of the paid-up equity capital at all the time.

(d) Valuation:

The Sweat equity shares to be issued shall be valued at a price determined by a registered valuer, if the shares to be issued for intellectual property rights (Know-how or any other value addition). A copy of the valuation report obtained in both the above cases shall be sent to the shareholders along with the notice of the general meeting.

(e) Register of Sweat Equity Shares:

The Company shall maintain a Register of Sweat Equity Shares in Form No. SH.3

(f) Lock in period:

Sweat equity shares shall be non-transferable for three years from the date of allotment.

Special Note: Lock-in period of Sweat Equity Shares

The sweat equity shares issued to directors or employees shall be locked-in (Non-transferable) for 3 years from the date of allotment. The share certificates are under lock-in and the period of expiry of lock-in shall be stamped in bold or in any other manner on the share certificate.

Additional Requirements for Sweat Equity

- Part of managerial remuneration: The amount of sweat equity shares issued shall be treated as part of managerial remuneration subject to the fulfilment of the following conditions:

  (a) The sweat equity shares are issued to the director or manager; and

  (b) They are issued for consideration other than cash.

  Note: The sweat equity shares issued during an accounting period, the accounting value of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

- Disclosure in Director's Report (Board Report): The Board of Directors shall disclose the following details in Director's Report with regard to issue of sweat equity shares:

  (a) Class of director/employee to whom sweat equity shares were issued;

  (b) Class of shares issued as Sweat Equity Shares;

  (c) The number of sweat equity shares issued to the directors, key managerial personnel (KMP) or other employees showing separately the number of such shares issued to them, if any, for consideration other than cash and the individual names of allotees holding one percent or more of the issued share capital;

  (d) The reasons/justification for the issue;

  (e) Principal terms and conditions for issue of sweat equity shares, including pricing formula;

(f) Total number of shares arising as a result of issue of sweat equity shares;

(g) Percentage of the sweat equity shares of the total post issued and paid-up share capital;

(h) Consideration including consideration other than cash received;

(i) Diluted Earnings Per Share (EPS) pursuant to issuance of sweat equity shares.

Note:

(a) Entries in respect of sweat equity shares in the register shall be authenticated by the Company Secretary or by any other person authorized in this regard.

(b) Sweat equity shares may be issued to the employees and directors at a discount and even without the approval of National Company Law Tribunal (NCLT).

CHAPTER 2.4
SHARES & SHARE CAPITAL
Buy Back & Reduction

BUY-BACK OF SECURITIES [paise ki kami nahi hai – shareholder se shares kharid le]

Buy-back of share means purchase of its own shares by the company.

In short, buy-back is a process when a company makes an offer to buy-back its own issued shares.

Objectives of Buy-Back

(a) To return the surplus cash to shareholders

(b) To increase the current Market price of the Company

(c) To discourage unwelcome takeover bids

(d) To increase promoters' shareholding

Section 67: A company limited by shares or guarantee having a share capital cannot buy its own shares and this restriction is applicable on all types of the Companies.

Section 68: This section allows a company to purchase its own shares or securities subject to certain conditions.

Methods of Buy-Back: The buy-back may be:

(a) From the existing shareholders

(b) From the open market

(c) By purchasing the securities from employee which have been issued under ESOP or Sweat Equity

AUTHORISATION & APPROVALS

Authorisation in the AOA: Buy-Back must be authorised by the articles of association of the company.

In case, there is no such provision, the company has to first alter the articles of association to authorise buyback.

Buy-back can be made with the approval of the Board of Directors or shareholders (by passing a special resolution) in a general meeting, depending on the quantum of buy-back.

Approval by Board of Directors: The Board of Directors can buy-back up to 10% of the total paid-up equity capital and free reserves of the company by passing a board resolution.

Approval by Shareholders: The Shareholders can buy-back up to 25% of the total paid-up capital and free reserves of the company by passing a special resolution in respect of any financial year.

Note: In case of a listed company, approval of shareholders shall be obtained only by postal ballot.

Sources to Buy-Back: A company may purchase its own shares or other specified securities out of:

(a) Its free reserves; or

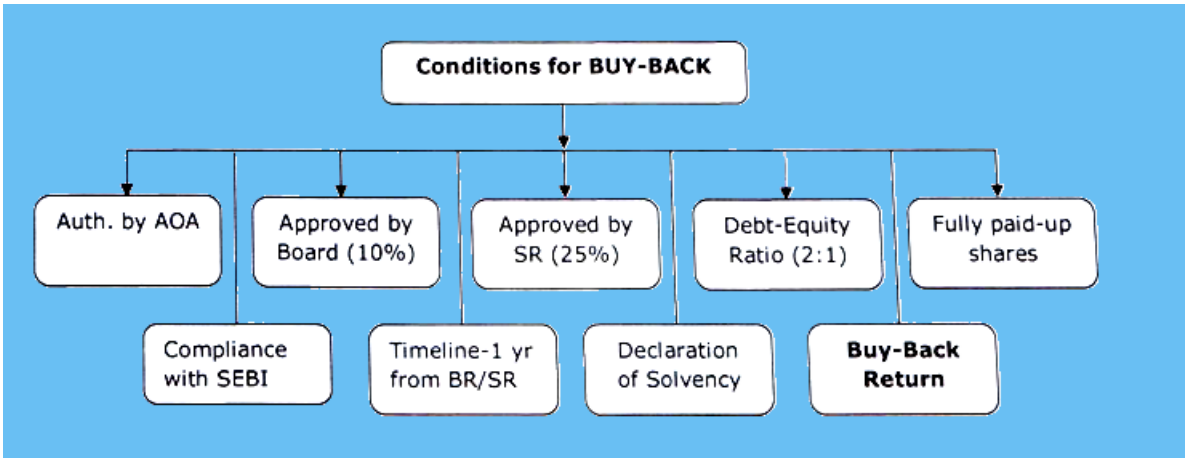
(b) The securities premium account; or

(c) The proceeds of any shares or other specified securities.

Note: No buy-back of any kind of shares or other specified securities can be made out of the proceeds of an earlier issue

of the same kind of shares or same kind of other specified securities. The Company can buy-back its own shares at any time provided that the Company has sufficient balance in any one or more of these accounts to accommodate the total value of the buy-back.

Conditions for Buy-Back:



(a) The buy-back shall be authorized by the articles of associations.

(b) The buy-back either approved by the Board of Directors or the shareholders.

(c) Debt-Equity Ratio: Ratio of debt owed by the company is not more than twice (i.e.2:l) the capital and its free reserves after such buy-back.

Explanation: For the purposes of this clause, the expression "debt" includes all amounts of unsecured and secured debts;

(d) Fully Paid-up shares: All shares or other specified securities for buy-back are fully paid-up.

(e) Compliance with SEBI Guidelines: The buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the SEBI in this regard;

(f) Passing of special resolution, if any.

The Notice of General Meeting shall be annexed with the explanatory statement and shall have the following details:

(a) A full and complete disclosure of all material facts;

(b) The necessity for the buy-back;

(c) The class of security intended to be purchased under the buy-back;

(d) The amount to be invested under the buy-back;

(e) The time limit for completion of buy-back.

(g) Letter of Offer to be filed with Registrar of Companies before Buy-Back: The Company which has been authorized by a special resolution shall, before the buy-back of shares, file with the Registrar of Companies a letter of offer in Form No. SH. 8.

(h) Dispatch of letter of offer to shareholders: The letter of offer shall be dispatched to the shareholders or security holders immediately after filing the same with the Registrar of Companies but not later than 21 days from its filing with the Registrar of Companies.

(i) Period of offer for buy back: The offer for buy-back shall remain open for a period of not less than 15 days and not exceeding 30 days from the date of dispatch of the letter of offer.

(j) Completion of Buy-Back: The buy-back operations should be completed within 1 year of the date of passing of the special resolution or a resolution passed by the Board.

(k) Time gap between two buy-backs: No offer of buy-back under Section 68(2) shall be made within a period of one year

reckoned from the date of the closure of the preceding offer of buy-back, if any.

(L) Declaration of Solvency: When a company proposes to buy-back its own securities, shall file with ROC and SEBI (in case of listed companies), a declaration of solvency signed by at least two directors of the company, one of whom shall be the managing director, if any, in Form No. SH.9 before making buy-back.

(m) Extinguishment of Securities: After completion of buy-back operation the securities must be extinguished and physically destroyed within 7 days of the last date of completion of buyback.

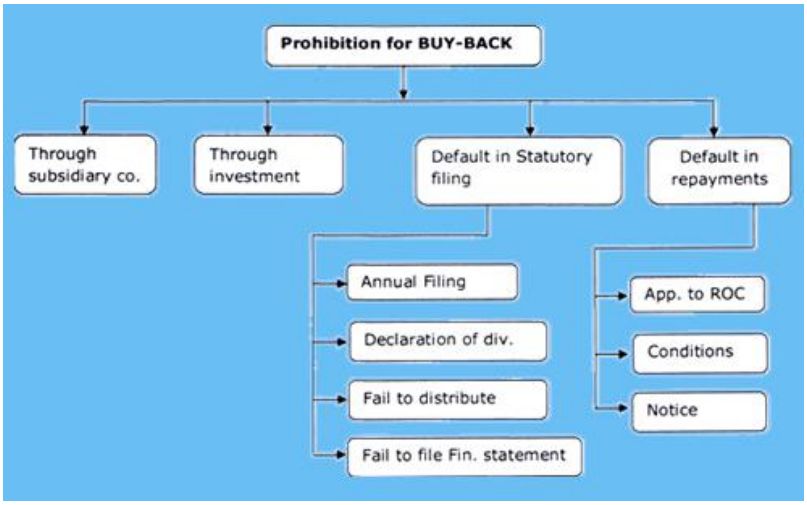
(n) No further issue: After completion of buy-back, the company shall not make a further issue of shares or other specified securities for a period of 6 months except by way of bonus issue or in discharge of subsisting obligations such as conversion of options/obligations given.

(o) Buy-Back return: A company shall file a return of buy-back in Form No. SH.15 within 30 days from the date of completion of buy-back. Such form must be signed by two directors of the company including the managing director, if any, certifying that the buy-back of securities has been made in compliance with the provisions of the Companies Act, 2013 and its rules.

(p) Register for Buy-Back: The Company has to maintain a register of the securities so bought, the consideration paid for the securities bought-back, the date of cancellation of securities, the date of extinguishing and physically destroying of securities and such other particulars as may be prescribed.

Prohibition for buy-back:

Section 70 the Companies Act, 2013



A company cannot buy-back shares or other specified securities, directly or indirectly—

(a) Through any subsidiary company including its own subsidiaries; or

(b) Through investment or group of investment companies; or

(c) When the company has defaulted in the repayment of deposit or interest thereon, redemption of debentures or preference shares or payment of dividend or repayment of any term loan or interest thereon to any financial institution or bank.

(d) Company has defaulted in:

(i) Filing of Annual Return (section 92)

(ii) Declaration of dividend (section 123)

(iii) Punishment for failure to distribute dividend (section 127)

(iv) Giving financial statement (section 129)

Special Note: A Company cannot buy-back its own shares in cases of any default regarding filing of the annual return, failure to distribute dividend and fails to give true & fair view on financial statement.

- Transfer of certain sums to Capital Redemption Reserve account:

Transfer to CRR (Section 69 of the Companies Act, 2013):

When a company buys-back shares out of free reserves or out of security premium account, then an amount equal to the nominal value of the shares needs to be transferred to the Capital Redemption Reserve Account (CRR).

The details of such transferred amount to CRR should be in balance sheet.

Utilization of CRR amount: CRR amount may be utilized for paying un-issued shares of the Company to the members as fully paid bonus shares.

Q1. The Following information is available from the audited balance sheet of Short Cut Ltd. as at 31st March, 2015:

Paid-up share capital	Rs.500 lakh
Share premium account	Rs.100 lakh
General reserves	Rs.800 lakh
Secured loans	Rs.500 lakh
Unsecured loans	Rs.400 lakh

The company plans to buy-back its shares. Compute the maximum limit upto which the company can buy-back its shares. (4 marks)

A1. According to Section 68(1) of the Companies Act, 2013, a company can buy-back its own shares to the extent of 25% of the paid-up capital and free-reserve. In case of Short Cut Ltd. the position is as under:

■ Paid-up Capital	Rs.500 lacs
■ Free reserve (include SPA for purpose of section 68)	Rs.900 lacs
■ Total	Rs. 1,400 lacs

■ 25% of paid-up shares capital and free reserve = Rs.350 lacs. Thus, the maximum limit up to which the company can buy-back its shares is to the extent of Rs.350 lacs.

Q2. Board of Directors of Pious Ltd. gives you the following information extracted from the company's financial statement as at 31st March, 2015:

	Rs. (in Crore)
Authorised equity share capital:	10
(1 crore shares ofRs.10 each)	
Paid-up equity share capital:	5
General reserve:	5
Debenture redemption reserve:	2

Board of Directors by resolution passed at its meeting decides to go for buy-back shares to the extent of 20% of the Company's paid-up share capital and free reserves. Examine the validity of the Board Resolution with reference to the provisions of the Companies Act, 2013. (Dec 2015) (4 marks)

A2. As per the provisions of Sections 67 & 68 of the Companies Act, 2013 and Rule 17 of Companies (Share Capital and Debentures) Rules, 2014:

Buy-Back must be authorised by the articles of association of the company.

In case, there is no such provision, the company has to first alter the articles of association to authorise

buy-back.

Buy-back can be made with the approval of the Board of Directors or shareholders (by passing a special resolution) in a general meeting, depending on the quantum of buy-back.

A company either has two options by which gets the approval for buy-back:

(a) Approval by Board of Directors: The Board of Directors can buy-back un to 10% of the total paid-up equity capital and free reserves of the company by passing a board resolution.

(b) Approval by Shareholders: The Shareholders can buy-back up to 25% of the total paid-up equity capital and free reserves of the company by passing a special resolution in respect of any financial year.

In the given question, Board of Directors passed a resolution for buy-back shares to the extent of 20% of the Company's paid-up share capital and free reserves whereas the Board is authorised upto 10% of total paid-up share capital and free reserves.

Therefore, such decision of the Board is null and void except it is supported with shareholders' approval.

Q3. ABC Co. Ltd. at a general meeting of shareholders passed an Ordinary Resolution to buy back 30% of its equity share capitA1. The articles of the company empower the company for buy-back of shares. The Company further decides that the payment for buy-back be made out of proceeds of the Company earlier issued equity. Examine whether proposal is in order. Will your answer be different if instead of 30% Company planned to buy back 20%

CA IPCC (Mau 2002)

A3. The proposal of the Company is not valid as the maximum buy back a company can do is 25% and that to with the SR.

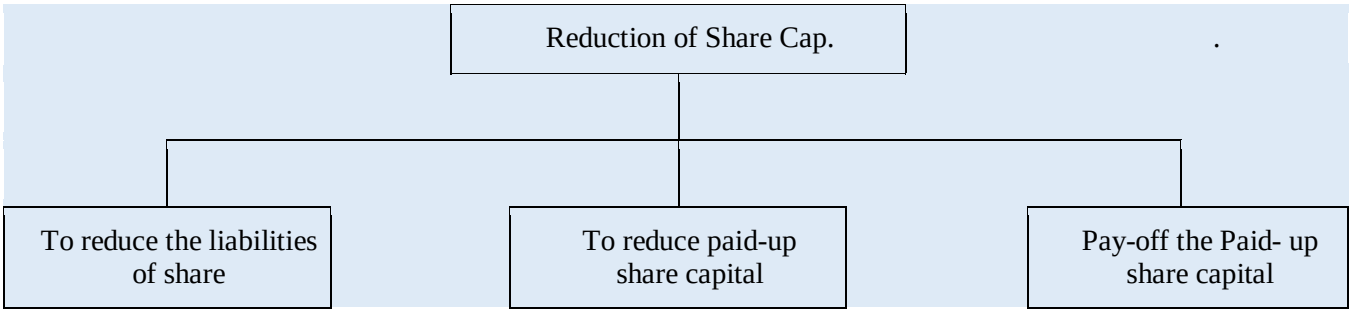
Further the Company cannot use proceeds from previous issue to buy back the shares.

Even if 20% was proposed it would have been still invalid as OR is passed instead of SR and even the source is not appropriate.

REDUCTION OF SHARE CAPITAL (Section 66 of the Companies Act, 2013)

[[Liability kam kiya jaye]

Reduction of capital means reduction of issued, subscribed and paid-up capital of the company by way of reduction of the liability of its shares in respect of share capital not paid-up or cancellation of paid-up share capital which is lost, or Payment of any paid-up share capital which is in excess of the wants of the Company.



A Company may by passing a special resolution subject to the approval of tribunal (NCLT), can reduce the share capital in following ways:

(a) Extinguish or reduce the liability with regard to any shares which is not fully paid-up; or

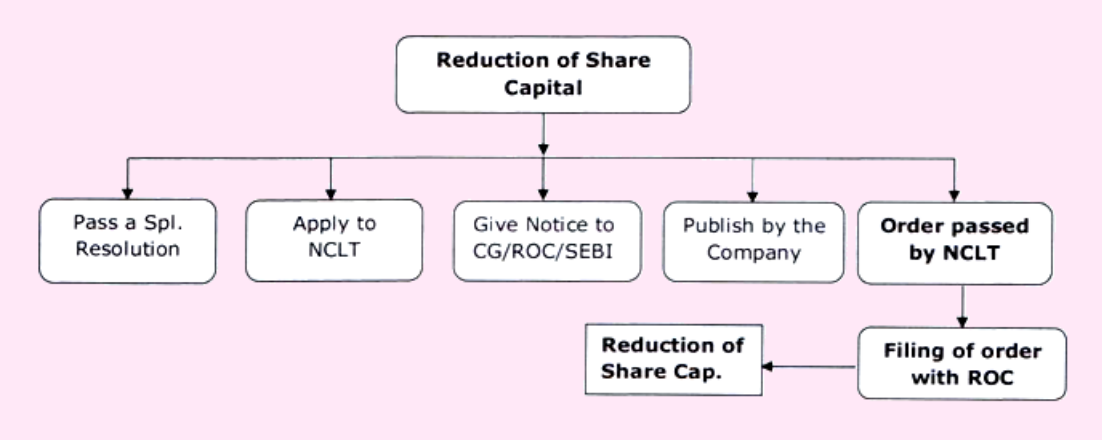
(b) Either with or without extinguishing or reducing liability on any of its shares:

(i) Cancel any paid-up share capital which is lost or is unrepresented by available assets; or

(ii)Pay off any paid-up share capital which is in excess of the wants of the company,

(iii) Alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Procedure for reduction of share capital



(a) Pass a special resolution

(b) Apply to the tribunal (NCLT)

(c) The tribunal shall give notice to CG, ROC and SEBI in case of listed companies, and the creditors of the company.

(d) NCLT shall take into consideration the representations, if any, made by the Government, ROC, the SEBI and the creditors within 3 months from the date of receipt of the notice.

(e) The NCLT may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit.

(f) The order of NCLT regarding the reduction of share capital shall be published by the company.

(g) The company shall deliver to ROC a certified copy of the order of the NCLT and of a minute approved by the NCLT showing:

(a) The amount of share capital;

(b) The number of shares into which it is to be divided;

(c) The amount of each share; and Reduction of share capital;

(d) The amount, if any, at the date of registration deemed to be paid-up on each share.

A certified true copy of order passed by NCLT shall be filed with ROC within 30 days from date of receipt of NCLT's order, who shall register the same and issue a certificate to that effect.

Note: A member shall not be liable to contribute in excess of the difference amount between the amount paid on the share or reduced amount. The order of confirmation of the reduction of share capital by the NCLT shall be published by the company in such manner as directed by the NCLT.

• Liability of Members in respect of Reduced Share Capital

On the reduction of share capital, the extent of the liability of any past or present member on any call or contribution shall not exceed the difference between the amount already paid on the share, or the reduced amount, if any, which is deemed to have been paid thereon by the member, and the amount of the shares fixed by the scheme of the reduction.

Example: Suppose the value of the share is Rs.100 and the member has paid only Rs.50. Subsequently on reduction, the share value reduced to Rs.75. In such case the liability remains of Rs.25.

CASE LAWS ON REDUCTION OF SHARE CAPITAL ON SELECTIVE BASIS

Case Law: **SIEL Ltd. (2008)**

Facts: the view was that reduction of the share capital of a company is a domestic concern of the company and the decision of the majority would prevail. If the majority by special resolution decides to reduce the share capital of the company, it has the right to decide to reduce the share capital of the company and it has the right to decide how this reduction should be effected. While reducing the share capital, the company can decide to extinguish some of its shares without dealing in the same manner with all other shares of the same class.

Judgment: A selective reduction is permissible within the frame work of law for any company limited by shares.

Case Law: **ELPRO INTERNATIONAL Ltd. (2009)**

Facts: A company proposed to extinguish and cancel 8,89,169 shares held by shareholders constituting 25% of the issued and paid-up share capital and return capital to such shareholders at Rs.183 per equity share of Rs.10 each so cancelled and extinguished in accordance with Section 100 of the Act (corresponds to section 66 of the Companies Act, 2013).

According to the scheme as approved by the shareholders, the reducing of 25% of the issued and paid-up capital was to take place from amongst 3,835 shareholders which included 112 shareholders who voted for the resolution, and 3,723 shareholders who did not object to the resolution.

Judgment: In this case, the court held that a selective reduction of share capital is legally permissible. The shareholders who did not cast their votes were those who had abstained from voting at the meeting. Moreover, there was no objection from any of the shareholders to the proposed reduction.

Reduction of Share Capital without sanction of NCLT

The following are cases which amount to reduction of share capital and where no confirmation by the Tribunal is necessary:

(i) **Surrender of Shares:**

It is a voluntary initiative by a registered shareholder for surrender of shares to the Company for any reason including for settlement of a dispute.

It will have the same effect as a transfer in favour of the company and amounts to a reduction of capitA1. The surrender of shares shall be treated as valid only when Articles of Association provide for the same and—

(a) Where forfeiture of such shares is justified; or

(b) When shares are surrendered in exchange for new shares of same nominal value.

(ii) **Forfeiture of Shares:**

A company may if authorised by its articles, forfeit shares for nonpayment of calls and the same will not require confirmation of the Court.

Diminution of Share Capital is not Reduction of Share Capital

Diminution of capital is the cancellation of the unsubscribed part of the issued capital. It can be affected by an ordinary resolution provided articles of the company authorise to do so. It does not need any confirmation of Court.

Reduction of share capital v. Diminution of Share Capital

Reduction of Share Capital	Diminution of Share Capital
■ Reduction may involve reduction inter alia of issued & paid-up share capital	■ Diminution may be in respect of authorised capital but not of issued & paid-up share capital
■ Reduction needs confirmation by the Court	■ Diminution needs no confirmation by the Court

■ Reduction which also needs authorisation by articles, can be effected only by a special resolution.	■ If the articles authorise the procedure, diminution can be effected by an ordinary resolution.
■ In the case of reduction more detailed procedure regarding notice to the ROC, though there is no such time limit as aforesaid (i.e. 30 days).	■ In case of diminution, notice is to be given to the ROC within 30 days from date of cancellation.
■ Where a company is ordered to add to its name the words "and reduced" these words shall exist until the expiry of the period specified in the order.	■ Such a provision does not exist in the case of diminution of the share capital as envisaged.

Conclusiveness of certificate for reduction of capital

Where the Registrar have issued his certificate confirming the reduction, the same shall be held conclusive, even if it is later discovered that company have no authority under its article to reduce capital or special resolution passed is invalid.

CHAPTER 2.5
SHARES & SHARE CAPITAL
A Brief on Transferability

Transferability

The investor in securities of an incorporated enterprise cannot withdraw his investment from the company.

He can only convert his investment into cash outside the company in the share market or by private sale.

Transferability feature of securities enables the company, to get permanent capital, the shareholder, liquid investments.

Shares of a Public Company are freely transferable.

However, a Private Company is required to restrict the right to transfer its shares by its articles.

Earlier, the shares were transferred only through physical mode, but now, the securities are transferred in dematerialized form.

TRANSFER OF SECURITIES (Section 44 of the Companies Act, 2013) [bech do]

The shares or debentures or other interest of any member in a company shall be movable property, transferable in any manner as given by the articles of the company.

(a) The securities or other interest of any member in a public company shall be freely transferable.

(b) Any contract or arrangement between 2 or more persons in respect of transfer of securities shall be enforceable as a contract.

(c) A private company is required to restrict the right to transfer its securities by its articles.

Though there cannot be absolute prohibition on transfer of securities by private companies.

Special Note: A company shall not register a transfer of securities unless a proper instrument of transfer duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or transferee within 60 days from the date of execution of transfer along with the certificate relating to the securities.

Transferability in case of Private Company

Shares of a private company are not marketable securities due to restriction on right to transfer.

Such shares by their very nature are not freely transferable in the market.

Section 2(68) of the Companies Act, 2013 restricts the right to transfer shares but does not prohibit the right to transfer shares, in case of private companies.

Methods to place Restriction on right to transfer shares by Private Companies

•Right of pre-emption: [pahle gharwale fir baharwale]

If a member wishes to sell some or all of his shares, such shares shall first be offered to other existing members of the company at a price determined by the directors or by the auditor of the company or by the use of formula set out in the articles.

If no existing member is ready to acquire shares, then shares can be transferred by the transferor to the proposed transferee.

• Powers of directors to refuse registration of transfer of shares:

The Powers of directors to refuse registration of transfer of shares are specified in the articles of association of the

company.

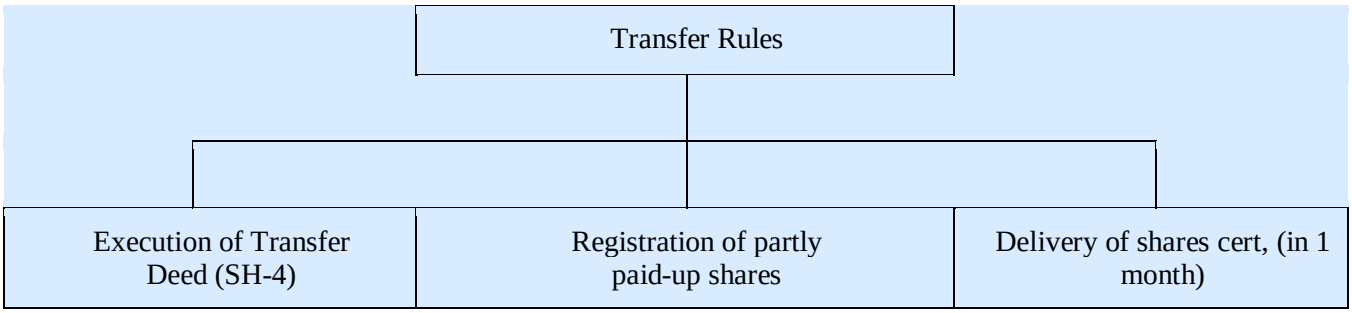
Transferability in case of Public Company

As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable.

The Board of Directors of a Company or the concerned depository has no discretion to refuse or withhold transfer of any security.

The transfer has to be effected by the company/depository automatically and immediately.

Transfer Rules (Section 56 & Rule 11 of Companies (Shares Capital and Debentures) Rules, 2014)



(a) Execution of Transfer Instrument: An instrument of transfer of securities held in physical form shall be in Form No.SH.4 and every instrument of transfer shall be delivered to the company within 60 days from the date of such execution.

(b) Registration of Partly paid-up shares: A company shall not register a transfer of partly paid shares, unless the company has given a notice in Form No. SH.5 to the transferee and the transferee has given no objection to such transfer within 2 weeks from the date of receipt of notice.

(c)Delivery of shares certificate: Every Company has to deliver the share certificate in respect of allotment, transfer & transmission of securities within 1 month from the date of receipt by the Company.

Transfer of Shares by Legal Representative

A transfer of the shares in a company of a deceased member shall be completed by his legal representative although the legal representative is not himself a member of the Company.

Transfer Instrument lost/not delivered

Where the transfer instrument has been lost or has not been reached to the Company for transfer then the Company may register the transfer on the basis of submission of Indemnity Bond by the transferee. The company may also ask for submission of affidavits (as proof for loss of share certificate) from the transferor or transferee before registering the transfer.

Note: Indemnity Bond is a legal document which is to be furnished for protecting unforeseen losses to other parties. Indemnity means undertaken to compensate others.

Intimation to depository

Where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

Payment of Stamp Duty on Transfer of Shares

Before the transfer is lodged with the company, the transfer instrument should be duly stamped.

0.25% stamp duty is payable on the total consideration amount of the transfer in accordance with the provisions of the Indian Stamp Act, 1899.

Only the Central Government can levy stamp duty on share transfers.

The stamp duty payable on transfer of debentures is State matter and may vary from State to State.

The amount of consideration is required to be mentioned in the share transfer deed as otherwise the companies cannot verify whether share transfer stamp duty has been correctly charged thereby attracting the penal provisions of the Stamp Act in case of a default.

Thus, in case where question of consideration does not arise like in the case of a gift of shares, stamp duty will be paid on the basis of the market value of shares and in case of unquoted shares or where quotations are not available at the face value of the shares.

Note: A company cannot register the transfer of securities unless a proper instrument of transfer duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company along with the certificate relating to the securities in question.

Effect of Transfer

A transfer is not complete until registered.

The transferee does not acquire a legal title to the shares until his name has been entered in the Register of Members.

Position during the period, between the date when a contract to transfer shares is made and the placing of the transferee's name on the Register of Members may be summed up as:

(a) Transferor must pay the calls. He may recover the amount from the transferee.

(b) If dividends are declared and paid before transfer is registered, the company must pay it to the transferor.

(c) The voting power rests with the transferor but he must vote as the transferee directs. If the transferee has not paid the price, the transferor may vote as he pleases.

Procedure for Transfer of Shares

Obtain the transfer deed in the prescribed form i.e. Form SH-4 (No specific format in case of

↓

Execute the form by Transferor and Transferee (In case of Joint holding, every joint holder will

↓

The deed should be stamped adequately and the stamp should be cancelled.

↓

The signature of transferor and transferee should be witnessed by a person.

↓

Attach Share/ Debenture certificate with the deed (If certificate not yet issued, attach allotment letter)

↓

The company shall serve notice to the transferee in Form SH-5 in case of partly paid shares.

↓

The company shall serve notice to the transferee in Form SH-5 in case of partly paid shares.

↓

Call a Board Meeting and pass resolution to transfer the shares

↓

Update members register and transfer register.

↓

Issue endorsed share certificates.

Q1. One of the joint-holders applied to a company requesting for the splitting of300 equity shares equally among the joint-holders by issuing fresh share certificates to each of the three joint-holders separately, is the company bound to comply with this request? Give reasons. 4 marks (June 2005)

A1. Section 58: If the shares held in joint name, the instruction with regard to transfer of shares or splitting of shares, shall be jointly made by all joint-holders. Based on that instruction, a Company shall register the transfer or split the shares certificate. A company shall not register a transfer of shares, unless a proper instrument of transfer duly stamped and executed by the transferor and by the transferee, has been delivered to the company along with the share certificate within 60 days from the date of execution of the Instruments.

In given case, the shares are held in joint name and one of the joint holders requested to split the shares equally among the joint holders for issuing fresh share certificate to each joint holders separately.

As per section 58, the company shall not be bound to split the shares certificate until the request received by all joint holders.

DEATH OF TRANSFEROR OR TRANSFEREE BEFORE REGISTRATION OF TRANSFER

Transferor death notice: Where the transferor dies and the company has no notice of his death the company would obviously register the transfer.

If the company has notice of his death, the proper course is not to register until the legal representative of the transferor has been referred to.

Transferee death notice: Where the transferee dies and company has notice of his death, a transfer of shares cannot be registered in the name of the deceased. With the consent of the transferor and the legal representatives of the transferee, the transfer may be registered in the names of the later.

Q2. Ajay sold his shares and executed a transfer deed in favour of Vijay. The documents were lodged for transfer with the company. However, before effecting and registering the transfer by the company, Ajay, the transferor passed away. What is the impact of the death of Ajay on the registration of transfer of shares in favour of Vijay, if the death of Ajay is - (i) intimated to the company before the registration; and (ii) intimated to the company after registration of the transfer of the shares in favour of Vijay?

If Vijay dies before registration of the transfer of shares, what will be the consequences — (i) if the death of Vijay is intimated to the company before registration of transfer; and (ii) if the death of Vijay is not intimated to the company before the registration of transfer? (June 2008) 4 marks)

A2. Where the transferor dies and the company has no notice of his death the company would obviously register the transfer.

If the company has notice of his death, the proper course is not to register until the legal representative of the transferor has been referred to.

(i) If the Company had intimation about Ajay's death before registration then the proper course is not to register until the legal representative of the transferor has been referred to.

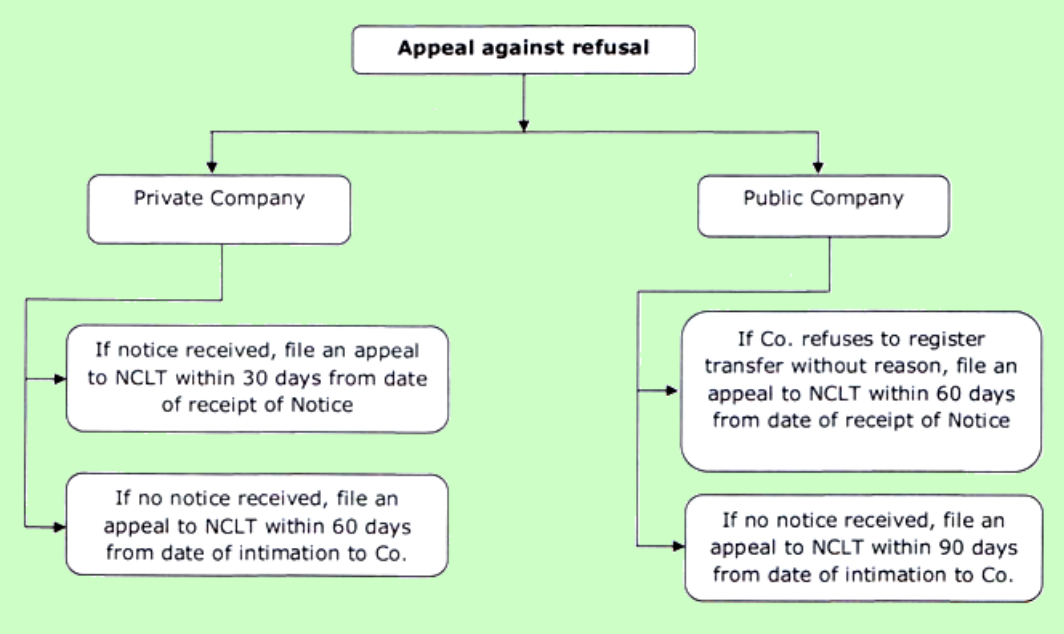
(ii) If the Company was intimated after then it would have obviously registered it.

In the second part of the question if Vijay dies

(i) Co. had notice of his death they should not register it in the name of deceased. Though with the consent of the transferor and the legal representatives of the transferee, the transfer may be registered in the names of the later.

(ii) If the Company was not intimated then obviously they would have registered it.

APPEAL AGAINST THE REFUSAL OF TRANSFER (Section 58 of the Companies Act, 2013)



The holder of securities has the right to transfer his securities and such right is absolute in nature.

Private Company:

If a private company limited by shares refuses to register the transfer or transmission, the transferee may appeal to the Tribunal (NCLT) against the refusal within 30 days from the date of receipt of the notice or in case no notice has been sent by the company, within 60 days from the date on which the instrument of transfer or the intimation of transmission was delivered to the company.

Public Company:

If a public company without sufficient cause refuses to register the transfer of securities within 30 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

Can a company refuse to register the transfer in the name of an employee?

Case Law: **Shri Nirmal Kumar v. Jaipur Metal and Electrical Limited (1976)**

Facts: A company was refused to register the transfer of shares in favour of its employee on the following grounds:

(a) The employee would create nuisance in general meetings and

(b) Would seek access to the records of the company.

Judgment: In this case, the court held that refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason.

Q3. An employee of a company purchased certain shares of his company through a member of a stock exchange and lodged with the company an application for transfer of shares in his (employee's) name. The company refused to execute the transfer on the suspicion that the employee, if admitted as a member of the company, will create nuisance in general meetings and seek access to the records of the company. Decide giving reasons:

Whether the company's contention shall be tenable; and

What is the remedy available to the employee in the given case? (June 2015) 4 marks

A3. An employee may purchase shares of his company through a stock exchange and the grounds of refusal of transfer application are not valid.

Case Law: Shri Nirmal Kumar v. Jaipur Metal and Electrical Limited (1976)

Facts: A company was refused to register the transfer of shares in favour of its employee on the following grounds:

The employee would create nuisance in general meetings and would seek access to the records of the company.

Judgment: In this case, the court held that refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason.

Therefore, in the given situation considering the judgment of the above mentioned case law, the contention of the company shall not be tenable. The employee may file an appeal in the court/tribunal against the company referring the above mentioned judgment of court.

TRANSMISSION OF SECURITIES (Section 56(2) of the Companies Act, 2013)

[mae gaya, pagal hua to shares baccho k]

The transmission of shares takes place because of death or lunacy of the registered shareholders or on his being adjudged as insolvent.

If the holder of securities is a company, when it goes into liquidation because of merger or amalgamation.

A company shall have power to register on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted.

By virtue of this section, the legal representative or nominee of the deceased shareholder shall be entitled to transfer the shares.

Operation of Law	Who is entitled to the shares?
Due to death / Lunacy	Legal representative or nominee
Due to insolvency	Official Assignee or Receiver
Due to merger or amalgamation (Companies)	The resultant company

Distinction between Transfer and Transmission

Transfer of Shares	Transmission of shares
■ Transfer takes place by a voluntary act of the transferor.	■ Transmission is the result of the operation of law i.e. death or insolvency
■ Transfer deed is required.	■ No instrument of transfer is required.
■ Transfer is a normal course of transferring property.	■ Transmission takes place on death or insolvency of a shareholder.
■ Generally made for some consideration.	■ No consideration payable
■ Stamp duty is payable by a member.	■ No stamp duty is payable.

Q4. Grace Ltd., a public limited company has received an application from Rosy for transmission of certain shares in her name. Rosy, being a widow of a shareholder, applies for transmission of the shares standing in the name of her deceased husband without producing a succession certificate. Can the company transfer the shares of the deceased?

A4. The transmission of shares takes place because of death or lunacy of the registered shareholders or on his being adjudged as insolvent or also in case, the holder of securities is a company, when it goes into liquidation because of merger or amalgamation.

By virtue of this section, the legal representative or nominee of the deceased shareholder shall be entitled to transfer the shares.

Operation of Law	Who is entitled to the shares?
Due to death / Lunacy	Legal representative or nominee
Due to insolvency	Official Assignee or Receiver
Due to merger or amalgamation (Companies)	The resultant company

If a widow applies for transmission of the shares standing in the name of her deceased husband without producing a succession certificate and if the articles of association of the company so authorises, the directors may dispense with the production of succession certificate, probate or letter of administration upon such terms as to indemnity as the directors may consider necessary, and transmit the shares to the widow of the deceased by obtaining an indemnity bond.

On the basis of indemnity, the company can transmit the shares in the name of Rosy.

PLEDGING OF SHARES [girvi rakhna]

Shares of a company can be a subject-matter of a valid pledge. Section 2(7) of the Sale of Goods Act, 1930, defines the term 'goods' as meaning every kind of moveable property other than actionable claim and money and includes stocks and shares.

Shares are goods under the Sale of Goods Act, 1930 and therefore can be pledged under the Indian Contract Act, 1872.

BLANK TRANSFER refers when a shareholder signs transfer form without filling in the name of the transferee and the date of execution and hands it over with the share certificate to the transferee.

In other words, Blank transfer means purchase and sale of shares by mere delivery of share certificate along with transfer deed without mentioning the name of transferee in the transfer deed.

Generally, the practice of blank transfer is prevalent for the following purposes:

(a) Avoidance of transfer stamps

(b) Concealment of the indemnity of the real beneficial owners

(c) Evasion of taxes by suppression of profits.

Note: A blank transfer accompanied by the delivery of the share certificates vests in the transferee both equitable as well as legal rights in the shares. But until the registration of his name in the register of members, the transferee does not acquire a title and thus he cannot exercise any right as shareholder in respect of those shares.

FORGED TRANSFER: An instrument on which the signature of the transferor is forged is called a forged transfer which is null and void.

A forged instrument of transfer is presented to the company for registration.

In order to avoid the consequences because of a forged transfer, companies normally write to the transferor about the lodgment of the transfer instrument so that he can object if he wishes.

Consequences of a forged transfer:

(i) Transfer null and void:
A forged transfer is a nullity and, therefore, the original owner of the shares continues to be with the shareholder and the company is bound to restore his name on the register of members.

(ii) No denial of transfer of shares sold to innocent purchaser:
If company issues a share certificate to transferee and he sells the shares to an innocent purchaser, the company is liable to compensate such a purchaser, if it refuses to register him as a member, or if his name has to be removed on the application of the true owner.

(iii) Indemnify the losses:
If the company is put to loss by reason of the forged transfer, as it may have paid damages to an innocent purchaser, it may recover the same independently from the person who lodged the forged transfer.

Q5. Arun buys 300 shares of a company from Barun on the faith of a share certificate issued by the company. Arun submits to the company a transfer deed, duly executed, along with Barun's share certificate for transferring the shares in his name. The company discovers that the certificate in the name of Barun has been fraudulently obtained and refuses to register the transfer, is Arun entitled to get the shares transferred in his name?
(June, 2005), 6 marks

A5. The given case is similar to the concept covered under "Forged Transfer - to innocent purchaser".
The Company cannot refuse to register the transfer of shares in favour of the innocent purchaser. Accordingly, Arun is entitled to register the shares in his name.
He is also entitled to claim damages from the company.

Q6. Anant buys 20 shares of a public company from Basant through a stock broker. Anant receives the share certificate and the blank-transfer deed countersigned by Basant but does not lodge the transfer

deed for registration. Examine the legal effect of unregistered transfer between the transferor and the transferee. (Dec, 2007), 4 marks

A6. As per the Companies Act, 2013, the Blank transfer is a valid transfer.

Blank transfer means purchase and sale of shares by mere delivery of share certificate along with transfer deed without mentioning the name of transferee in the transfer deed.

The contract between Anant and Basant for transfer of shares is a valid contract and Anant becomes the beneficial owner of the shares even though the transfer has not been lodged with the company and he has not acquired the legal title to shares.

In given case, only the formalities of registration of transfer are pending.

TRANSPOSITION (rearrangement) OF NAMES OR JOINT NAMES

[naam upper niche karo]

In the case of joint-shareholders, one or more of them may require the company to alter or rearrange the serial order of their names in the register of members of the company or all joint holders wish to hold shares individually.

In this process, there will be need for effecting consequential changes in the share certificates issued to them.

If the company provides in its articles that the senior-most among the joint-holders will be recognised for all purposes like service of notice, a copy of balance sheet, profit and loss account, voting at a meeting etc., the request of transposition may be duly considered and approved by the Board or other authorised officer of the company.

Since no transfer of any interest in the shares takes place on such transposition, the question of insisting on filing transfer deed with the company, may not arise.

Transposition does not also require stamp duty.

DEPOSITORY SYSTEM - AN OVERVIEW

It is like the banking system.

A depository holds securities in accounts for its clients and transfers securities from one account to another.

Earlier, the investors were using the share certificate which has many risks like risk of losing share certificate and risk of bad deliveries.

In depository system, above risks have been phased out and it is as safe like your bank account.

- Benefits of Depository System

  (i) Elimination of bad deliveries

  (ii) Elimination of all risks associated with the physical certificates.

  (iii) It facilitates the immediate transfer and registration of the securities.

  (iv) It facilitates faster disbursement of non-cash corporate benefits like rights, bonus, etc.

  (v) It reduces the brokerage for trading in dematerialized securities.

  (vi) Elimination of paper work and recording of transactions like transfer of shares.

  (vii) Elimination of problems related to change of the address of investor, transmission, etc.

  (viii) Elimination of problems related to selling securities on behalf of minor.

- Models of Depository

  > Dematerialization: It is a process of conversion of physical share certificate into electronic form.

  So, when a shareholder uses the dematerialization facility, a company takes back the shares, through depository system and equal number of shares is credited in his Demat account in electronic form.

  > Immobilization: Where physical share certificates are kept in vaults with the depository for safe custody.

  All subsequent transactions in these securities take place in book entry form.

The actual owner has the right to withdraw his physical securities as and when desired.

The immobilization of fresh issue may be achieved by issuing a jumbo certificate representing the entire issue in the name of depository, as nominee of the beneficial owners.

- Legal Framework for Depository System

(i) The Depositories Act, 1996

(ii) The SEBI (Depositories and Participants) Regulations, 1996

(iii) Bye-Laws of Depository

(iv) Business rules of Depository

- Depository Participant

A Depository Participant (DP) is the representative of the investor in the depository system providing link between the Company and investors through depositories.

An investor opens its Demat Account with a Depository Participant for keeping its securities in electronic form.

- Functions of the Depository Participant in connection with Dematerialization:

(i) Acts as the agent of Depository;

(ii) Customer interface of Depository;

(iii) Functions like securities Bank;

(iv) Account Opening;

(v) Facilitates dematerialization;

(vi) Instant transfer on payout;

(vii) Credits to investor on IPO, rights and bonus;

(viii) Settles trades in the electronic segment.

- Rematerialisation

(i) Client submits Rematerialisation Request Form (RRF) to DP;

(ii) DP intimates Depository;

(iii) Depository intimates the Registrar/Issuer;

(iv) DP sends RRF to the Registrar/Issuer;

(v) Registrar prints certificates and sends to the investors;

(vi) Registrar confirms the Remat to the depository;

(vii) Investor's account with DP debited.

- Functions of the Registrar/Issuer in connection with Demat Account:

(i) Dematerialization;

(ii) Confirmation of Beneficiary Holdings;

(iii) Corporate actions- Rights, Bonus, etc;

(iv) Reconciliation of Depository Holdings;

(v) Rematerialisation.

- Electronic Credit in New Issues

(i) Investor opens account with DP;

(ii) Submits application;

(iii) Registrar upholds list of allotees to Depository;

(iv) Depository credits allottee's account with DP;

(v) Refund sent by Registrar as usual

FUNGIBILITY (Fungibility means interchangeable or exchangeability). [joh gaya wohi wapis nahi milega]

All securities held in depository shall be fungible i.e. all certificates of the same security shall become interchangeable in the sense that investor loses the right to obtain the exact certificate he surrenders at the time of entry into depository.

It is like withdrawing money from the bank without bothering about the distinctive numbers of the currencies.

As per Section 9 of the Depositories Act, 1996, securities in depositories are in fungible form.

In this system, an investor loses its right to get the exact shares certificate he surrenders at the time of entry into the depository.

THE DEPOSITORIES ACT, 1996

- Objectives

  (i)It acts as a legal basis for establishment of depositories;

  (ii) Dematerialization of securities in the depositories mode becomes possible;

  (iii) Making the securities fungible;

  (iv) Making the shares, debentures and any interest thereon of a public limited company freely transferrable;

  (v) Exempting all transfer of shares from the stamp duty.

- Eligibility for depository system

  Any company or institution must:

  (i) be formed and registered under as a company under the Act;

  (ii) be registered with SEBI as a depository;

  (iii) have framed bye-laws with the previous approval of SEBI;

  (iv) have one or more participants;

  (v) have adequate systems and safeguards to prevent manipulation of the records;

  (vi) comply with the Depositories Act, 1996;

  (vii) meet all the eligibility criteria.

- Eligible securities required to be in Depository mode

  It is not necessary for all the eligible securities to be in the depository mode.

  The investor also possesses the choice of holding the physical securities.

- Rights of Depositor and the Beneficial Owner

  The depository becomes the registered owner for the purpose of transferring ownership of securities on behalf of the beneficial owner.

  The beneficial owner possesses all the rights and benefits and is subjected to all the liabilities in respect of securities held by a depository.

- Power of the Board to give Directions

  SEBI may after proper investigations and enquiry, issue such directions to any depository or participant which may be in the interest of general public.

- Penalty for failure to enter into agreement

  If any person fails to furnish any information, documents, etc. or fails to file any return or to maintain any books of accounts or records, he shall be liable to a penalty of Rs.1,00,000/- for each day during which the failure continues or Rs. 1 crore, whichever is less.

CHAPTER 3
MEMBERS & SHAREHOLDERS

INTRODUCTION

The membership in a company is obtained through subscribing to the memorandum, through allotment/ transfer/ transmission etc.

The membership rights enable the member to participate into the affairs of the company through general meeting.

The Companies Act prescribes aspects as to the mode of acquisition of membership, eligibility criteria, and minimum number of members, rights and liabilities of members.

WHO ARE MEMBERS?

A company is composed of members, though it has its own separate legal entity.

The members of a company are the persons who constitute the company, as a corporate entity.

In the case of a company limited by shares, the shareholders are the members.

The terms "members" and "shareholders" are usually used interchangeably, being synonymous, as there can be no membership except through the medium of shareholding.

Thus, generally speaking every shareholder is a member and every member is a shareholder.

However, there may be exceptions to this statement,

e.g., a person may be a holder of share(s) by transfer but will not become its member until the transfer is registered in the books of the company in his favour and his name is entered in the register of members. Similarly, a member who has transferred his shares, though he does not hold any shares yet he continues to be member of the company until the transfer is registered and his name is removed from the register of members maintained by the company under Section 88 of the Companies Act, 2013.

• Definition of Member

According to Section 2(55) of the Companies Act, 2013:

(a) The subscribers to the memorandum of a company who shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members;

(b) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall, be a member of the company;

(c) Every person holding shares of a company and whose name is entered as a beneficial owner in the records of a depository shall be deemed to be a member of the concerned company.

Accordingly, a person can acquire membership in a company by the following ways:

(i) Agreement to become a member; and

(ii) Entry of the name of the person in the register of members of the company.

• Who can become a member of a Company?

A person who is eligible to make contract under section 11 of the Indian Contract Act, 1872 can become a member of a company.

A person who

(i) has completed 18 years of age.

(ii) is of sound mind.

(iii) is not disqualified from contracting by any law to which he is subject.

Accordingly, there are two important elements which must be present before a person can acquire membership of a company viz.,

(i) Agreement to become a member; and

(ii) Entry of the name of the person so agreeing, in the register of members of the company.

Both these conditions are cumulative.

MODES OF ACQUIRING MEMBERSHIP

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

(a) by subscribing to the Memorandum of Association (deemed agreement); or

(b) by agreeing in writing to become a member:

  (i) by making an application to the company for allotment of shares; or

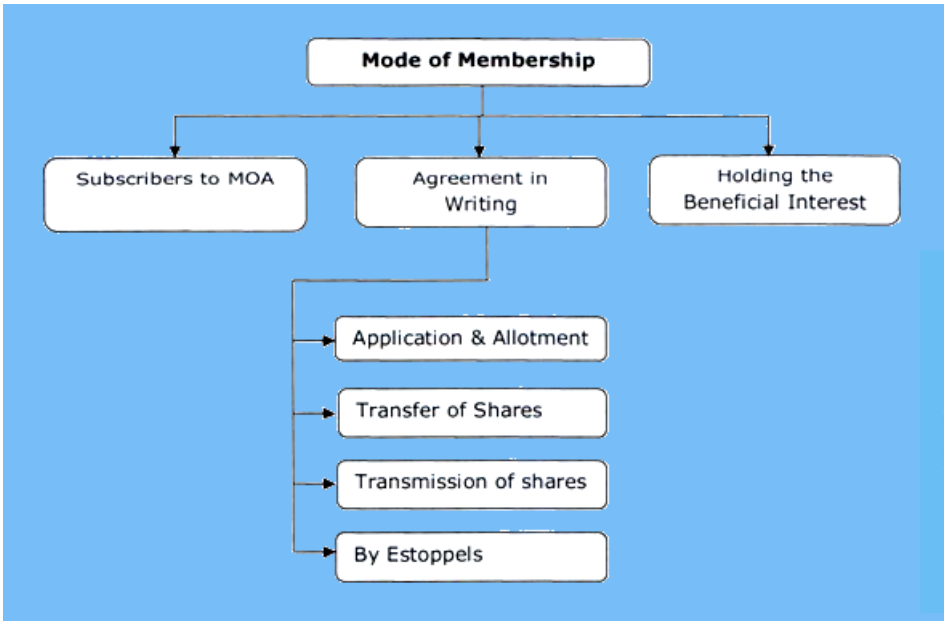
  (ii) by executing an instrument of transfer of shares as transferee; or

  (iii) by consenting to the transfer of share of a deceased member in his name; or

  (iv) by acquiescence or estoppel.

(c) by holding shares of a company and whose name is entered as beneficial owner in the records of a depository (Under the Depositories Act, 1996), and on his name being entered in the register of members of company.

Also every such person holding shares of the company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be the member of the concerned company.



• Subscribers to the Memorandum

In the case of a subscriber, no application or allotment is necessary to become a member.

By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member.

A subscriber to the memorandum cannot rescind the contract for the purchase of shares even on the ground of fraud by the promoters.

• Agreement in Writing

> By an Application and Allotment:

A person who applies for shares becomes a member when shares are allotted to him, a notice of allotment is issued to him and his name is entered on the register of members.

The general law of contract applies to this transaction.

There is an offer to take shares and acceptance of this offer when the shares are allotted.

> By Transfer of Shares:

Shares in a company are movable property and are transferable in the manner as prescribed in the articles of the company.

A person can become a member by acquiring shares from an existing member and by having the transfer of shares registered in the books of the company.

> By Transmission of Shares:

A person may become a member of a company by operation of law i.e. if he succeeds to the estate of a deceased member.

Membership by this method is a legal consequence.

On the death of a member, his executor or the person who is entitled under the law to succeed to his estate gets the right to have the shares transmitted and registered in his name in the company's register of members.

> By Acquiescence or Estoppels

A person is deemed to be a member of a company if he allows his name, without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows him to be held out as a member.

In such a case, he is estopped from denying his membership.

He can, however, escape his liability by taking prompt action for having his name removed from the register of members on permissible grounds.

> Holding Shares as Beneficial Owner in the Records of Depository:

That a person holding equity share capital of a company whose name is entered in the records of the depository shall be deemed to be a member of the concerned company.

Q1. Mohan applied for 4000 shares of in a company but no allotment was made to him. Subsequently, 4000 shares were transferred to him without his request and his name was entered in the register of members. Mohan stood by and allowed his name to remain in the register of members. Subsequently, the company went into liquidation and he was held liable as a contributory. Now Mohan wants to apply to the Court/Tribunal for rectification of the register of members. Can he do so? Explain. (4 marks) Dec 2012

A1. A person is deemed to be a member of a company if he allows his name, without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows him to be held out as a member.

WHO MAY BECOME A MEMBER?

- Company as a Member of another Company: [Yes]

A company is a legal person and so is competent to contract.

A subsidiary company cannot become a member of its holding company.

- Partnership firm as a Member: [No]

  A partnership firm is not a legal person and as such it cannot, in its own name, become a member of a company except in company registered u/s 8 of Companies Act.

- Limited Liability Partnership: [Yes]

  Being an incorporated body under the statute, can become a member of a company.

- Section 8 Company: [Yes]

  A non-profit making company licensed under Section 8 of the Companies Act can become a member of another company if it is authorised by its Memorandum of Association to invest into shares of the other company.

- Foreigners as Members: [Yes]

  A foreigner may take shares in an Indian company and become a member subject to the provisions of the Foreign Exchange Management Act, 1999.

- Minor as Member: [No]

  A member, who is a minor, is wholly incompetent to enter into a contract and as such cannot become a member of a company.

  Consequently, an agreement by a minor to take shares is void ab-initio.

  After attaining majority, the minor, if he does not want to be a member, must repudiate his liability on the shares on ground of minority, and if he does so, the company cannot plead estoppel on the ground of his having received dividends during his minority or that he had fraudulently misrepresented his age in his application for shares.

  If shares are transferred to a minor, the transferor will remain liable for all future calls on such shares so long as they are held by the minor even if the transferor was ignorant of his minority.

  If the company knows of his minority it may refuse to register the transfer, unless the transfer was made through the guardian.

- Insolvent as Member: [Yes]

  An insolvent may be a member of a company as long as he is on the register of members.

  He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver.

- Pawnee: [No]

  Pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law.

  In this sense, a pledge differs from a mortgage.

  In view of the above, a Pawnee cannot be treated as the holder of the shares pledged in his favour, and the Pawner continues to be a member and can exercise the rights of a member.

- Receiver: [No]

  A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party and an order is made therein.

- Persons taking shares in fictitious names: [Yes]

  A person who takes shares in the name of a fictitious person, becomes liable as a member besides incurring criminal liability under Section 38 of the Act, wherein punishment is provided for commission of fraud

- Trade Union as Member: [Yes]

  A trade union registered under the Trade Unions Act, can be registered as a member and can hold shares in a company in its own corporate name.

- Status of ADR/GDR holders as members:

A holder of American Depository Receipts (ADR) / Global Depository Receipts (GDR) cannot be treated as a member of the Company.

It was **clarified by the MCA** on the following grounds:

(a) A person is a member of a company

(b) Who is a subscriber to MOA or

(c) Whose name has been entered in the register of members?

(d) A person holding share capital of the company and whose name is entered as beneficial owner in the records of the depository is deemed to be a member of the Company.

(e) A holder of ADR/GDR may become a member of the Company only on transfer/redemption of ADR/GDR into equity shares.

(f) Since the underlying equity shares are allotted in the name of overseas depository bank, the name of such overseas bank is to be entered in the register of members of the issuing company.

Note: Since the overseas depository bank is neither the depository as defined under the Companies Act, 2013 & the Depositories Act, 1996 non holding share capital.

Therefore, it cannot be deemed to be a member of the Company.

Special Note: Since, a holder of ADR/GDR is neither the subscriber to the Memorandum nor a holder of the shares, his name cannot be entered in the Register of Members.

Therefore, a holder of Global Depository Receipts cannot be called a member of the company.

- Joint Membership: [4 log sath me shares hold kar sakte hai]

  If two or more persons apply for shares in a company and shares are allotted to them, each one of such applicant becomes a member.

  Joint holders of shares in a public company are not a single member except for the purpose of voting rights, dividend rights, and right to receive notice & other documents of General Meeting. Each of the joint holders of shares is a member of the company except in case of private company for the purpose of determining the maximum number of members.

- Section 10 of the Companies Act, 2013:
  The articles of association will be binding on the joint shareholders as contract between them and the company.

Q2. ABC & Co., a partnership firm applied for shares in XYZ Ltd. The company allotted the shares required by the partnership firm. In the given context, what is the liability of the partners and the partnership firm?

A2. A partnership firm is not a legal person and as such it cannot, in its own name, become a member of a company except in company registered u/s 8 of Companies Act, 2013.

The allotment in the name of partnership firm is invalid.

Therefore, in the given situation, neither the partnership firm nor partners are liable to the company.

Q3. Fortune Ltd. refused to enter the name of the minor son of a deceased member in the register of members on the ground that the minor cannot enter into a contract as per Section 11 of the Indian Contract Act, 1872. The shares are fully paid-up. Comment on the decision of the company and suggest remedies available.

(4 marks) Dec 2009

A3. A member, who is a minor, is wholly incompetent to enter into a contract and as such cannot become a member of a company.

Consequently, an agreement by a minor to take shares is void ab-initio.

If shares are transferred to a minor, the transferor will remain liable for all future calls on such shares so long as they are held by the minor even if the transferor was ignorant of his minority.

If the company knows of his minority it may refuse to register the transfer, unless the transfer was made through the guardian.

Case Law: Diwan Singh v. Minerva Films Ltd.:

In this case, it was held that law does not prevent a minor to acquire shares in a joint stock company if they are properly representative by lawful guardians.

In the given case, the shares are fully paid-up and nothing is payable to the Fortune Ltd. and minor enters into a contract on behalf of deceased lawful guardian.

Therefore, Fortune Ltd. cannot refuse to enter the name of the minor son of deceased member.

Q4. Rahees, who is a member of Vivek Ltd., a public company, has very recently become an insolvent. Can the insolvent Rahees continue as a member of the company? June 2011

A4. In this case, Rahees shall continue as a member of the company even after becoming insolvent but he will loss his beneficial rights like right of dividend and transfer of shares in favour of transferee.

All kinds of beneficial rights shall be with official receiver of Mr. Rahees duly appointed by the Court.

Q5. M/s Honest Cycles Ltd. has received an application for transfer of 1,000 equity shares ofRs.10 each fully paid-up in favour of Mr. Balak. On scrutiny of the application form it was found that the applicant is minor. Advise the company regarding the contractual liability of a minor and whether shares can be allotted to the Balak by way of transfer.

A5. A Company cannot allot shares to the minor since minor has no contractual capacity to enter into a Contract with the Company.

In the given case, Honest Cycles Ltd. allotted shares to a minor, in such situation minor shall not be liable for any kind of liabilities but can avail benefits.

Q6. RSP Limited allotted 500fully paid-up shares ofRs.100 each to Z, a minor, in response to his application without knowing that he was a minor and entered his name in the Register of members. Later on, the company came to know of this fact. The company cancelled the allotment and struck-off his name from the Register of members and also forfeited his entire share money. He filed a suit against the action of the company. Decide whether Z would be given any relief by the court under the provisions of the Companies Act, 2013.

A6. A Company cannot allot shares to the minor since minor has no contractual capacity to enter into a Contract with the Company.

After allotment to minor, the company cannot cancel the allotment.

In the given case, RSP Ltd allotted shares to a minor and after allotment, cancelled the allotment and forfeited the money. In such situation, minor shall file a suit against the Company.

RESTRICTION ON MEMBERSHIP

Any 7 or more persons can form a public company, or where the company to be formed will be a private company, any 2 or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of the Act in respect of registration, form an incorporated company, with or without limited liability.

One person, where the company to be formed is to be One Person Company with compliance of the Companies Act, 2013 in respect of registration.

• Maintenance of Minimum Number:

If the number of members falls below the statutory minimum (i.e. 2 & 7), the liability of members become unlimited and the company may be wound up by the Court.

• Restriction on Membership:

The maximum number of members of a private company is limited to 200 excluding the present and past employees of the company.

There is no restriction with regard to the maximum number of members of a public company.

CESSATION OF MEMBERSHIP [abh member nahi raha]

A person ceases to be a member of a company when his name is removed from its register of members, which may occur in any of the following situations:

(i) By transfer or by forfeiture;

(ii) By transmission of shares;

(iii) He is adjudged insolvent and the Official Assignee disclaims his shares;

(iv) By redemption of preference shares;

(v) Member may rescind the contract on ground of fraud or misrepresentation or mistake;

(vi) Due to the winding-up of the Company;

(vii) Share warrants have been issued in exchange of fully paid shares.

Though one ceases to be a member, he remains liable as a contributory and is also entitled to share in the surplus, if any.

• Expulsion of a Member:

Expulsion of a member of a company by the Board of Directors by amending the Articles of Association of a company is illegal and void.

Case Law: **"Bajaj Auto Ltd. v. N.K. Firodia"**

The Supreme Court held that any provisions relating to the expulsion of a member by the (BOD) of a company will be treated as illegal & ultra vires. Based on this judgment, the DCA (now MCA) clarified that assumption by the Board of Directors of a company of any power to expel a member by amending its articles of association is illegal and void.

Q7. Thrive Ltd. is a public limited company, incorporated under the Companies Act, 2013. The Board of Directors of the said company has recently decided to insert an article in its articles of association relating to expulsion of a member by the Board of Directors of the company where the directors were of the view that the activities or conduct of such a member was detrimental to the interests of the company. Is the Board's decision valid in the eye of law

4 marks (Dec 2011)

A7. If the article of association provides expulsion of any members, then the Board of Directors of the Company can expel any members who are working against the interest of the Company.

MCA has clarified that any assumption of the powers by the Board of Directors to expel a member by alteration of article of association shall be illegal and void and same has also been decided "Bajaj Auto

Case".

REGISTER OF MEMBERS

Section 88 of the Companies Act, 2013:

(1) Every company shall keep and maintain the following registers in such form as may be prescribed:

(a) Register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;

(b) Register of debenture-holders; and

(c) Register of any other security holders.

(2) The register of the Company includes an index of the names.

(3) The register and index of beneficial owners maintained by a depository, shall be deemed to be the corresponding register and index for the purposes of this Act.

(4) Foreign register.

Important Points related to Register of Members

1. Timing of Entry: The entries in the Member's registers shall be made within seven days of the approval of allotment or transfer by the Board of Directors.

2. Place of keeping the Register: The registers shall be maintained at the registered office of the company.

   It can also be kept at any of the following two places if a special resolution is passed at General Meeting:

   - At any other place within the city, town or village in which the registered office is situated or
   - Any other place in India in which more than one-tenth of the total members reside.

3. Changes to be recoded: Any changes consequent to issue of right, bonus, preferential allotment, transmission, transfer, etc. shall be recorded within 7 days of the approval of Board.

   Death and Insolvency shall also be recorded.

4. Details of Pledge of securities: If the promoters have pledged the shares of the company which is listed, the details of pledging of share to be entered in the register within 15 days of event.

5. Authentication of entries: The entries shall be authenticated by the company secretary of the company or by any other person authorised by the Board.

6. Inspection of Register: The member, debenture-holder, other security holder or beneficial owner, can inspect the registers during business hours without payment of any fees.

   Any other person can inspect that on payment of such fees as may be specified in the articles of association of the company but not exceeding Rs. 50 for each inspection.

   PROVIDED that such particulars of the register or index or return as may be prescribed shall not be available for inspection or for taking extracts or copies under this sub-section.

7. Supply of Extract of Register:

   Any member, debenture-holder, other security holder or beneficial owner of the company or any other person on payment of such fee as may be specified in the Articles of Association of the company but not exceeding rupees ten for each page and such copy can request to supply extract of register.

   The company should supply it within a period of 7 days from the date of deposit of fee to the company.

8. Penalty: If a company fails to maintain a register of members or debenture-holders or other security holders, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs.50,000/- but not more than Rs.3,00,000/- and where the failure is a continuing one, with a further fine which may extend to Rs.1000/- for every day, after the first during which the failure continues.

Register Prima Facie Evidence:

Section 95 of the Companies Act, 2013 provides that the registers, their indices and copies of annual returns shall be prima facie evidence of any matter.

A register of members is prima facie evidence of the truth of its contents.

Accordingly, if a person's name, to his knowledge, is there in the register of members of a company, he shall be deemed to be a member and onus lies on him to prove that he is not a member.

Case Law: **M.F.R.D. Cruz (1939)**

Facts: The plaintiff applied for 4,000 shares in a company but no allotment was made to him. Subsequently 4,000 shares were transferred to him without his request and his name was entered in the register of members. The plaintiff knew it but took no steps for rectification of the register of members. The company went into liquidation and he was held liable as a contributory.

Judgment: The Court held "when a person knows that his name is included in the register of shareholders and he stands by and allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed".

- Foreign Register:

  Every company has to maintain or keep a register of foreign members or debenture-holders, other security holders or beneficial owners residing outside India.

  Foreign Register contains the names and particulars of the members, debenture holders, other security holders or beneficial owners residing outside India."

Penalty: If a company fails to maintain a register of members or debenture-holders or other security holders, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs.50,000/- but not more than Rs.3,00,000/- and where the failure is a continuing one, with a further fine which may extend to Rs.1000/- for every day, after the first during which the failure continues.

A foreign register is deemed to be a part of the company's principal register and it should be kept in the same manner as the principal register and be likewise open to inspection.

- Preservation of Registers:

  Rule 15 of Companies (Management and Administration) Rules, 2014 regulates the preservation and disposal of registers which the companies registered under the Companies Act, 2013 or previous company law are required to maintain.

Register Details	Retention Period
• Register of members commencing from the date of the registration of the company	• Permanent
• Index of members	• Permanent
• Register and Index of debenture holders	• 8 years after the redemption of the debentures
• Copies of all annual returns prepared under Section	• 8 years from the date of filing with the Registrar of

92 and copies of all documents required to be annexed	Companies
• Foreign Register	• Permanent

Book Closure (Section - 91 of the Companies Act, 2013) [books band]

Book Closure is the periodic closure of the Register of Members and Transfer Books of the company to take a record of the shareholders to determine their entitlement to dividends or to bonus or right shares or any other rights pertaining to shares.

A company may close the register of members for a maximum of 45 days in a year and for not more than 30 days at any one time.

The listed company should close their book atleast once in a year.

Section 91 of the Companies Act, 2013 contains guidelines for closing the register of members.

It lays down:

(1) A company may close the register of members or the register of debenture-holders or the register of other security holders for any period or periods not exceeding 45 days in each year, but not exceeding 30 days at any one time, subject to giving of previous notice of atleast 7 days.

(2) If the register of members or of debenture-holders or of other security holders is closed without giving the notice, or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits as specified, the company and every officer of the company who is in default shall be liable to a penalty of Rs.5000/- for every day subject to a maximum of Rs.1,00,000/- during which the register is kept closed.

Record date (Regulation - 42 of the listing Regulation) is the date on which the records of a company are closed for the purpose of determining the stockholders to whom dividends, proxy's rights etc. are to be sent.

In case of fixation of record date, a company fixes a date for determining the corporate benefits like dividends rights, bonus shares rights and rights issue.

The listed company should give notice of record date in a newspaper at least 7 days before the fixation of the record date.

Nomination by Security holders (including members)—Section 72 of the Companies Act, 2013

Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

When the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

When the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

RIGHTS OF MEMBERS

When once a person becomes a member he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act.

The appointment of a receiver, the attachment of the shares, and the pledge of the shares or taking over of the management of a company which is holding shares in another company under Section 18A of the Industries (Development & Regulation) Act, 1951 will not alter the position.

- Individual Rights:

  Members of a company enjoy certain rights in their individual capacity, which they can enforce individually. These rights are contractual rights and cannot be taken away except with the written consent of the member concerned.

These rights can be categorised as under:

Right to receive copies of the following documents from the company:

(a) Balance-sheet and profit and loss account.

(b) Report of the Cost Auditor, if so directed by the Government.

(c) Contract for the appointment of the managing director/manager.

(d) Notices of the general meetings of the company.

- Collective Membership Rights:

Members of a company have certain rights which can be exercised by members collectively by means of democratic process, i.e. by majority of members usually unless otherwise prescribed.

This involves the principle of submission by all members to the will of the majority, provided that the will is exercised in accordance with the law and the Memorandum and Articles of Association of the company.

In short, the shareholders in majority determine the policy of the company and exercise control over the management of the company.

However, if and when the majority becomes oppressive or is accused of mismanagement of the affairs of the company, confers right, to not less than 100 members of a company or not less than 1/10 of the total number of its members whichever is less or any member or members holding not less than 1/10 of the issued share capital of the company (but they must have paid all calls and other sums due on their shares) and in the case of a company not having a share capital, not less than one-fifth of the total number of its members, to apply to CLB (NCLT) for relief in cases of oppression or for relief in cases of mismanagement respectively.

1. Right to inspect statutory registers/returns and get copies thereof on payment of prescribed fee.
   The members have been given right to inspect the following registers etc.:
   (a) Debenture trust deed;
   (b) Register of Charges;
   (c) Register of Members, Register of Debenture holders, Index of Members, Index of Debenture holders;
   (d) Shareholder's Minutes Book;
   (e) Register of Contracts, Companies and Firms in which directors are interested;
   (f) Register of directors;
   (g) Register of Directors' Shareholdings; and
   (h) Copy of agreement of appointment of the managing director/manager.
2. Right to attend meetings of the shareholders and exercise voting rights at these meetings either personally or through proxy.
3. Additional rights, the members have the following additional rights:
   (a) To receive share certificates as title of their holdings.
   (b) To transfer shares (Sections 82 and 108 and AOA of the company).
   (c) To resist and safeguard against increase in his liability without his written consent.
   (d) To receive dividend when declared.
   (e) To have rights shares.
   (f) To appoint directors.
   (g) Right of dissentient shareholders to apply to court.
   (h) Right to make application collectively to the Company Law Board for oppression and mismanagement.
   (i) Right of Nomination.

VOTING RIGHTS OF MEMBERS

Member's rights are determined by the Companies Act, Memorandum of association, Articles of association of the company and the terms of issue of shares.

Rights attached to a class of shares are known as "class rights".

Member's rights relate to dividend, voting at members' meetings and return of capital.

Preference shareholders may have rights to a fixed amount or a fixed rate of dividend or to cumulative dividend.

Where ordinary shareholders are conferred the right to participate in the surplus assets on winding-up of a company, it is not deemed to be a class right as it is implied even in the absence of any express provision in the articles.

Note: If the variation by one class affects the rights of any other class of shareholders, the consent of three- fourth of such other class of shareholders needs to be obtained.

Further, the variation of rights of shareholders can be effected only:

(i) If provision with respect to such variation is contained in the Memorandum or Articles of association of the company; or

(ii) In the absence of any provision in a Memorandum or Articles of association of the company, if such a variation is not prohibited by terms of issue of the shares of that class.

Right of Dissenting Members:

According to section 48(2), where the rights of any class of shares are varied, the holders of not less than 10% of the issued shares of that class, being persons who did not consent to such variation or vote in favour of the special resolution for the variation, can apply to the Tribunal (NCLT) to have the variation cancelled.

Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made within 21 days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

SHAREHOLDERS' DEMOCRACY

The concept of shareholders' democracy in the present day corporate world denotes the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or through their elected representatives.
In that context the shareholders democracy means the rule of shareholders, by the shareholders, and for the shareholders in the corporate enterprise, to which the shareholders belong.
Thus the Companies Act has tried to demarcate the area of control of directors as well as that of shareholders.
Basically all the business to be transacted at the meetings of shareholders is by means of an ordinary resolution or a special resolution or by postal ballot.

SHAREHOLDER'S AGREEMENT

Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how

the company should be operated and the defining inter-se shareholders' rights and obligations.
Shareholders' agreement (SHAs) are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party.
Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act.
SHA creates personal obligation between the members signing such agreement however, such agreements do not become a regulation of the company in the way the provisions of Articles are.

VETO POWER

A veto – Latin for "I forbid" – is the power to unilaterally stop an official action, especially the enactment of legislation.
A veto may give power only to stop changes, thus allowing its holder to protect the status quo.

There are some instances where the consent of the shareholders is mandatory to approve any decision or transaction which is said to be as the veto power or veto right of shareholders of the company.
For instance in case of related-party transactions, promoters, who are majority shareholders, cannot vote in

special resolutions in cases of related-party transactions.
As stated under the provisions of Section 188 any related-party transaction that is not done in the ordinary course of business and is not at an arm's length will need approval of minority shareholders by way of a special resolution.
The other instance where the law provides veto power to shareholders is in case of class action suits.
Section 245 of Companies Act, 2013 provides for class action to be instituted against the company as well as the auditors of the company.

Veto Power and Casting Vote

Veto power is different than casting vote of Chairman.
Casting vote is applicable on in case of equality of votes in favour and against.
In case of equality the Chairman may give vote either in favour or against the resolution and it can be carried accordingly.
Veto power has not been defined in Companies Act.
However, dictionary meaning of veto power is: "to refuse to admit or approve; specifically: to refuse assent to (a legislative bill) so as to prevent enactment or cause reconsideration."

CHAPTER 4
DEBT CAPITAL

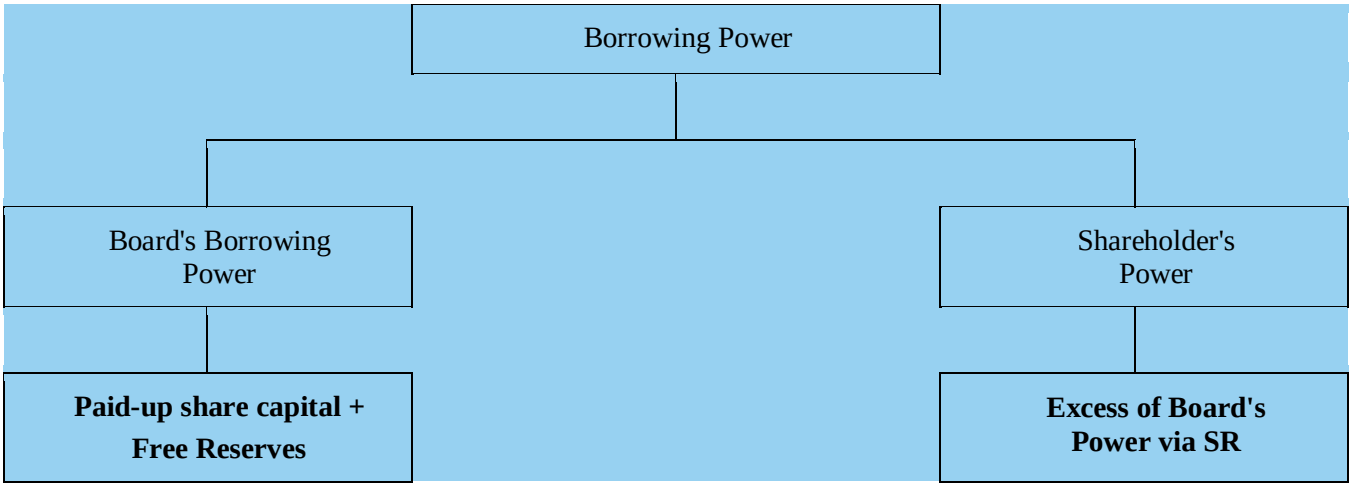
The Cost of Capital is one of the major concern areas of the company.
The company has to economies the capital.
Debt is one of the most important sources of capital.
The debt can be generated from different sources, i.e. bonds, debentures, banks and FIs etc.
The debt can be raised by following the prescribed procedure of Companies Act and Rules thereunder.
The SEBI has also issued the regulations for listed entities pertaining to issue of debentures.
Even the permission of RBI is required in some cases for raising debt.

BORROWING [loan de do...]

In order to run a business effectively/successfully, adequate amount of capital is necessary.
In some cases capital arranged through internal resources i.e. by way of issuing equity share capital or using accumulated profit is not adequate and in some cases, the Organisation arranges the fund from the external resources like External Commercial Borrowing (ECB), Debentures, Bank Loan and Public Fixed Deposits etc.

• Power of Company to Borrow Section 180(l)(c)

The power of the company to borrow is exercised by its directors, who cannot borrow more than the sum authorized.
The powers to borrow money and to issue debentures can only be exercised by the Directors at a duly convened meeting.



The Board of Directors cannot borrow the money in excess of the aggregate of the paid-up share capital and free reserves of the Company apart from temporary loans.
The prior approval of shareholders via special resolution is required in case the company exceeds the above limits of borrowing.

Exemption to Private Companies:

Private Companies are exempted from the requirement of passing Special Resolution to borrow the money in excess of the aggregate of the paid-up share capital and free reserves of the Company.

Note: The power to issue debentures cannot be delegated by the Board of Directors. Temporary Loans means loans repayable on demand or loan repayable within six months.

• Unauthorized or Ultra Vires Borrowing [Haad kardi App ne]

Where a company borrows without the authority as given in the AOA or beyond the amount set out in the Articles, it is an ultra vires borrowing.

In such a case the contract is void and the lender cannot sue the company for the return of the loan.

The securities given for such ultra-vires borrowing are also void and inoperative.

The following remedies are available to the lender in case of Ultra Vires Borrowing:

(i) Injunction and Recovery:

The lender can obtain an injunction (Stay) order from the court and recovery any property which the company has bought with borrowed amount.

(ii) Suit against Directors:

In case of ultra vires borrowing, the lender may be able to sue the directors for breach of warranty of authority, especially if directors deliberately misrepresented their authority.

(iii) Subrogation (In substitution'):

Where the money of an ultra vires borrowing has been used to pay off lawful debts of the company, he would be subrogated to the position of the creditor paid off and to that extent would have the right to recover his loan from the company.

• Intra Vires Borrowing But Outside The Scope Of Agents' Authority [director ke power se jyada within companies power]

A distinction should always be made between a company's borrowing powers and the authority of the directors to borrow.

Where the directors borrowed money beyond their authority and the borrowing is not ultra vires the company, such borrowing is called Intra vires borrowing but outside the Scope of Agent's Authority.

The company will be liable to such borrowing if the borrowing is within the director's ostensible authority and the lender acted in good faith **or** if the transaction was ratified by the company.

Where the borrowing is intra vires the company but outside the authority of the directors the directors can be ratified by the company and become binding on the company.

The company would be liable, particularly if the money has been used for the benefit of the company.

Case Law: **V.K.R.S.T Firm v. Oriental Investment Trust Ltd. (1944)**

Facts: Under the authority of the company, its managing director borrowed large sums of money and misappropriated it. Such borrowed amount is within the limit of paid-up share capital and free reserves of the company.

Judgment: In this case, the company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer has applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse.

Case Law: **T.R. Pratt. (Bom) Ltd. v. E.D. Sassoon and Co. Ltd. (1936)**

Facts: There was no limit on the borrowing for business in the memorandum of the company. But the directors could not borrow beyond the limit of the issued share capital of the company without the sanction of the general meeting. The directors borrowed money from the plaintiff beyond their powers.

Judgment: It was held that the money having been borrowed and used for the benefit of the principal either in paying its debts, or for its legitimate business, the company cannot repudiate its liability on the ground that the agent had no authority from the company to borrow.

TYPES OF BORROWINGS

A company uses various kinds of borrowing to finance its operations.

The various types of borrowings can generally be categorized into:

1) Long term/short term borrowing,
2) Secured/unsecured borrowing,
3) Syndicated/ Bilateral borrowing,
4) Private/Public borrowing.

1A. Long Terms Borrowings –

Funds borrowed for a period ranging for five years or more are termed as long-term borrowings.

A long term borrowing is made for getting a new project financed or for making big capital investment etc.

Generally Long term borrowing is made against charge on fixed Assets of the company.

1B. Short Term Borrowings –

Funds needed to be borrowed for a short period say for a period up to one year or so are termed as short term borrowings.

This is made to meet the working capital need of the company.

Short term borrowing is generally made on hypothecation of stock and debtors.

1C. Medium Term Borrowings –

Where the funds to be borrowed are for a period ranging from two to five years, such borrowings are termed as medium term borrowings.

The commercial banks normally finance purchase of land, machinery, vehicles etc.

2A Secured/unsecured borrowing –

A debt obligation is considered secured, if creditors have recourse to the assets of the company on a proprietary basis or otherwise ahead of general claims against the company.

2B Unsecured debts –

Unsecured debts comprise financial obligations, where creditors do not have recourse to the assets of the company to satisfy their claims.

3A Syndicated borrowing –

If a borrower requires a large or sophisticated borrowing facility this is commonly provided by a group of lenders known as a syndicate under a syndicated loan agreement.

The borrower uses one agreement covering the whole group of banks and different types of facility rather than entering into a series of separate loans, each with different terms and conditions.

3B Bilateral borrowing –

Bilateral borrowing refers to a borrowing made by a company from a particular bank/financial institution.

In this type of borrowing, there is a single contract between the company and the borrower.

4A Private borrowing– comprises bank-loan type obligations whereby the company takes loan from a bank/financial Institution.

4B Public borrowing– is a general definition covering all financial instruments that are freely tradable on a public exchange or over the counter, with few if any restrictions i.e. Debentures, Bonds etc.

Q1. Ajay Ltd. borrowed 100 crores from Prem, without the authority conferred on it by the articles of association. Later, the money borrowed by Ajay Ltd. was used by its Board of Directors to pay off lawful debts of the company. In this scenario, Prem, the lender seeks your advice for recovery of his money. Advise him. (5 marks) (June, 2012)

A1. The money borrowed by Ajay Ltd. from Prem is ultra vires borrowing and accordingly, Prem cannot file a claim for such borrowing.

Since, Ajay Ltd. has used such money for payment of intra vires borrowing (lawful debt) accordingly, such ultra vires borrowing shall be treated as legal and valid debt to the Company.

Therefore, Ajay Ltd. is liable to repay such ultra vires borrowed debt.

Q2. Balance sheet of Duck Ltd. shows a paid-up capital of Rs.5 crore and free reserves of Rs.2 crore. Due to heavy financial requirement of the Company, it plans to apply for a loan of Rs.8 crore with XYZ Bank Ltd. Advise the company on the formalities required to be fulfilled. Also on the alternative course of action (4 marks) (June, 2013)

A2. As per section 180 of the Companies Act, 2013, the power of the company to borrow is exercised by its directors, who cannot borrow more than the sum authorized.

The powers to borrow money and to issue debentures can only be exercised by the Directors at a duly convened meeting.

The Board of Directors cannot borrow the money in excess of the aggregate of the paid-up share capital and free reserves of the Company apart from temporary loans.

The prior approval of shareholders via special resolution is required in case the company exceeds the above limits of borrowing.

Q3. Alok, the Managing Director of Yellow Ltd., borrowed a large sum of money and misappropriated the same. Later, when the lender demanded his money, the company refused to repay, contending that the money borrowed by Managing Director was misappropriated by him and the company is not liable for repayment. Decide, giving reasons, whether the lender would succeed in recovering the money from the company (4 marks) (June, 2015)

A3. Refer the case law - V.K.R.S. T Firm v. Oriental Investment Trust Ltd.

In this case, the company will be held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer has applied

Q4. Board of Directors of Joy Ltd., by a resolution passed at its meeting, decide to provide a loan ofRs.50 crore to Happy Ltd. The paid-up share capital of Joy Ltd. on the date of resolution was Rs.100 crore and the aggregate balance in the free reserves and securities premium account stood at Rs.40 crore. Examining the provisions of the Companies Act, 2013, decide whether the Board's resolution to provide a loan ofRs.50 crore to Happy Ltd. is valid?

(4 marks) (June, 2015)

A4. The provisions of Section 180(l)(c) of the Companies Act, 2013 prohibit the Board of Directors of a company from borrowing a sum which together with the monies already borrowed exceeds the aggregate of the paid-up share capital and free reserves apart from temporary loans unless they have prior approval from the shareholders by a special resolution in general meeting.

Here “temporary loan” means a short-term loan which is payable on demand or within 6 months from the date of loan.

Therefore, the decision of the Board of Directors is in accordance with the provisions of the Companies

Act, 2013 and the Joy Ltd. can provide loan ofRs.50 crore as decided by the BOD.

DEBENTURES

Debenture [Section 2(30)] includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not.

But it shall not include

(a) The instruments referred to in Chapter lll-D of the Reserve Bank of India Act, 1934 (Example: Derivatives and money market instruments); and

(b) Such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company

It is evident from the above definition that the term of debentures covers both types of secured and unsecured debentures.

A debenture certificate is a document given by a company under its seal as an evidence of a debt to the holder usually arising out of a loan and most commonly (not necessarily) secured by a charge.

In short, Debenture is a document which creates a debt.

• Characteristics of Debentures

The usual features of a debenture are as follows:

(i) A debenture is usually in the form of a certificate (like a share certificate) issued under the common seal of the company.

(ii) The certificate is an acknowledgement by the company of its indebtedness to a holder.

(iii) Debenture usually provides for payment of a specified principal sum at a specified date. A company may issue perpetual or irredeemable debentures with no undertaking to pay.

(iv) A debenture usually provides for payment of interest until the principal sum is paid back.

(v) A debenture is, as a rule, one of a series, although a single debenture is not uncommon.

There may be a single debenture issued to one person.

(vi) A debenture generally contains a charge on an undertaking of the company, or on some class of its assets or on some part of its profits.

(vii) The debentures carry no voting rights at any meeting of the company.

(viii) Fixed deposit is not debenture: MCA has clarified that a fixed deposit receipt may be regarded as a security but not as a debenture.

• Issue of Debentures

The debentures can be issued in the same manner as shares in a company.

But unlike shares, they can be issued at a discount without any restriction, if articles so authorise, the reason being that they do not form part of the capital of the Company.

They can also be issued at a premium.

There is no ceiling, minimum or maximum, for the rate of interest payable on debentures.

• Pari Passu Clause in case of Debentures

Debentures are usually issued in a series with a pari passu clause and it follows that they would be on an equal footing as to security and should the security be enforced, the amount realised shall be divided pro-rata, i.e. they are to be discharged ratably.

The expression 'pari passu' implies with equal step, equally treated, at the same rate, or at par with. When it is said that existing debentures shall be issued pari passu clause, it implies that no difference will be made between the old and new debentures.

• Kinds of Debentures

Debentures are generally classified into different categories on the basis of:

> **Convertibility**, Debentures may be classified into following categories:

(i) Non-Convertible Debentures (NCD): These instruments retain the debt character and cannot be converted into equity shares.

(ii) Partly Convertible Debentures (PCD): A part of these instruments is converted into Equity shares in the future at notice of the issuer.

The issuer decides the ratio for conversion.

This is normally decided at the time of subscription.

(iii) Fully Convertible Debentures (FCD): These are fully convertible into Equity shares at the issuer's notice.

The ratio of conversion is decided by the issuer.

Upon conversion the investors enjoy the same status as ordinary shareholders of the company.

(iv) Optionally Convertible Debentures (OCD):

The investor has the option to either convert these debentures into shares at price decided by the issuer/agreed upon at the time of issue.

> **Redeemability,** debentures are classified into:

(i) Redeemable Debentures: It refers to the debentures which are issued with a condition that the debentures will be redeemed at a fixed date or upon demand, or after notice, or under a system of periodical drawings.

(ii) Perpetual or Irredeemable Debentures: A Debenture, in which no time is fixed for the company to pay back the money, is an irredeemable debenture.

But all debentures, whether redeemable or irredeemable become payable on the company going into liquidation.

No more in existence as per the Companies Act, 2013

> **Securit**y, debentures are classified into:

(i) Secured Debentures: These instruments are secured by a charge on the fixed assets of the issuer company.

(ii) Unsecured Debentures: These instruments are unsecured in the sense that if the issuer defaults on payment of the interest or principal amount, the investor has to be along with other unsecured creditors of the company, they are also said to be naked debentures.

> **Registration**, debentures may be classified into:

(i) Registered Debentures: Registered debentures are made out in the name of a particular person, whose name appears on the debenture certificate and who is registered by the company as holder on the Register of debenture holders.

Such debentures are transferable in the same manner as shares.

(ii) Bearer debentures: Bearer debentures on the other hand, are made out to bearer, and are negotiable instruments, and so transferable by mere delivery like share warrants.

The person to whom a bearer debenture is transferred becomes a "holder in due course" and unless contrary is shown, is entitled to receive and recover the principal and the interest accrued thereon.

Distinction between Debenture and Loan:

A debenture means a document which creates or acknowledges a debt.

A loan creates a right in the creditor to demand repayment, and the substance of a debt is a liability upon the debtor to repay the money.

BROAD REGULATORY FRAMEWORK FOR DEBT SECURITIES

(a) SEBI (ICDR) Regulations, 2009
(b) SEBI (Listing Obligation Disclosure Requirement) Regulations, 2015
(c) SEBI (Issue and Listing of Debt Securities) Regulations, 2008
(d) SEBI (Public Offer and Listing of Securitized Debt Instruments) Regulations, 2008
(e) The Companies Act, 2013
(f) Companies (Share Capital and Debentures) Rules, 2014

The aforesaid regulations are discussed in detail in Securities Law and Capital Market paper.

Provisions of Companies Act, 2013 for issue of debentures:

A company proposes for the Issue of Debentures, should take the approval from the shareholders via special resolution.

A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption.

The issue of debentures with an option to convert such debentures into shares, wholly or partly, shall be approved by a special resolution passed at a general meeting.

Note: No debenture shall carry any voting rights.

Compliance for issue of Secured Debentures

(a) Redemption period: Secured debentures can be issued subject to the maximum redemption period i.e. not exceeding 10 years from the date of issue.

Following companies are permitted to issue debentures exceeding 10 years but not exceeding 30 years.

- Companies engaged in setting up of infrastructure projects.
- Infrastructure Finance Companies
- Infrastructure Debt Fund Non-Banking Financial Companies
- Other companies permitted by RBI, National Housing Bank, Ministry or Department of Central Government, etc.

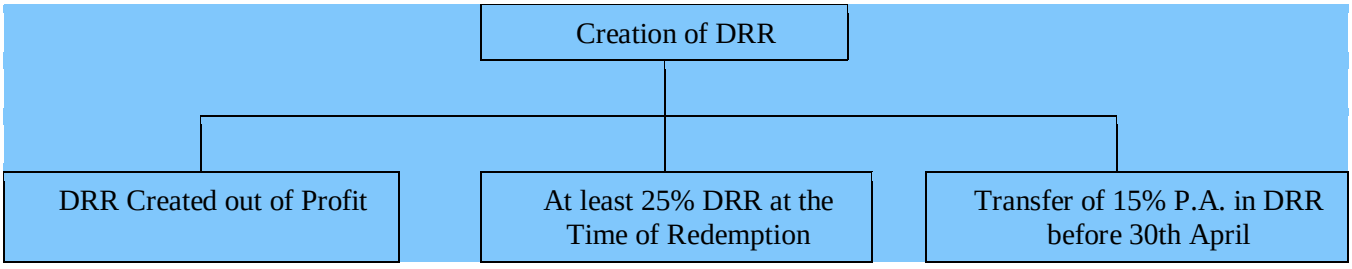
(b) Creation of Charge: Issue of secured debentures must be secured by the creation of a charge on the assets of a company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.

(c) Appointment of Debenture Trustee: The Company shall appoint a debenture trustee before the issue of prospectus for subscription of its debentures and not later than 60 days after the allotment of the debentures, execute a debenture trust deed to protect the interest of the debenture holders.

(d) Creation of Charge in favour of Debenture Trustee: The security for the debentures by way of a charge or mortgage shall be treated in favour of the debenture trustee on:

- any specific movable property of the company (not being in the nature of pledge); or
- any specific immovable property.

Creation of Debenture Redemption Reserve (DRR)



When debentures are issued by a company, the company shall create a debenture redemption reserve account out of the profits of the company, shall not be utilised by the company except for the redemption of debentures.

Condition for creation of DRR:

The Company shall create a Debenture Redemption Reserve (DRR) for the purpose of redemption of debentures subject to the following conditions:

(a) DRR shall be created out of the profits which is available for payment of dividend.

(b) The company shall create DRR as follows:

(i) No DRR is required for Financial Institution & Bank.

(ii) The DRR should be maintained at least 25% of the value of debentures issued by the NBFCs registered under RBI.

(iii) For other companies including listed & unlisted, the DRR should be maintained at least 25% of the value of debentures.

(c) Every company required to create DRR is required to invest or deposit at least 15% of the debentures maturing during the current financial year ending 31st March of next year.

(d) In case of partly convertible debentures, DRR shall be created in respect of non-convertible portion of debenture issue.

(e) The amount credited to the DRR shall not be utilised by the company except for the purpose of redemption of debentures.

Appointment of Debenture Trustees

No company shall issue a prospectus or make an offer to its members exceeding 500 for the subscription of its debentures, unless the company has appointed debenture trustee.

Conditions for appointment of Debenture Trustees

1. The names of the debenture trustees must be stated in letter of offer for debentures.
2. A written consent must be obtained from the debenture trustee before his appointment as debenture trustee.
3. The following person shall not be appointed as a debenture trustee:

(a) He must not be beneficiary of shares in the company;

(b) He should not be promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;

(c) He is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

(d) He is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(e) Has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;

(f) Has any pecuniary relationship with the company amounting to 2% or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(g) He is relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel.

Duties of Debenture Trustees

A debenture trustee shall take steps to protect the interests of the debenture holders and redress their grievances in accordance with such rules as may be prescribed.

It shall be the duty of every debenture trustee to —

(a) Satisfy himself that the letter of offer does not contain any matter which is inconsistent with the terms of the issue of debentures or with the trust deed;

(b) Satisfy himself that the covenants in the trust deed are not prejudicial to the interest of the debenture holders;

(c) Call for periodical status or performance reports from the company;

(d) Communicate promptly to the debenture holders defaults with regard to payment of interest or redemption of debentures and action taken by the trustee;

(e) Take steps to convene a meeting of the holders of debentures as and when such meeting is required to be held;

(f) Ensure that the debentures have been converted or redeemed in accordance with the terms of the issue of debentures;

(g) Ensure that the company does not commit any breach of the terms of issue of debentures and inform the debenture holders immediately of any breach of the terms;

(h) Appoint a nominee director on the Board of the company in the event of—

i. Two consecutive defaults in payment of interest to the debenture holders; or
ii. Default in creation of security for debentures; or
iii. Default in redemption of debentures.

Remedy in case of Insufficient Funds:

Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal.

Tribunal may, after hearing the company and any other person interested in the matter, impose restrictions necessary in the interests of the debenture-holders.

Debenture Certificate:

Every company shall, within 2 months of allotment of any of its shares, debentures or debenture stock and within 1 month after the application for registration of the transfer of any such debentures or debenture stock, deliver the certificates of all debentures and debenture stock allotted or transferred in accordance with the procedure laid down.

Register of Debenture holders:

Every company has to keep an Index and register of debenture holders.

Closure of register of debentures:

Register of debentures can be closed by the company after giving atleast 7 days previous notice by advertisement for a period not exceeding 45 days in a year but not exceeding 30 days at a time.

DEPOSIT [paise jyada hai – deposit karo]

Deposits from the public are an important mode of finance in the corporate sector.

It is accordingly necessary to control the companies inviting deposits from the public in order to safeguard interest of the public at large.

• **Non-Applicability of Deposit Provisions** (Section 73(1) read with Rule 1(3))

The provisions of Deposits given under the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014 shall not apply to—

– a banking company
– a non-banking financial company as defined in the Reserve Bank of India Act, 1934 and
– a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 2013; and
– such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

• What is Deposit? (Section 2(31) of the Companies Act, 2013)

Deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

• What is not a deposit?

(a) Any amount received from the Central Government (CG) or a State Government (SG) or Local Authority (LA) or any other Statutory Authority;

Any amount received from any other source whose repayment is guaranteed by CG or SG.

(b) Any amount received from foreign Governments, foreign/international banks, multilateral financial Institutions, foreign government owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens etc.,

(c) Any amount received as a loan or facility from any banking company or from the State Bank of India

(d) Any amount received as a loan or financial assistance from Public Financial Institutions, Regional Financial Institutions, Insurance Companies or Scheduled Banks;

(e) Any amount received against issue of commercial paper or any other instrument issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

(f) Any amount received by a company from any other company;

(g) Any amount received towards subscription to any securities, including share application money or advance towards allotment of securities.

> **Special Note:** If the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit under these rules

(h) Any amount received from a person who was a director of the company at the time of receipts; relative of the director of the Private Company.

> **Special Note:** If the above mentioned person from whom money is received, furnishes a declaration in writing that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;

(i) Interest free security deposit from an employee not exceeding his annual salary;

(j) Any amount received as security deposit for the performance of the contract for supply of goods or provision of services;

(k) Any amount brought in by the promoters of the company by way of unsecured loan;

(L) Any amount received by the company under any collective investment scheme in compliance with regulations framed by the Securities and Exchange Board of India;

(m) Any Amount received as chit by a chit fund Company

(n) Any amount received by a Nidhi Company as per provisions of this Act;

(o) An amount of twenty-five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person.

Explanation : For the purposes of this sub-clause,—

"Start-up Company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry;

"Convertible note" means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of the start-up company.

(p) Any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds, "Infrastructure Investment Trusts" and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it.".

Q5. Please check which of the following source of funds are coming under the definition of deposits in case of a company.

(a) Rs. 5 Crore from Government Agency, Financial institutions, Banks or by way of Commercial Paper.
(b) Rs. 50 Lakh by way of Share Application money
(c) Rs. 50 Lakh from one of its director by way of loan
(d) Rs.50 Lakh by means of inter corporate deposit
(e) Rs.25 Lakh from its employees.
(f) Rs. 50 Lakh as business advance from customers
(g) Rs. 50 Lakh as advance against consideration for an immovable property.
(h) Rs. 25 Lakh as security deposit for performance of provision of services

A5. (a) The said amount is to be received or borrowed from any government agency or Financial Institution or Bank or by way of Commercial paper is not covered under deposits.

(b) Company must allot share within 60 days of receipt of share application money or it must refund the share application money to the subscribers within 15 days from the date of completion of sixty days, otherwise, such amount shall be treated as a deposit.

(c) Company can receive loan from its director (or relative of director of the private company) provided they give a declaration to the company that the loan given is from own funds and not from borrowed money.

(d) Inter corporate deposits are not covered in the definition of deposits

(e) If amount received from employee doesn't exceed their total annual salary; and such deposits should be non-interest bearing security deposit it would not come under the definition of deposit.

(f) Advance can be raised from customers however; such advance should be adjusted within 365 days from the date of receipt of advance. Otherwise it would be termed as deposits.

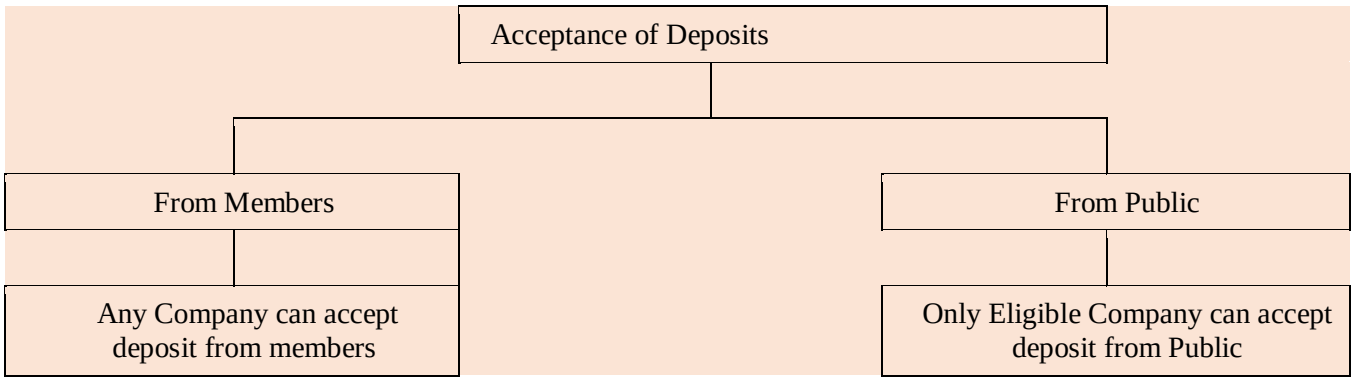
(g) Such amount should be adjusted against such property only; otherwise it would be termed as deposits.

(h) Security deposits are out of the ambit of definition of deposits. It is suggested to accept security deposits under specific agreement.

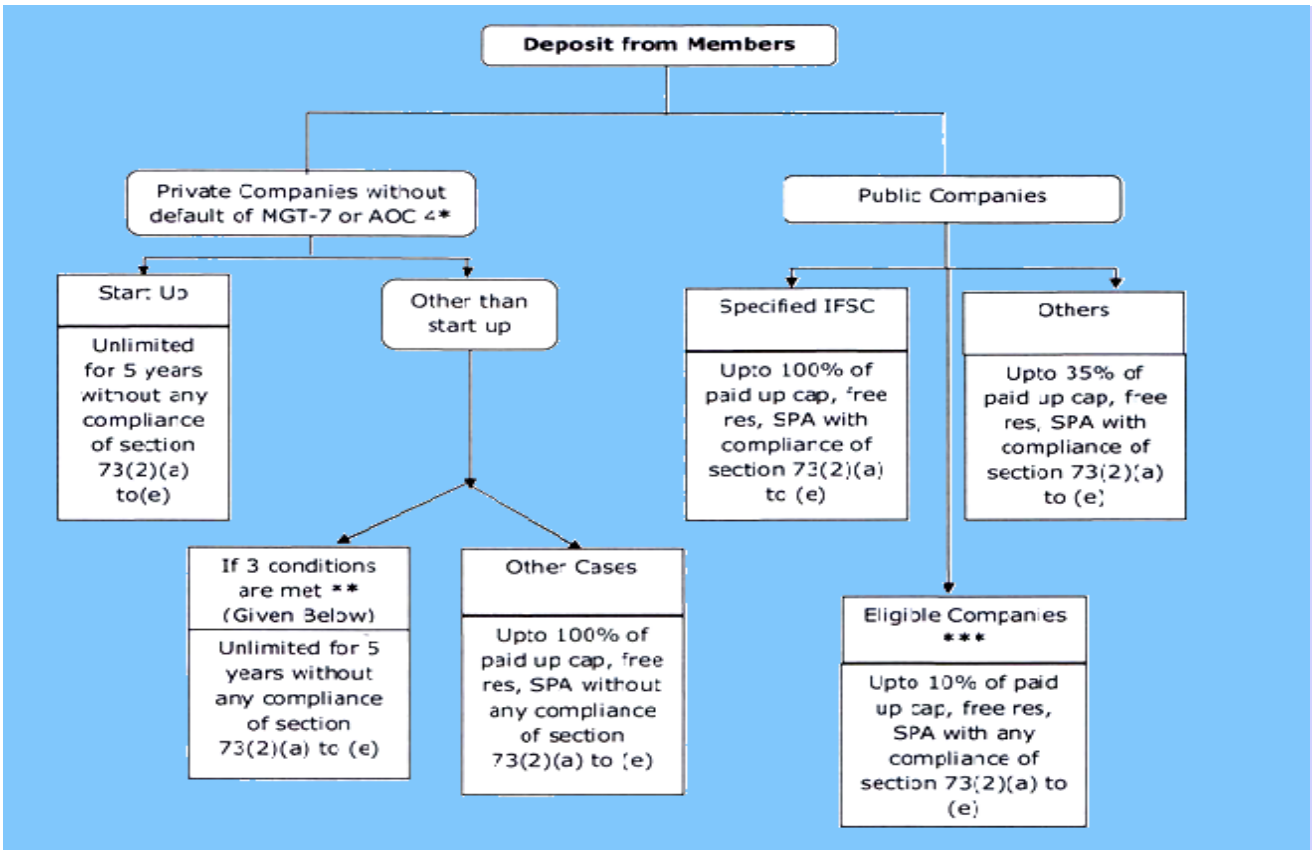
Who is depositor?

Depositor [Rule 2(1)(d)] means:

(a) Any member of the company who has made a deposit with the company.
(b) Any person who has made a deposit with a public company.



DEPOSIT FROM MEMBERS



Note: * If Private Companies defaulted in filing of MGT-7 or AOC-4 then they have to comply with the requirements of section 73(2) (a) to (e)

Note: ** The 3 conditions mentioned above to be followed by private companies are as follows -

- It should not an associate or a subsidiary company of any other company;
- The borrowings of such a company from banks or financial institutions or anybody corporate is less than twice of its paid up share capital or Rs. 50 crore, whichever is less ; and
- The company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits.

And where a default had occurred, the company made good the default and a period of 5 years had lapsed since the date of making good the default

Note: *** Eligible Company means a public company, having

- a net worth of not less than Rs.100 crore or
- a turnover of not less than Rs.500 crore

Procedure for Acceptance of Deposits from the Members

Section 73(2) states that a company may accept deposits from its members on fulfillment of such terms and conditions:

- By passing Resolution in general meeting
- By fulfillment of following conditions under Section 73(2):

(a) Issuance of Circular: issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars;

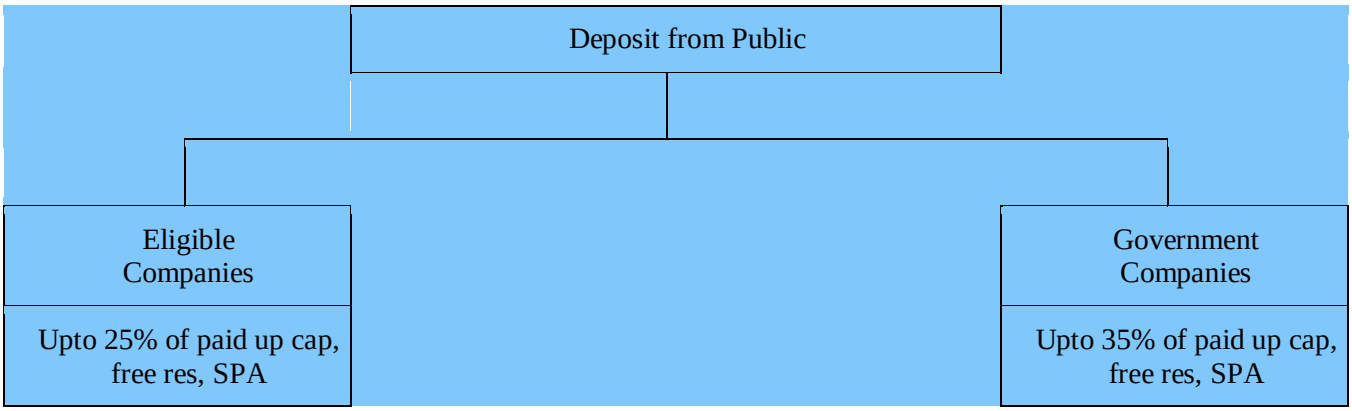
(b) Filing of Circular: filing a copy of the circular along with such statement with the ROC within 30 days before the date of issue of the circular;

(c) Creation of Deposit Repayment Reserve Account: depositing, on or before the 30th day of April each year, such sum which shall not be less than 20% of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account;

d) Certificate of No Default: certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default; and

(e) Security: providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.

DEPOSIT FROM PUBLIC



Conditions for acceptance of Deposits by Public

In addition to passing a Resolution at General Meeting, following compliances to be done

(a) Issuance of a circular: Issuance of a circular to its members including a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company.

(b) Filing of Circular to ROC: The filing a copy of the circular along with such statement with the ROC within thirty days before the date of issue of the circular.

(c) Creation of Deposit Repayment Reserve: The Company has to create a Deposit Repayment Reserve (DRR) by depositing not less than 20% of total deposits maturing during a financial year and the financial year next following, and be kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account.

(d) Advertisement and Display of circular on website.

(e) Credit Rating: Credit Rating to be obtained by the Company.

TERMS OF DEPOSITS (Both from Public and Member)

Central Govt., in consultation with the Reserve Bank of India has prescribed the terms for acceptance of Deposits:

Period:

Minimum period - 6 months from the date of acceptance of deposit

Maximum Period - 36 Months from the date of acceptance or renewal of such deposit

Note: A company may accept or renew deposits for the purpose of meeting any of its short-term requirements for a period less than 6 months if such deposits:

- do not exceed 10% of the aggregate of paid -up capital and free reserves
- are repayable not earlier than 3 months.

Rate of Interest:

As prescribed by the RBI for Non-Banking Finance Companies (NBFC)

Premature repayment of deposits:

When a company makes a repayment of deposits, on the request of the depositor, after the expiry of a period of 6 months from the date of such deposit but before the expiry of the period for which such deposit was accepted, the rate of interest payable on such deposit shall be reduced by 1%.

Maintenance of liquid assets:

Every company and every eligible company shall on or before the 30th day of April of each year, deposit with any scheduled bank and the amount so deposited shall only be utilised for the repayment of deposits. The amount remaining deposited shall not at any time fall below 20% of the amount of deposits maturing, until the end of the current financial year and the next financial year.

Registers of deposits

(1) Every company accepting deposits shall, from the date of such acceptance, keep at its registered office one or more separate registers for deposits accepted/renewed, in which there shall be entered separately in the case of each depositor the following particulars, namely: —

(a) Name, address and PAN of the depositor/s;

(b) Particulars of guardian, in case of a minor;

(c) Particulars of the nominee;

(d) Deposit receipt number;
(e) Date and amount of each deposit;
(f) Duration of the deposit and the date on which each deposit is repayable;
(g) Rate of interest;
(h) Due date(s) for payment of interest;
(i) Mandate and instructions for payment of interest and for non-deduction of tax at source, if any;
(j) Date or dates on which payment of interest will be made;
(k) Details of deposit insurance including extent of deposit insurance;
(L) Particulars of other security/charge created;
(m) Any other particulars relating to the deposit;

(2) Entries in the register shall be made within 7 days from the date of issuance of the deposit receipt and such entries shall be authenticated by a director or secretary of the company or by any other officer authorized by the Board for this purpose.

(3) The register or registers shall be preserved in good order for a period of not less than 8 years from the financial year in which the latest entry is made in the register.

Return of Deposits

Every company to which these rules apply, shall on or before the 30th day of June, of every year, file with the Registrar, a return in Form DPT-3 along with the prescribed fee as provided in Companies (Registration Offices and Fees) Rules, 2014 and furnish the information contained therein as on the 31st day of March of that year duly audited by the auditor of the company.

Q6. Shine Well Ltd. has accepted deposits from the public under the Companies (Acceptance of Deposits) Rules, 2014. The company has now decided to repay some of its deposits before maturity. Can the company do so? If yes, what are the conditions attached thereto? (4 marks) (June, 2011)

A6. Rule 15 - General provisions for premature repayment of deposits.

When a company makes a repayment of deposits, on the request of the depositor, after the expiry of a period of 6 months from the date of such deposit but before the expiry of the period for which such deposit was accepted, the rate of interest payable on such deposit shall be reduced by 1%.

Nothing contained in this rule shall apply to the repayment of any deposit before the expiry of the period for which such deposit was accepted by the company, if such repayment is made solely for the purpose of—

- complying with the provisions of rule 3 (i.e. terms of deposit 6 months to 36 months); or
- providing war risk or other related benefits to the personnel of the naval, military or air forces or to their families, on an application made by the associations or societies formed by such personnel, during the period of emergency declared.

Penal Provisions:

THE COMPANIES (AMENDMENT) ACT, 2015:

1. The Company shall be liable to pay in addition to the deposits & its interest thereon, also liable to pay Minimum Liability- Rs. 1 crore or twice the amount of deposit accepted by the company, whichever is lower Maximum liability- Rs.10 crores
2. Every officer of the Company who is in default shall be punishable with imprisonment which may extend to 7 years

and with fine between Rs.25 lakhs and Rs.2 crores or with both.

Damages for fraud (Section 75 of the Companies Act, 2013)

When a company fails to repay the deposit or part thereof or any interest thereon within the time or such further time as allowed by the NCLT and it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall be personally responsible, without any limitation of liability for all or any of the losses or damages as incurred by the depositors.

Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon.

CHAPTER 5
CHARGE

INTRODUCTION & DEFINITION

A charge is a security given for securing loans or debentures by way of a mortgage on the assets of the company.

Generally, the debentures and borrowings of the company are secured by a charge on the assets of the company.

Section 2(16): Charge means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

NEED FOR CHARGE [loan lena hai security deni padegi]

Every Company depend upon share capital and borrowed capital for financing their projects.

Borrowed capital may consist of debentures, or by obtaining financial assistance from financial institution or banks.

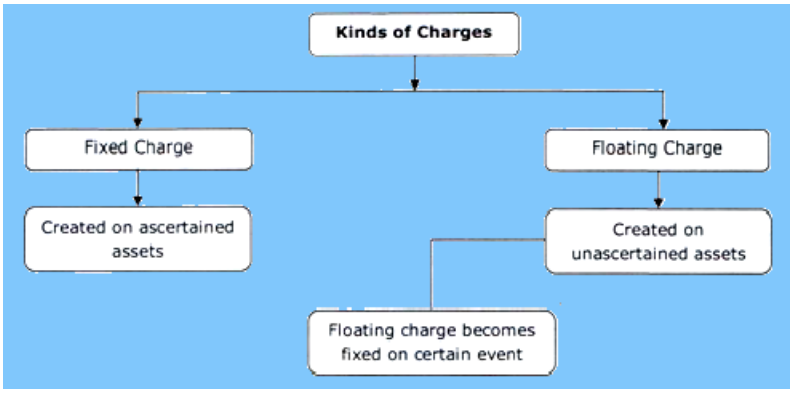
The financial institutions/banks do not lend their monies unless they are sure that their funds are safe and they would be repaid as per agreed repayment schedule along with payment of interest.

In order to secure their loans they resort to creating right in the assets and properties of the borrowing companies, which is known as a charge on assets.

The same assets can be charged for second and subsequent times, provided that permission is sought from previous lending institute.

KINDS OF CHARGE

Charge on the property of the company as security for debts may be of the following kinds:



(i) Fixed or Specific Charge:

A charge is fixed or specific when it covers assets which are ascertained and definite or are capable of being ascertained and defined, at the time of creating charge.

Example: Charges created on land, building, or heavy machinery. A fixed charge is a charge created against certain specific property and the company loses its right to dispose off that property.

(ii) Floating Charge:

A floating charge is a charge created on floating assets or unidentified assets of the Company.

In other words, a floating charge is not attached to any definite property but covers property of a fluctuating type like stock-in-trade.

A floating charge is a charge on a class of assets present and future which in the ordinary course of business is changing

from time to time and leaves the company free to deal with the property as it deems fit until the holders of charge take steps to enforce their security.

'The essence of a floating charge is that the security remains dormant until it is fixed or crystallized".

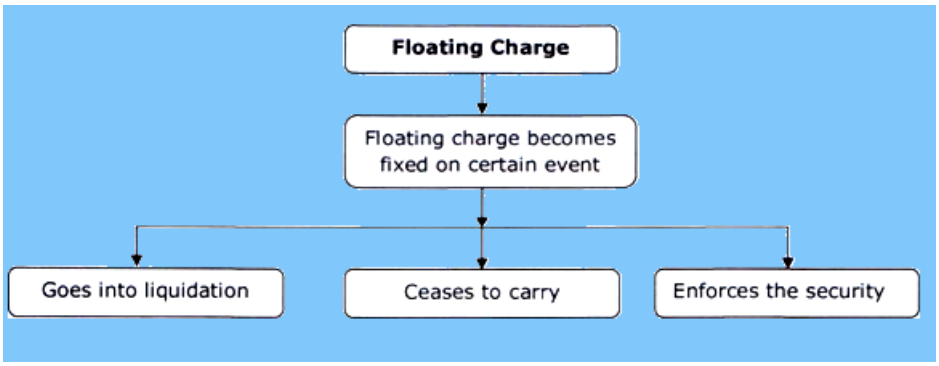
The advantage of a floating charge is that the company may continue to deal in any way with the property which has been charged.

The company may sell, mortgage or lease such property in ordinary course of its business if it is authorised by its memorandum of association.

CRYSTALLIZATION OF FLOATING CHARGES [floating ka fix hoga]

A floating charge attaches to the company's property generally and remains dormant till it crystallizes or becomes fixed.

The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right.



A floating charge crystallize and the security becomes fixed in the following cases:

(i) When the company goes into liquidation;
(ii) When the company ceases to carry on the business;
(iii) When the creditors or the debenture holders take steps to enforce their security e.g. by appointing receiver to take possession of the property charged;
(iv) On the happening of the event specified in the deed.

In the aforesaid circumstances, the floating charge is said to become fixed or to have crystallized.

Until the charge crystallizes or attaches or becomes fixed the company can deal with the property so charged in any manner it likes.

• Effect of Crystallization of a Floating Charge

On crystallization, the floating charge converts itself into a fixed charge on the property of the company.

It has priority over any subsequent equitable charge and other unsecured creditors.

But preferential creditors who have priority for payment over secured creditors in the winding-up get priority over the claims of the debenture holders having floating charge.

• Postponement of a Floating Charge

The creation of a floating charge leaves the company free to create a legal and equitable mortgage on the same property until the floating charge crystallizes.

Where such a mortgage is created it has priority over the floating charge which gets postponed.

The floating charge is postponed in favour of the following persons if they act before the crystallization of the security:

(i) A landlord who distrains for rent;

(ii) A creditor who obtains a garnishee order absolute;

(iii) A judgment creditor who attaches goods of the company and gets them sold (But if the goods are not sold and the debenture holders take action in the meantime, the floating charge has priority);

(iv) The employees of the company, as well as other preferential creditors in the event of winding-up of the company;

(v) The supplier of goods to the company under a hire-purchase agreement on terms that goods are to remain the property of the seller until they are paid for in full, has priority over the floating charge.

Debenture-holders with a floating charge do not, therefore, enjoy the same rights as the secured creditors, for claims against the company.

The deed creating the floating charge may, however, contain a clause restricting the power of the company to create charges in priority to or pari passu with it.

But even in such a case a person who takes mortgage without notice of floating charge gets priority. But such a contingency can be safeguarded by registering the charge.

• Restraint on the Power to Create Charges with Priority to a Floating Charge

As the floating charge allows wide powers to the company to deal with its property subject to floating charge, it is common to insert a clause restricting the powers of the company to create charge with priority to or pari passu with it.

Thus if the company creates a mortgage in favour of any person who has notice of the floating charge and restriction, such person ranks after the floating charge.

• Invalidity of Floating Charge

A floating charge remains afloat till the commencement of the winding-up of the Company or a floating charge can also be crystallized by the intervention of the debenture holders or the creditors. A floating charge is valid only against the unsecured creditors, whether in a winding-up or otherwise.

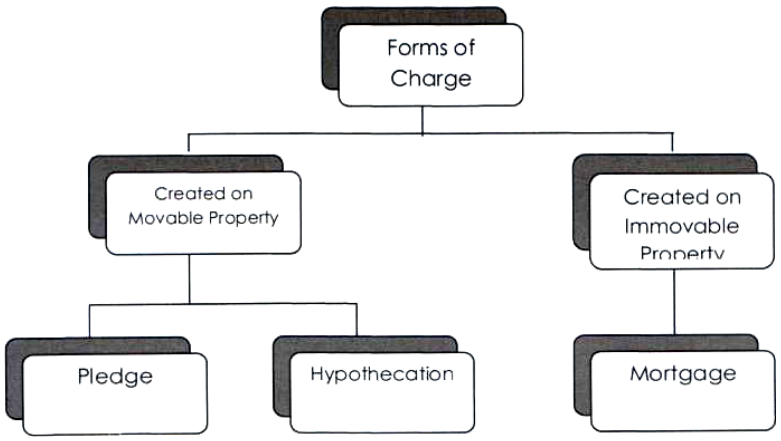
But the provision of this Act prevents an unsecured creditor to get priority over the other creditors by obtaining a floating charge when he learns that the company's liquidation is imminent.

Section 332: A floating charge on the property of the company, which is created within 12 months immediately preceding the commencement of the winding-up proceedings of a company shall be invalid, unless it is proved that the company was solvent immediately after the creation of the charge.

DIFFERENCE BETWEEN CHARGE, MORTGAGE AND PLEDGE

Charge denotes an impediment over the title of the property, i.e. when the charge is created on an asset, the asset is not allowed to be sold or transferred.

Basically, there are three ways through which charge is created on the property, that are classified according to the movability of the asset, i.e. on movable property, the charge is created by way of pledge or hypothecation, whereas when the charge is created on an immovable asset, then it is known as Mortgage.



Difference between Charge and Mortgage

Basis	Mortgage	Charge
Meaning	Mortgage implies the transfer of ownership interest in a particular immovable asset.	Charge refers to the security for securing the debt, by way of pledge, hypothecation and mortgage
Creation	A mortgage is created by the act of the parties.	A charge may be created either through the act of parties or by operation of law.
Registration	A mortgage requires registration under the Transfer of Property Act, 1882.	A charge created by operation of law does not require registration. But a charge created by act of parties requires registration.
Term	A mortgage is for a fixed term.	The charge may be in perpetuity.
Personal Liability	In general, mortgage carries personal liability, except when excluded by an express contract.	No personal liability is created, however, when it comes into effect due to a contract, then personal liability may be created.

Difference between Charge and Pledge

To understand the difference between charge and pledge let us first understand the meaning of pledge and hypothecation.

- **Pledge** –

Pledge is used when the lender takes actual possession of the property.

Example, Gold pledged with the bank for a gold loan.

The bank takes the possession of gold and gives you money.

Pledge can be done only in the case of movable assets.

And the pledgee (lender) retains the possession of the goods until the pledgor (i.e. borrower) repays the entire debt amount.

In case there is default by the borrower, the pledgee has a right to sell the goods in his possession and adjust its proceeds towards the amount due.

- **Hypothecation** –

Hypothecation is creating charge against the security of movable assets, but here the possession of the security remains with the borrower itself.

Example, in a car loan, the car is hypothecated to the bank/lender.

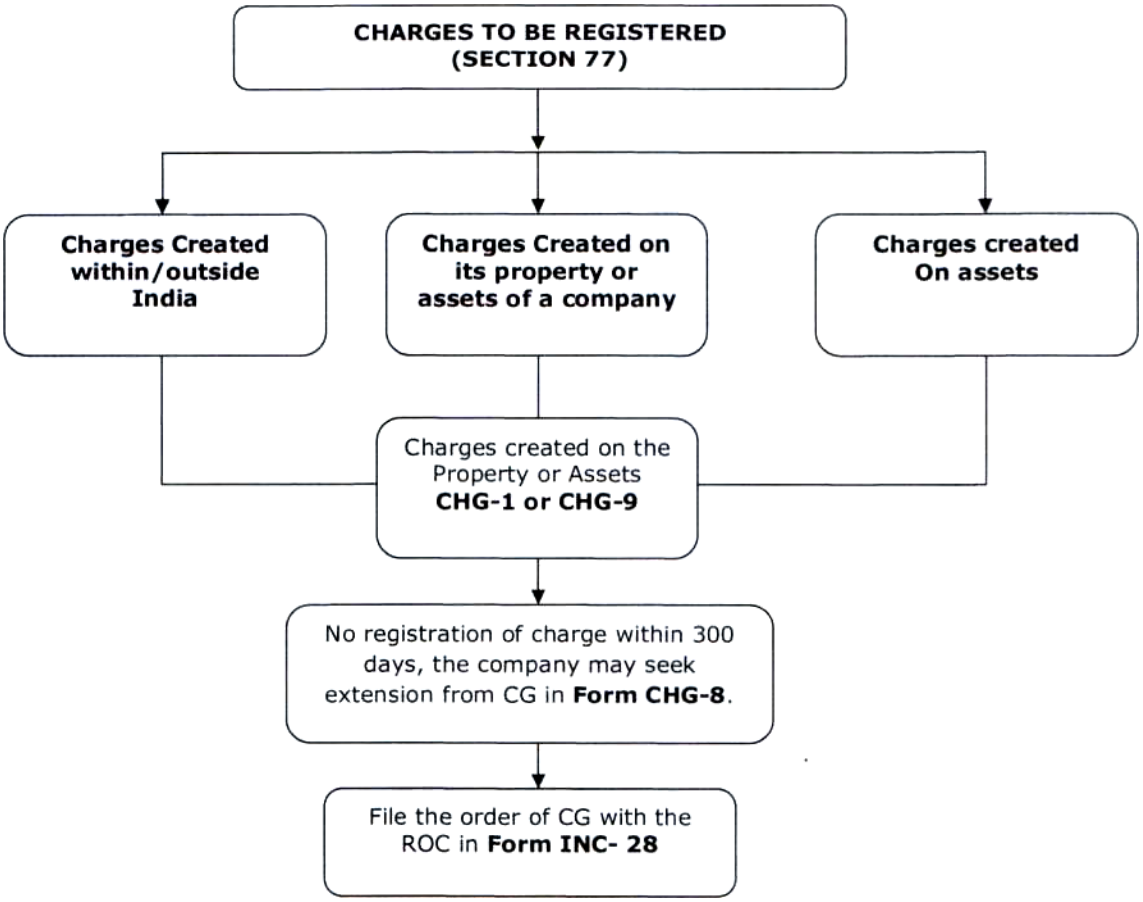
Here it is a movable asset and you (i.e. borrower) have the possession of the asset.

Thus, in case of default by the borrower, the lender (i.e. to whom the goods/security has been hypothecated) will have to first take possession of the security and then sell the same.

The difference between charge and pledge is that charge can be created on movable or immovable property, whereas pledge can be created only on movable property.

Further in case of pledge transfer of possession is a must, which is not mandatory in case of charge.

REGISTRATION OF CHARGES (Section 77 of the Companies Act, 2013)



REGISTRATION OF CHARGE (Section 77 of the Companies Act, 2013) [ROC ko charges ke bare me batao]

Every company is responsible to create a charge within or outside India on its property or assets by registering the particulars of the charge duly signed by the company and the charge-holder.

The company is responsible to register the charge within 30 days from the date of its creation.

Form - CHG-1 (for other than the debentures) or Form - CHG - 9 (for debentures) shall be filed by the Company with ROC for registration of charge within 30 days

The ROC shall issue a certificate of registration after registering the charge in favour of the person who has created the charge.

The ROC may allow the registration of charge within a period of 300 days on payment of additional fees.

Note: If registration is not made within a period of 300 days of its creation, the company shall seek extension of time from the Central Government provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

CONSEQUENCES OF NON-REGISTRATION OF CHARGE

Void against the liquidator means that the liquidator on winding up of the company can ignore the charge and can treat the concerned creditor as unsecured creditor.

The property will be treated as free of charge i.e. the creditor cannot sell the property to recover its dues.

Void against any creditor of the company means that if any subsequent charge is created on the same property and the earlier charge is not registered, the earlier charge would have no consequence and the latter charge if registered would enjoy priority.

In other words, the latter charge holder can have the property sold in order to recover its money.

Thus, non-filing of particulars of a charge does not invalidate the charge against the company as a going concern.

It is void only against the liquidator and the creditors at the time of liquidation.

The company itself cannot have a cause of action arising out of non-registration [Independent Automatic Sales Ltd. vs. Knowles & Foster (1962) 32 Comp Cas].

Modification of Charge:

It shall be the duty of the Company to register the modification of charge in Form CHG-1 in the same way as above for 1st creation of charge even in change of Interest rate.

CERTIFICATE OF REGISTRATION OF CHARGE

When a charge is registered with the ROC, ROC shall issue a certificate of registration of charge in Form No.CHG-2 and for registration of modification of charge in Form No.CHG-3 to the company and to the person in whose favour the charge is created.

The certificate issued by the ROC whether in case of registration of charge or registration of modification shall be treated as conclusive evidence of the Compliances of the requirements of the Companies Act, 2013 (Registration of Charges) and its rules.

Effect of Non-Registration:

If a charge is not registered with the prescribed period with the ROC, then such charge shall become void against the liquidator and the creditors of the company.

An unregistered charge shall remain valid and be treated as unsecured charge.

Punishment for contravention (Section 86):

If a company makes any default with respect to the registration of charges, penalty shall be levied from Rs.l lakh to Rs.10 lakh.

Every defaulting officer is punishable with imprisonment for a term not exceeding 6 months or fine which shall not be less than Rs.25,000/-, but not exceeding Rs.l lakh or both.

CONDONATION OF DELAY TO REGISTER A CHARGE (Section 87 of the Companies Act, 2013)

If a company fails to register the charge even within 300 days, such company may seek extension of time from the Central Government.

The Central Government is empowered to extend the time for registration of the charge.

The Central Government has to be satisfied that the failure to register the charge:

(a) was accidental; or

(b) was due to inadvertence or some other sufficient reason; or

(c) is not of a nature to prejudice the position of creditors or shareholders of the company; or

(d) on any other grounds just and equitable

Rule 12 of Companies (Registration of Charges) Rules, 2014

When the instrument creating or modifying a charge is not filed within 300 days from the date of its creation or modification and where the satisfaction of the charge is not filed within 30 days from the date of final payment made, the ROC shall not register the same unless the delay is condoned by the Central Government.

(a) The application for condonation of delay shall be filed with CG in Form No.CHG-8 along with the fee.

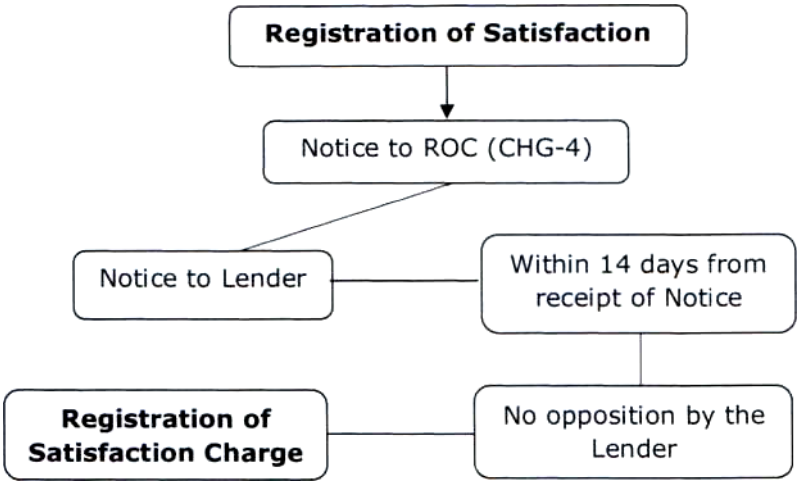
(b) The order passed by the CG shall be required to be filed with the ROC in Form No.INC.28 along with the fee.

SATISFACTION OF CHARGES (Section 82 of the Companies Act, 2013)

Satisfaction of charge means full payment of the outstanding loan amount.

After making full payment to the Bank or Charge holder, the company has to inform to the ROC for registration of the satisfaction of charge.

SATISFACTION PROCESS



1. Notice to ROC:

   The Company shall give intimation to the ROC in respect of the full payment or satisfaction in full of any charge within 30 days from the date of such payment or satisfaction in Form No.CHG-4 along with the fee.

   If the satisfaction of the charge is not filed within 30 days from the date on which such payment of satisfaction, the ROC shall not register the same unless the delay is condoned by the Central Government.

2. Notice to Charge Holder by ROC:

   On receipt of such intimation, the ROC shall issue a notice to the charge-holder calling a show cause within such time not exceeding 14 days regarding the full payment or satisfaction of the charge.

3. Opposition of Charge:

   If no cause is shown, by such holder of the charge, the ROC shall order that a memorandum of satisfaction shall be entered in the register of charges maintained by the ROC and shall inform the company.

   If the cause is shown to the ROC shall record a note to that effect in the register of charges and shall inform the company accordingly.

4. Certificate of Registration for Satisfaction:

   After completion of above formalities, the ROC will issue a certificate of registration for satisfaction in Form - CHG-4.

REGISTERS AND RECORDING OF CHARGES

- **Company's Register of Charges**

  Every company is required to keep a register in Form No. CHG.7 of all floating and fixed charge containing a short description of the property charged, the amount of the charge, and the names of the persons entitled to it.

  Further every company must keep at its registered office, a copy of every instrument creating any charge.

  The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

- **Inspection of Register of Charges**

  The register of charges and instrument of charges shall be kept open for inspection during business hours by

members, creditors or any other person subject to reasonable restriction as the company by its article imposes.

The register of charges and the instrument of charges kept by the company shall be open for inspection-

(a) by any member or creditor of the company without fees;

(b) by any other person on payment of fee.

- **Registrar's Register of Charges**

  In accordance with section 81 and the rules, the Registrar of Companies shall maintain a register containing particulars of the charges registered in respect of every company.

  The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of section 81 of the Act.

  This charge register shall be open to inspection by any person on payment of fee for each inspection.

PROCEDURE FOR REGISTRATION OF CREATION/MODIFICATION/SATISFACTION OF CHARGE

File CHG-l(for other than debentures) or CHG-9 (for debentures) with ROC for creation or modification of charge within 30 days of creation or modification along with required document
↓
If the particulars of charge cannot be filed within 30 days due to unavoidable reasons, then it may be filed within 300 days of creation /modification along with reason for delay
↓
On receipt of the above form ROC will issue Certificate of Registration in CHG-2 (in case of creation) or Particulars of Modification in CHG-3 (in case of modification of charge)
↓
In case of Satisfaction of Charge the Company shall file CHG-4 with ROC within 30 days of satisfaction (No late filing permitted by ROC in case of satisfaction)
↓
Registrar will issue certificate of registration of satisfaction of charge in Form No. CHG-5 on being satisfied.
↓
Update register of charges maintained by the company in Form No. CHG.7 in case of Creation, Modification and satisfaction, signed by director/Company Secretary/authorised person
↓
File CHG-8 for condonation of delay with CG, if in case creation/modification of charge not registered within 300 days of event or in case of satisfaction, it is not registered within 30 days
↓
The order passed by CG shall be filed with ROC in INC-28, so that ROC can register the charge

CHAPTER 6
DISTRIBUTION OF PROFITS

INTRODUCTION [laadu katega to sab me batega]

Dividend is the part of net profit which is payable as return on equity and preference shares.

The payment of dividend is not obligatory on the part of the Company but once it is declared by the shareholders, it is like a debt to the Company.

This chapter broadly covers the transfer of profits to reserves, maximum dividend that can be declared, in case of inadequacy of profits, maintenance of separate bank account for distribution of dividend, transfer of Unpaid Dividend to IEPF.

Dividend means a portion of net profit payable to the members of the Company.

In other words, dividend is a return on the paid-up share capital and payable to the members of a company.

Section 2(35) of the Companies Act, 2013: "Dividend includes any interim dividend".

SS-3 defines dividend so as to mean "a distribution of any sums to Members out of profits and wherever permitted out of free reserves available for the purpose."

The dividend is the liability of the company after its declaration by the shareholders of the company.

On other side, the shareholders have the right to claim dividend only after a dividend is declared by the company in general meeting.

Special Note: Until and unless dividend is declared, the shareholder has no claim against the company

Note: SS-3 clarifies that distribution of discount coupons to all the Shareholders shall not be treated as deemed Dividend.

TYPES OF DIVIDEND

(a) Final dividend: [AGM me denge]

Dividend is said to be a final dividend if it is declared at the annual general meeting of the company.

Final dividend once declared becomes a debt enforceable against the company.

Final Dividend can be declared only if it is recommended by the Board of Directors of the Company.

Note: Board of Directors must mention about the amount of dividend in the Directors' Report.

(b) Interim dividend: [2 AGM ke bich me denge]

Dividend is said to be an interim dividend if it is declared by the Board of Directors between two annual general meetings of the company.

Note: All the provisions relating to the payment of dividend except the declaration of dividend by the shareholders shall be applicable on the interim dividend also.

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

In case, the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividend declared by the company during the immediately preceding 3 financial years.

A dividend including interim dividend once declared becomes a debt and cannot be revoked, except with the consent of the shareholders.

Q1. The Board of directors of a company in a meeting held on 30th April, 2013 declared interim dividend. In another meeting held on 18th May, 2013, the Board revoked the interim dividend declared without assigning any reason. Advise the company in the matter. (4 marks) (Dec, 2013)

A1. Section 2(35) of the Companies Act, 2013: "Dividend includes any interim dividend".

The dividend is the liability of the company after its declaration by the shareholders of the company.

On other side, the shareholders have the Right to claim dividend only after a dividend is declared by the company in general meeting.

In case of interim dividend, the decision of the Board shall be treated as a declaration of dividend and once declared dividend becomes a debt to the company.

Once declared, it cannot be revoked except with consent of the shareholders.

In case, dividend has been declared illegally, then the Board can revoke the declared dividend.

PROVISIONS RELATING TO DECLARATION OF DIVIDEND

Payment of dividend to be authorized by the articles:

As per section 51 of the Companies Act, 2013, a company may, if so authorized by its articles, pay dividend in proportion to the amount payable on each share.

If not, the Articles have to be amended accordingly.

Sources for payment of dividend (Section 123 of Companies Act, 2013)

No dividend shall be declared or paid for any financial year except current and previous year profits or money provided by the Central Government or State Government.

(A) Current & Previous Year Profits: The dividend shall be payable

(i) out of the current year profits of the company as arrived after providing depreciation, or

(ii) out of the previous year profits of the company arrived at after providing for depreciation and remaining undistributed, or

(iii) out of both;

The Companies (Amendment) Act, 2015:

A Company shall not declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set-off against profits of Company for the current year,

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

(B) Money Provided by CG or SG: The dividend shall also be payable out of the money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

Provisions for Depreciation (Section 123 of the Companies Act, 2013)

Depreciation must be provided before any dividend (including interim and final dividend) can be declared out of current and previous year profits of any financial year and the depreciation must be as per Schedule - II of the Companies Act, 2013.

Transfer of profits to Free reserves

A company may transfer some specified of its profit percentage to the free reserves of the company before the declaration of any dividend in any financial year.

DIVIDEND IN CASE OF ABSENCE OR INADEQUACY OF PROFITS:

[Profit nahi hai fir bhi denge]

In case of inadequacy or absence of profits in any financial year, any company may declare the dividend out of the previous year's accumulated profits.

Rule 3 of Companies (Declaration and Payment of Dividend) Rules. 2014

In the event of inadequacy or absence of profits in any year, a company may declare dividend out of previous year surplus subject to the fulfilment of the following conditions:

(a) Rate of dividend: The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year.

Note: This rule shall not apply to a company which has not declared any dividend in immediately preceding 3 financial years.

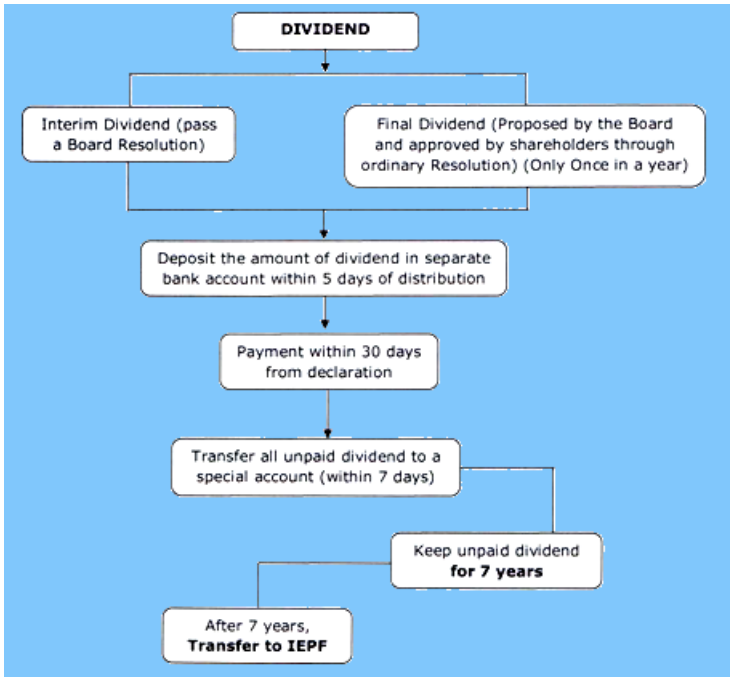
(b) Total withdrawal from accumulated profits: The total amount to be drawn from such accumulated profits shall not exceed 1/10 of the sum of its paid-up share capital and free reserves as per the latest audited financial statement.

(c) Setting off the losses: The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(d) To maintain reserve: The balance of reserves after withdrawal shall not fall below 15% of its paid-up share capital as per the latest audited financial statement.

(e) Dividend to be declared only from free reserves: No dividend shall be declared or paid by a company from its reserves other than free reserves.

COMPLETE PROCESS FOR APPROVAL & PAYMENT OF DIVIDEND



(a) Recommendations by the Board of Directors: The Board of Directors recommend the rate of dividend to be declared by the shareholders in their meeting.

(b) Approval by shareholders: The shareholders in their meeting (i.e. AGM) shall declare/ approve the rate of dividend as recommended by the Board of Directors and authorize board of directors for payment of dividend.

(c) Payment of Dividend: After declaration of dividend, the company has to pay the dividend within 30 days from the date of declaration.

Note: The amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within 5 days from the date of declaration of dividend.

The dividend shall only be payable in cheque or warrant or in any electronic mode to the shareholders who are entitled for the dividend.

(d) Transfer of dividend to a Special Account: In any reason, the dividend has not been paid to the members, the company has to open a special account "unpaid dividend account" and transfer the unpaid or unclaimed dividend amount to the special account. The unpaid or unclaimed dividend amount shall be kept in this account for 7 years from the date of transfer.

Note: In case of any default in transfer of the unpaid or unclaimed dividend within 7 days from the expiry of 30 days of declaration, the company shall be liable to pay interest at the rate of 12% on remaining unpaid amount.

(e) Transfer to Investors Education and Protection Fund (IEPFI): After 7 years, the company has to transfer the entire unpaid or unclaimed amount to the Investors Education and Protection Fund.

Shareholder or their legal heirs can claim his dividend and its shares from the IEPF.

Special Note: No company shall pay dividend in case of failure of repayment of deposits and its interest

(f) Details of unpaid dividend to be placed at the website: The Company shall prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person on the website of the company within 90 days after making transfer of the amount to the Unpaid Dividend Account.

Q2. Due to inadequacy of profits, the Board of Directors of Rise Limited decided not to recommend any dividend for the financial year ended 31st March, 2015.

Certain shareholders of the company complained to the Tribunal regarding mismanagement of the affairs of the company, since the Board of the company did not recommend any dividend. Explaining the provisions of the Companies Act, 2013, examine whether the contention of the shareholders is tenable.

A2. The Board of Directors may keep the entire profit for the purpose of expansion/growth of the company and it is not an obligation on the Board to recommend dividend to the shareholders. Therefore, the contentions of shareholders are not tenable.

TRANSFER TO INVESTOR EDUCATION AND PROTECTION FUND

Any money transferred to the Unpaid Dividend Account which remains unpaid or unclaimed for 7 years from the date of such transfer, such amount along with interest shall be transferred to the Fund (i.e. IEPF).

The company shall send a statement of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.

Offence & Penalty: For Company: Fine - Minimum Rs.5 lakh & Maximum Rs.25 lakh, For Officer: Fine - Minimum Rs. l lakh & Maximum Rs.5 lakh

INVESTOR EDUCATION AND PROTECTION FUND (IEPF):

[jiska koi nahi uska IEPF]

The Central Government has established an Investor Education and Protection Fund [IEPF] for the purpose to educate investors and to protect the interest of investors.

The following amount is being credited to this fund:

(a) amounts in the unpaid dividend accounts of companies;

(b) unpaid or unclaimed application moneys received by companies for allotment of any securities and due for refund;

(c) unpaid or unclaimed amount of matured deposits with companies;

(d) unpaid or unclaimed amount of matured debentures with companies;

(e) the interest accrued on the account referred to in clauses (a) to (d);

(f) grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund; and

(g) the interest or other income received out of the investments made from the Fund.

UTILISATION OF INVESTOR EDUCATION AND PROTECTION FUND

The amount of IEPF shall be utilized for:

(a) The refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;

(b) Promotion of investors' education, awareness and protection;

(c) Distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;

(d) Reimbursement of legal expenses incurred in pursuing class action suits by members, debenture-holders or depositors as sanctioned by the NCLT; and any other purpose.

Note: The Statement of amounts to be credited to IEPF shall be filed in Form DIV 5.

DIVIDEND ON PREFRENCE SHARES

A Preference share carries a preferential right with regard to dividend in accordance with the term of issue and the articles of association subject to the availability of distributable profits. Preference shares can carry dividend of a fixed amount, before any dividend is paid on the equity shares.

Where there are two or more classes of preference shares, the shareholders of the class which has priority are similarly entitled to their preferential dividend before any dividend is paid in respect of the other class but these rights are subject to three conditions:

1. Preference shares are part of the company's share capitA1.
2. A dividend becomes payable to the shareholders only when it is declared by the shareholders.
3. There should have been a formal declaration. Preference shareholders are not entitled to treat the preference dividend as a debt and sue for its payment.

Note: If the articles specify that the company's profit shall be applied, by way of payment of the preference dividend, the preference shareholder can sue for it even though it has not been declared.

DIVIDEND DURING REGISTRATION OF TRANSFER OF SHARES

Section 126 of the Companies Act, 2013

When any instrument of transfer of shares has been delivered to any company for registration and the transfer of such shares has not been registered by the company, it shall, notwithstanding anything contained in any other provision of this Act:

(a) Transfer such fund to unpaid dividend account: Transfer the dividend in relation to such shares to the Unpaid Dividend Account unless the company is authorised by the registered holder of such shares in writing to pay such dividend to the transferee specified in such instrument of transfer; and

(b) Keep in abeyance: Keep in abeyance in relation to such shares, any offer of rights shares and any issue of fully paid-up bonus shares.

PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS (Section 127 of Companies Act, 2013)

When a dividend has been declared by a company but has not been paid within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to 2 years and with fine which shall not be less than Rs.1000/- for every day during which such default continues and the company shall be liable to pay simple interest at the rate of 18% per annum during the period for which such default continues.

Exceptions

Proviso to section 127 has provided a list where no offence under this section shall be deemed to have been committed:

(a) where the dividend could not be paid by reason of the operation of any law;

(b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him;

(c) where there is a dispute regarding the right to receive the dividend;

(d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; or

(e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

PROCEDURE FOR DECLARATION AND DISTRIBUTION OF INTERIM DIVIDEND

Check whether AOA authorizes declaration of Interim Dividend. If not the first amend the AOA
↓
Hold the BM for declaration of dividend.
↓
The Board before passing BR should consider all the pre-requisites and conditions imposed by the Act for declaration of interim dividend.
↓
Closure of register of members for declaration of record date for payment of interim dividend. Adequate notice of closure of register should be given as per the Act as well as SEBI (LODR)
↓
Before commencement of closure hold a BM for addressing all the pending transfers of shares, if any.
↓
Open a separate bank account called "Interim Dividend Account of Ltd." with the bank as resolved by the Board and transfer the total dividend within 5 days of declaration
↓
Ensure that the dividend tax is paid to the tax authorities within the prescribed time.

↓
Prepare list of members and print sufficient number of dividend warrants
↓
Dispatch dividend warrants within 30 days of the declaration of dividend. In case of joint shareholders, dispatch the dividend warrant to the first named shareholder.
↓
Instruct to banks to pay dividend at par on presentation of dividend warrant
↓
Issue bank drafts and/or cheques to those members who inform that they received the dividend warrants after the expiry of their currency period or their dividend warrants were lost in transit after satisfyinq that the same have not been encashed.
↓
Instruct to banks to pay dividend at par on presentation of dividend warrant
↓
Arrange for transfer of unpaid or unclaimed dividend to a special account named "Unpaid dividend A/c" within 7 days after expiry of the period of 30 days of declaration of dividend.
↓
Confirm the interim dividend in the next Annual General Meeting

PROCEDURE FOR DECLARATION AND DISTRIBUTION OF FINAL DIVIDEND

Hold the BM for proposal of dividend. Approve notice to call GM for approval of shareholders
↓
In the same BM, decide about date of closure of register/record date. Authorise to open separate bank account for payment of dividend.
↓
The company may transfer such amount as may be desired.
↓
Closure of register of members for declaration of record date for payment of dividend. Adequate notice of closure of register should be given as per the Act as well as SEBI (LODR)
↓

Before commencement of closure hold a BM for addressing all the pending transfers of shares, if any.
↓
Hold the GM and pass an ordinary resolution declaring the payment of dividend to the shareholders of the company as per recommendation of the Board.
↓
Transfer amount to separate bank account called "Interim Dividend Account of Ltd." with the bank as resolved by the Board within 5 days of declaration of dividend.
↓
Ensure that the dividend tax is paid to the tax authorities within the prescribed time.
↓
Prepare list of members and print sufficient number of dividend warrants
↓
Dispatch dividend warrants within 30 days of the declaration of dividend. In case of joint shareholders, dispatch the dividend warrant to the first named shareholder.
↓
Instruct to banks to pay dividend at par on presentation of dividend warrant
↓
Issue bank drafts and/or cheques to those members who inform that they received the dividend warrants after the expiry of their currency period or their dividend warrants were lost in transit after satisfvinq that the same have not been encashed.
↓
Instruct to banks to pay dividend at par on presentation of dividend warrant
↓
Arrange for transfer of unpaid or unclaimed dividend to a special account named "Unpaid dividend A/c" within 7 days after expiry of the period of 30 days of declaration of dividend.

Q3. A company for the financial year 2011-12, declared dividend on 19th September, 2012 but failed to distribute the same within the prescribed period. A case was filed against a director in this regard. The director has contended that he had resigned before the declaration of dividend. Decide fate of the director in the light of the relevant provisions of the Companies Act, 2013. (4 marks) (Dec, 2013)

A3. As per section 127 of Companies Act, 2013, if dividend is not paid within 30 days or dividend warrant not posted within 30 days, the Company shall be liable to pay simple interest @ 18% P.A. until the default continues. Every director is liable for punishment upto 2 years in addition to fine of Rs. 1000/- per day (till default continues) if he has committed the default knowingly.

Case Law: N. Kumar V. M. O. Roy, Assistant Director S.E.I.O.

Facts: a company for the financial year 1995-96, declared the dividend but failed to distribute same within the prescribed period (i.e. 30 days). A complaint has been filed against the company and its directors for the contravention under section 127.

Judgement: In this case, the Court held that the director was not a whole-time director at the time of declaration of dividend. Therefore, he shall not be liable for default under section 127 of the Companies Act, 2013.

CHAPTER 7

CORPORATE SOCIAL RESPONSIBILITY

INTRODUCTION [Jisne kamaya hai unko return dene ka time aagaya]

CSR's concept is based on the philosophy of giving back to the society.

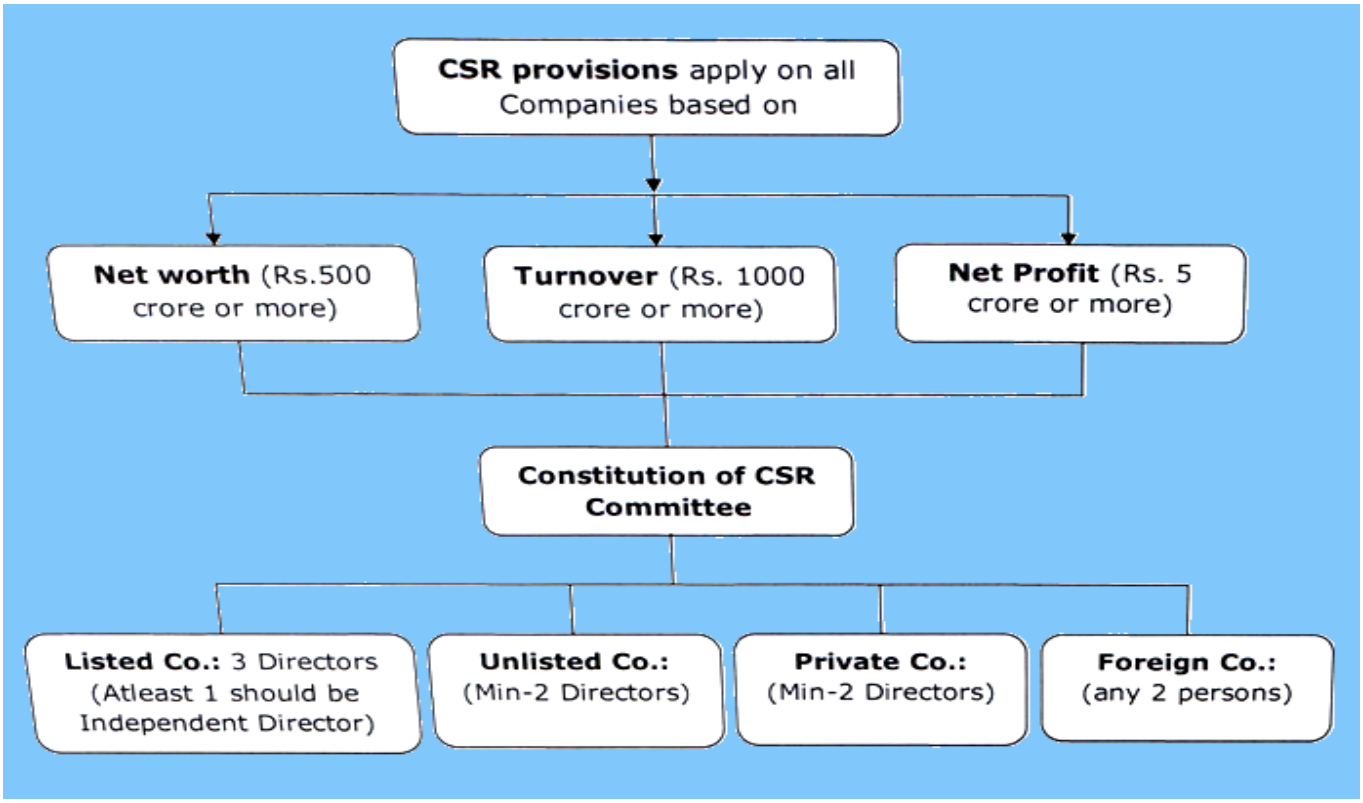
Earlier, many companies have adopted the same concept of CSR for doing social work.

Now, it is applicable on certain class of companies.

In other words, Corporate Social Responsibility (CSR) is a form of self-regulation integrated into a business model.

It is also known as corporate conscience, corporate citizenship, social performance or sustainable business/ responsible business.

CORPORATE SOCIAL RESPONSIBILITY- Section 135 of the Companies Act, 2013



The CSR Committee is required to be constituted if a Company fulfills any of the following criteria during the immediately preceding financial year:-

- Net worth of Rs.500 Crore or more or
- Turnover of Rs. 1,000 Crore or more or
- Net profit of Rs.5 Crore or more during any financial year.

According to the CSR Rules, the CSR provision will also be applicable to every company including its holding or subsidiary, and a foreign company having its branch office or project office in India.

Cessation of applicability of provision

If a company does not satisfy the specified criteria for a consecutive period of three financial years is not required to

comply with the CSR obligations.

Composition of CSR Committee

(a) For Listed Company: The CSR committee shall consist of 3 or more directors, out of which one director shall be an independent director.

(b) For Unlisted Public or Private Company: In case of an unlisted public company or a private company which is not required to appoint an independent director shall have its CSR Committee without the independent director with 2 or more directors.

Example: A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(c) For Foreign Company: With respect of foreign company, the CSR Committee shall comprise of at least two persons out of which one person resident in India and another person may be from foreign country duly nominated by the foreign company.

Benefits of CSR:

The benefits of CSR could be listed as follows:

(a) Strengthened brand positioning
(b) Enhanced corporate image and reputation
(c) Satisfaction of economic and social contribution to society
(d) Contribution to the surrounding society
(e) Increased ability to attract, motivate and retain employees
(f) Enhanced sales and market share
(g) Increased appeals to investors and financial analysts
(h) Local economy gains in all dimensions

Functions of the CSR Committee

The Committee shall formulate a CSR Policy and recommend to the Board which shall indicate the activities to be undertaken by the company in future.

The Committee shall recommend the amount of expenditure to be incurred on the activities.

Further, the CSR Committee is under an obligation to monitor the implementation of the CSR policy from time to time.

CSR Activities:

The CSR activities shall be completed by way of the following methods:

(a) By Charity: A company can donate money to various charitable trusts, societies, NGOs etc. who work for social economic welfare of society.

(b) By Contract: A company can make a contract with an NGO or any other agency for carrying out the CSR Activities for and on behalf of the company.

(c) By Itself: A company can take up any CSR activities on its own or create its own trust for CSR Activities.

Note:

1. The CSR projects or programs or activities undertaken in India only shall amount to CSR Expenditure.
2. The CSR projects or programs or activities that benefit only the employees of the company and their families shall not be considered as CSR activities.
3. Contribution of any amount directly or indirectly to any political party under section 182 of the Act, shall not be considered as CSR activity.

CSR Activities

As per the Companies Act, 2013, the following shall be treated as CSR Activities:

(a) Social Welfare Work: Eradicating poverty and malnutrition, providing preventive health care and sanitation and

making available safe drinking water;

(b) Promotion of Education: Promoting education including special education and employment enhancing vocation skills especially among children, women and others;

(c) Promotion of Gender Equality: Promoting gender equality, empowering women, setting up homes and hostels for women and orphans etc.;

(d) Environment Protection: Ensuring environment sustainability, ecological balance, animal welfare, conservation of natural resources and maintaining quality of soil, air and water;

(e) Protection of national heritage: Protection of national heritage, art and culture including restoration of building and sites of historical importance and works of art;

(f) Contribution to the Prime Minister's National Relief Fund: Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.

(g) Combating Diseases: Contribution towards combatting HIV/aids, or other maternal diseases.

As per Clarification issued by MCA on 18th June, 2014; following may be noted with regard to provisions mentioned under section 135:

> One-off events such as marathons/awards/charitable contribution/advertisement/sponsor- ships of TV programmes etc. not to be qualified as part of CSR expenditure.

> Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) are not count as CSR expenditure under the Companies Act.

Formulation of Policy:

The CSR Committee will prepare and recommend to the Board, a policy which will specify the activities to be undertaken (CSR Policy); advocate the amount of expenditure to be incurred on the activities referred and monitor the CSR Policy related to the company.

The Board will take into account the recommendations made by the CSR Committee and support the CSR Policy of the company.

Role of the Board of Directors:

The Board of every company shall -

(a) Ensure that the activities which formulate by CSR Committee are duly undertaken by the company.

(b) Ensure that the company spends in every financial year, at least 2% of the average net profits of the company made during the 3 immediately preceding financial years, in pursuance of its CSR Policy.

(c) Ensure that the company shall give preference to the local area and areas around it where it operates.

Note: If the company fails to spend CSR amount (2%), the Board shall give reasons for not spending the amount in the Director's report.

CSR Expenditure:

• Total Contribution:

The Board of every company shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

- Disclosure if amount not spent: If the company fails to spend such amount, the Board shall, in its report specify the reasons for not spending the amount.
- Preference: The Company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.
- Amount to be spent in India: Expenditure incurred on specified activities that are carried out in India only will qualify as CSR expenditure.

• Miscellaneous:

Expenditure incurred in undertaking normal course of business will not form a part of the CSR expenditure.

Any surplus arising out of CSR activities will not be considered as business profit for the spending company.

Penalty

For Company: If a Company fails to comply with the above provisions, it shall be punishable with fine which shall not be less than Rs.50.000/- but which may extend up to Rs.25 lakh.

For every officer: Every officer who is in default shall be punishable with imprisonment upto 3 years or with fine which shall not be less than Rs.50 thousand but which may extend up to Rs.5 lakh or with both.

Q1. (b) Referring to the provisions of the Companies Act, 2013 relating to 'corporate social responsibility' (CSR), answer the following:

(i) Which activities would not qualify as CSR?

(ii) Whether the average net profit criteria for CSR are before tax or after tax. (Dec, 2016)

A1. (i) Schedule VII mandates expenditure for the following activity—

1. Eradicating hunger, poverty and malnutrition, promoting preventive health care and sanitation, including contribution to the Swachh Bharat Kosh set-up by the Central Government and making available safe drinking water,
2. Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects,
3. Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward ,
4. Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set-up by the Central Government;
5. Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts,
6. Measures for the benefit of armed forces veterans, war widows and their dependents;
7. Training to promote rural sports, nationally recognised sports, para Olympic sports and Olympic sports;
8. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
9. Contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government,
10. Rural development projects,
11. Slum Area Development

Net profit after tax is taken as base and accordingly the adjustments need to be considered, which disallow Income-tax expense, so effectively it will be Net Profit Before Tax.

Q2. Net profits of PQR Ltd. during the following years as disclosed in the statement of profit and loss are as under: Financial year

	Net Profits
(Rs.in crore)	
31st March, 2013	10
31st March, 2014	12
31st March, 2015	08

The Board of Directors of the Company at its meeting decided to continue to a charitable organization, for charitable purposes, a sum ofRs.3 crore out of net profits of the financial year ended 31st March, 2015. This contribution has been made by the Board without seeking approval of shareholders in general meeting.

In the light of the provisions of the Companies Act, 2013, examine the validity of the contribution

made by the company. What shall be your answer in case the Board decides to contribute Rs.l crore only? Dec 2015 4 marks

A2. As per section 135 of the Companies Act, 2013, a company is under obligation to spend in every financial year, at least 2% of the average net profits of the company made during the 3 immediately preceding financial years, in pursuance of its CSR Policy.

In the given case, average 2% of last financial profit is only Rs.l.50 crore and it is responsibility of Board to spend such amount.

The Companies Act, 2013 is silent with regard to spending excess of 2% of average net profit on CSR activities as prescribed but that can be spent if the committee and Board agrees.

CHAPTER 8

ACCOUNTS, AUDIT AND AUDITORS

As a part of legal compliance, it is obligatory to the companies to maintain their books of accounts and the books of accounts get verified and audited from an auditor.

An auditor is responsible for checking and verification of books of accounts of a company. The checking and verification of books of account is known as auditing. The auditing is also known as the post mortem of books of accounts of a Company.

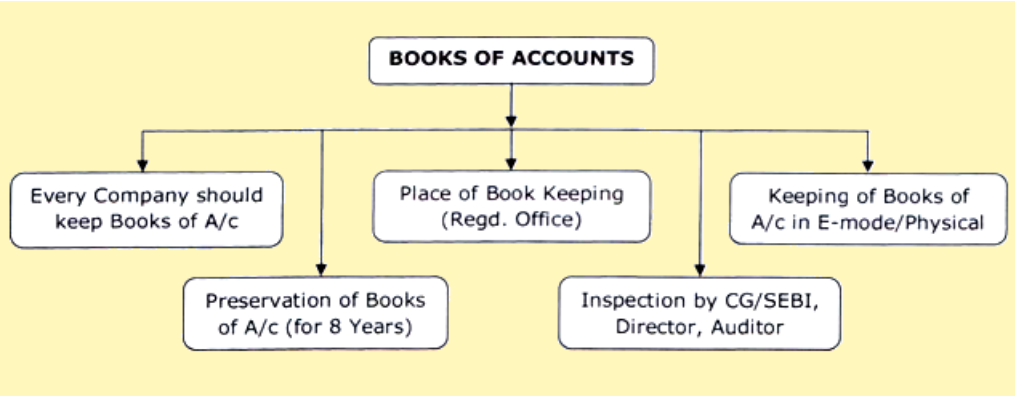
PART I- ACCOUNTS

ACCOUNTS [hisab bato]

The shareholders give capital to the company for doing the business and they are the owners of the company.

On contrary, despite providing capital to the company, shareholders do not participate in managing the affairs of the company.

However, they have every right to know as to how their money has been dealt with by the directors in a particular period (i.e. financial year).



REQUIREMENT OF KEEPING BOOKS OF ACCOUNT (Section 128 of the Companies Act, 2013)

Every company shall keep proper books of account of the company. The main features of the proper books of account are as under: —

(a) The company must keep the books of account.

(b) The books of account must show all money received and expended, sales and purchases of goods and the assets and liabilities of the company.

(c) The books of account must be kept on accrual basis and according to the double entry system of accounting.

(d) The books of account must give a true and fair view of the state of the affairs of the company or its branches.

Books of Account include the records maintained in connection with:

(a) all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;

(b) all sales and purchases of goods and services by the company;

(c) the assets and liabilities of the company; and

PLACE OF KEEPING BOOKS OF ACCOUNT:

Every company has to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office.

The books of accounts may be kept at other place in India as decided by the Board of Directors.

Note: In case of any change about the place of keeping Books of accounts, the company is required to file a notice to ROC in form AOC-5 within 7 days.

Special Note: The books of accounts of the branch office relating to transactions of a branch office may be kept at that office. However, the branch office must send summarized books of accounts of branch at intervals of not more than 3 months to the registered office

MAINTENANCE OF BOOKS OF ACCOUNT:

- A company may maintain the books of account in electronic mode and/or in physical form.
- The information contained in the records shall be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.
- The information received from branch offices shall not be altered and shall be kept as it is originally received.
- The information in the electronic record of the document shall be capable of being displayed in a legible form.
- A proper system for storage, retrieval, display or printout of the electronic records as decided by the Audit Committee, if any, or the Board should be followed.
- The back-up of the books of account maintained in electronic form (whether in India or outside India) shall be kept in a server physically located in India and shall be updated time to time.

The company shall intimate to the ROC on an annual basis along with financial statement:

(a) the name of the service provider;

(b) the internet protocol (IP) address of service provider;

(c) the location of the service provider;

(d) where the books of account are maintained on cloud (web cloud), such address of the service provider.

PRESERVATION OF BOOKS OF ACCOUNT:

Every company shall preserve their books of accounts

together with the vouchers for at least 8 years immediately preceding the current year.

Note: If the company has not been in existence for 8 years, then for the whole period of its existence.

INSPECTION OF BOOKS OF ACCOUNT

(a) Director: A director can inspect the books of accounts and relevant papers during business hours of a Company. A director may also appoint his agent or representative to inspect the books of accounts of the company during business.

Note: The right of inspection can be refused if it is found that the inspection is being sought to pass on the information to a rival business of the company.

(b) Inspection by the ROC/Officers of SEBI: The ROC and any other officer authorised by the Central Government to carry out inspection of books of account. The books of account can also be inspected by officers of the SEBI.

(c) Member's right of inspection of accounting records: Members of a company do not have a right of inspection of its accounting records except as authorised by the Board or the company in general meeting. The right of inspection of documents and books of a company is not limited to the Board of Directors.

(d) Auditor's right of inspection of accounts: An auditor has the right to access at all time to the company's accounts, whether kept at the head office of the company or elsewhere.

PERSONS RESPONSIBLE FOR KEEPING THE BOOKS OF ACCOUNT

The following persons are responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts:

(a) Managing Director,

(b) Whole-Time Director, in charge of finance

(c) Chief Financial Officer

(d) Any other person of a company charged by the Board.

FINANCIAL STATEMENT (Section 2(40) of the Companies Act, 2013)

Financial Statement includes

(a) Balance Sheet

(b) Profit and Loss account or Income and Expenditure account

(c) Cash flow Statement

(d) Statement of change in equity, if applicable

(e) Any explanatory notes annexed to or forming part of financial statements, giving information required to be given and allowed to be given in the form of notes.

Note: The financial statement with respect to One Person Company (OPC), Small Company and Dormant Company, may not include the cash flow statement.

The financial statement shall be laid in the AGM of that financial year.

In case of Companies, having subsidiaries and/or associates, the company shall prepare a consolidated financial statement of the Company including its subsidiaries and associates and lay before the AGM.

The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary/ies or associate/s or joint venture/s in Form AOC-1

Approval and Signing of Financial Statements

For Private or Public Companies:

Financial statement (including consolidated financial statements) of the private and public companies should be approved by the Board of Directors, before such statements are signed.

Financial statement should be signed on behalf of the Board by atleast:

(a) Chairperson of company, if so authorised by the Board, or 2 directors (one should be the managing director, if any), and

(b) Chief Executive Officer, if he is director, chief financial officer and company secretary, if any in the company.

Signing of Financial staement

Chairperson (If Authorised by BOD)	OR	2 Directors (out of which 1 should be MD, if there is

- CEO (if he is
- CFO
- CS

Other Requirement:

(a) One Person Company's financial statements shall be signed by only one director.

(b) Such sign is required for submission of financial statements to the auditor for his report.

(c) Auditor's report is required to be attached to every financial statement.

(d) Board's report shall be attached to the statements laid before the company in general meeting.

Penal provisions:

For Company: not less than Rs.50,000/- which may extend upto Rs.5,00,000/-, For every officer in default: Imprisonment upto 3 years, or fine from Rs.50,000/- to Rs.5,00,000/- or both.

Q1. The Board of Directors of Grow More Ltd., a public company, has duly delegated its power to approve the annual accounts of the company for the year 2011-12 to a committee of directors. The said committee considered the annual accounts and approved the same before the accounts were handed over to the statutory auditor of the company. Will you accept such approval of annual accounts? (4 marks) June 2012

A1. Section 134: The Board of Directors has only the power to approve the Financial Statements and such power cannot be delegated to a committee of directors.

The approval of annual accounts which are to be ultimately placed before the shareholders of the company is not to be treated as a routine or part of day-to- day work.

Accordingly, the Board of Directors must consider the annual accounts and approve them before the accounts are handed over to the statutory auditor of the company.

Therefore, such approval by committee shall not be accepted.

Right to get Copies of Audited Financial Statements (Section 136 of Companies Act, 2013)

- Following persons have right to get a copy of financial statements including consolidated financial statement, if any, auditor's report along with every other document required by law which are to be laid before a company in its general meeting:
  - every member of the Company,
  - every trustee for the debenture holder and
  - all other persons who are so entitled,
- The copies should be sent to the above mentioned persons atleast 21 days before the date of General Meeting (atleast 14 days in case of Section 8 companies).
- A shorter period than 21 days is sufficient if it is agreed as follows—
  - > In case of Company having share capital: It is agreed by majority of members in number who are entitled to vote and atleast 95% of the paid up share capital having voting rights.
  - > In case of Company not having share capital: It is agreed by atleast 95% of the members holding voting power.
- In case of listed companies this section shall be deemed to have been complied with, if:
  - The copies of the documents are made available for inspection at its registered office, during working hours, for a period of 21 days before the date of the meeting and
  - A statement containing the salient features of such documents in the prescribed form [i.e. form AOC-3] is sent to the eligible parties atleast 21 days before the date of meeting.

  Note: A listed company is required to supply a copy of the complete financial statements with auditor's report and director's report, to such shareholders who ask for full financial statements.
- A listed companies and such public companies which have a net worth of more than Rs. 1 crore and turnover of more than Rs. 10 crore can send the copies of financial statements in the following manner:
  - In electronic form to members who hold share in demat form and whose e-mail id's are registered with the depositories.
  - In electronic form to members who hold shares in physical form but positively consented in writing to

receive financial statements in electronic form.

– In physical copies to other members.

–

- Penalty: If any default is made in complying with the provisions of this section, the company shall be liable to a penalty of—

  (i) Rs. 25000/- and

  (ii) every officer of the company who is in default shall be liable to a penalty of Rs. 5000/-

RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL'S ORDER (Section 130)

The Company can reopen or re-cast books of accounts if the competent Court or Tribunal passed such order in response of the application received by the Tribunal.

Who can make an application?

Application to re-open or re-cast the books of account to Tribunal is made by any of the following parties:

- Central Government
- Income Tax Authorities
- Securities Exchange Board of India
- Any other regulatory body or any other person concerned
- Order made by Competent Court

Grounds for re-opening or re-casting

The books of accounts can be re-opened or re-casted only on the following grounds:

> Accounts were prepared in a fraudulent manner; or

> The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

Note: Maximum period of which the books of accounts can be opened is 8 financial years immediately preceding the current financial year. If CG gives direction period of 8 years can be exceeded.

VOLUNTARY REVISION OF FINANCIAL STATEMENT OR BOARD'S REPORT (Section 131)

The directors can prepare revised financial statement or a revised Board's report in respect of any of the three preceding financial years after obtaining approval of the Tribunal.

Grounds for voluntary revision:

> If financial statements do not comply with requirements of Section 129

> Board's Report do not comply with the requirements of Section 134.

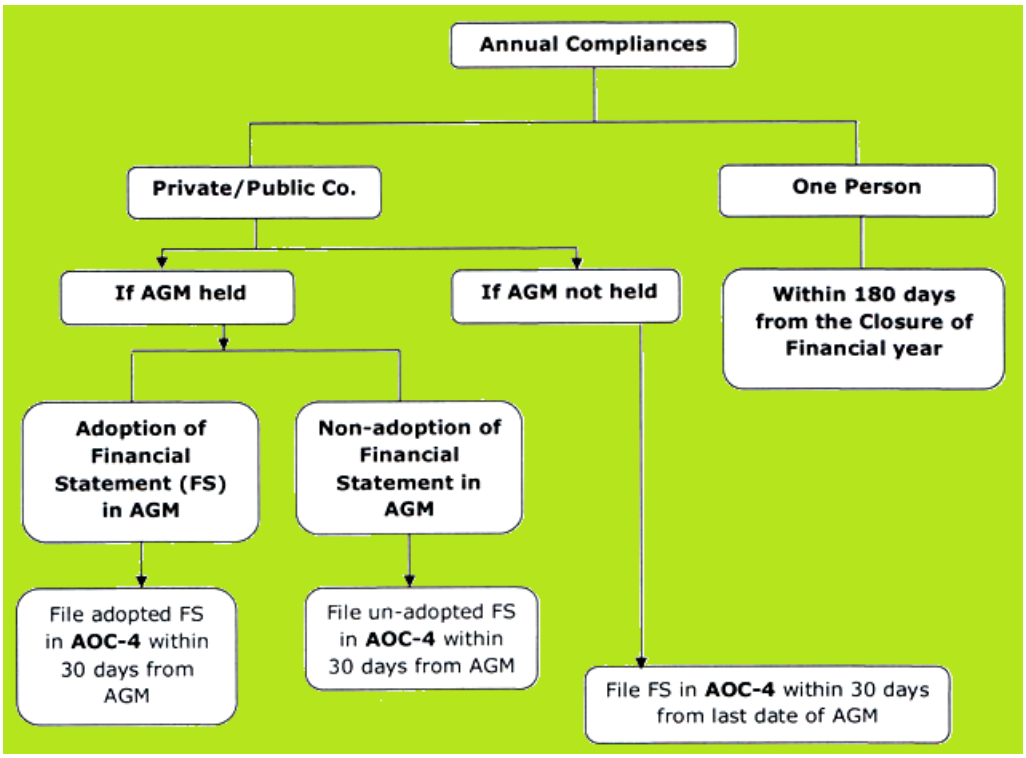
Note: The detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

Duration for which revision is permitted:

The revisions of financial statements and board's report in respect of any of the 3 preceding financial years after obtaining approval of the tribunal on an application made by the company.

The revised financial statements and board's report shall not be prepared or filed more than once in a financial year.

ANNUAL COMPLIANCES OF FINANCIAL STATEMENT (Section 137 of the Companies Act, 2013)



For Private or Public Company:

(a) **Adoption of Financial Statement in AGM**: Every company is required to file the financial statements (including consolidated financial statement) in Form AOC- 4 with the ROC within 30 days from the day on which the AGM held and adopted the financial statements.

(b) **Non-adoption of Financial Statement in AGM:** If the financial statements are not adopted at the AGM or adjourned AGM, such un-adopted financial statements along with the required documents to be filed with the ROC within 30 days of the date of AGM.

Note: The ROC shall take on record the unadopted financial statement as provisional compliances till the adoption such financial statement at AGM.

For One Person Company:

An OPC shall file the copy of financial statements duly adopted by its members within 180 days from the closure of financial year.

Note: The Company shall also attach the financial statements of its subsidiaries incorporated outside India. Special Note: The Certain class of companies as notified by the Central Government, shall mandatorily file their financial statement in XBRL format.

If AGM has not been held, the financial statement duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with ROC within 30 days of the last day before which the AGM should have been held.

Penal Provisions: If company fails to comply with the requirement of submission of financial statement before ROC, the company shall be punishable with fine of Rs.1000/- per day till the continuance of default subject to maximum of Rs.10 lakh.

Note: The MD and CFO if any, and in the absence of MD or CFO, any other director who is charged by the Board with the responsibility of complying with this provision, in the absence of such delegation of authority, all directors of the company shall be punishable with imprisonment upto 6 months or with fine which shall not be less than Rs. 1 lakh but not more than Rs.5 lakh or with both.

Q2. Give your opinion whether the Registrar of Companies can take balance sheet and profit and loss account on record even if it is not laid before annual general meeting or placed before the extra-ordinary general meeting.

(4 marks) Dec 2006

A2. Section 137: Every company has to file financial statements including consolidated financial statement together with Form AOC- 4 with the ROC within 30 days from the day on which the annual general meeting (AGM) held and adopted the financial statements with fees or additional fee, as the case may be.

If financial statement has not been adopted at the AGM or adjourned AGM, such unadopted financial statements along with the required documents shall be filed with ROC within 30 days of the date of AGM.

The Registrar shall take them in his record as provisional, until the adoption at annual general meeting.

In case of an OPC, financial statements duly adopted by its members shall be filed within 180 days from the closure of financial year.

Q3. A director of the Company along with another director of the company was prosecuted under section 137 for their failure to file annual return, annual accounts and audited balance sheet required to be laid before AGM. The directors filed a petition before the Court/tribunal to quash the prosecution initiated by the registrar of companies. As a Company Secretary in practice, advice in the matter

A3. As per section-137 of the Companies Act, 2013, every company is required to file the financial statements including consolidated financial statement together in Form AOC- 4 with ROC within 30 days from the day on which the annual general meeting held and adopted the financial statements in accordance with the Companies (Registration Offices and Fees) Rules, 2014.

If the financial statements are not adopted at the AGM or adjourned AGM, such unadopted financial statements along with the required documents be filed with the ROC within 30 days of the date of annual general meeting.

The ROC shall take them in his record as provisional, until the adoption at annual general meeting.

In case of One Person Company, it shall file the copy of financial statements duly adopted by its members within a period of 180 days from the closure of financial year.

The company shall also attach the accounts of subsidiaries incorporated outside India and which have not established their place of business in India with the financial statements. Certain class of companies as notified by the Central Govt., has to file in Extensible Business Reporting Language (XBRL) format.

If annual general meeting has not been held, the financial statement duly signed along with the statement of facts and reasons for not holding the AGM shall be filed with the Registrar within 30 days of the last days before which the AGM should have been held.

Conclusion: In the given situation, if the company has not filed annual return and annual account, it is a violation of section 137 and directors shall be punishable with fine of Rs.1000/- for every day during which failure continues subject to maximum of Rs.10 lacs.

The MD and CFO if any, and, in the absence of such MD or CFO, any other director who is charged by the Board with the responsibility of complying with the provisions of the Act, in the absence of such director, all directors of the company shall be punishable with imprisonment for a term which may extend upto 6 months or with fine which shall not be less than Rs.l lakh but which may extend to Rs.5 lakh or with both. To avoid such situation, the company should have filed unadopted financial statement.

PART II- AUDIT AND AUDITORS

Audit and Auditors [Aao aur aake dekho]

Meaning of Audit:

Audit means an unbiased examination and evaluation of accounting records.

It can be done internally (i.e. Internal Audit) or externally (Statutory Audit).

In other words, an audit of accounts is being conducted for detection of and prevention of errors, detection and prevention of any fraud, prevention of falsification of books of accounts.

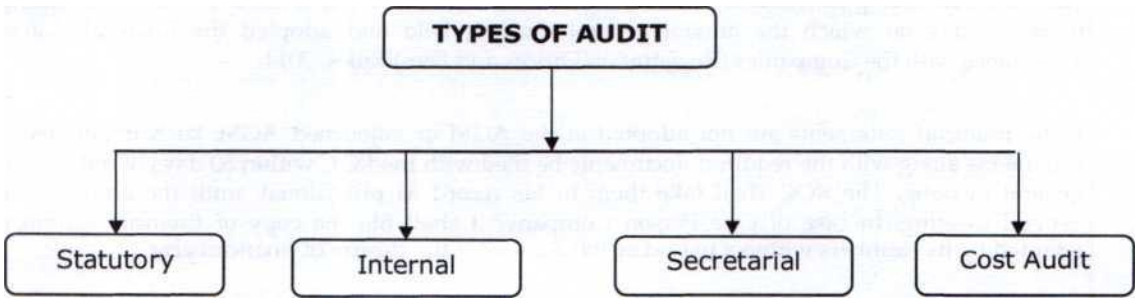
Object of Audit:

To make sure that the statement of accounts of the relevant financial year reflects true and fair affairs of the Company.

Need of Audit:

Generally, in a company, the business is run by persons (Board of Directors) other than the owners (shareholders) in a company. Therefore, in order to safeguard the interest of the shareholders, it is necessary to appoint independent person for audit of statement of accounts of the company.

Types of Audit



STATUTORY AUDIT

APPOINTMENT OF STATUTORY AUDITORS

Qualification of Auditors (Section 141 (1) & (2) of the Companies Act, 2013)

- **For Individual or firm:**

  Only a Chartered Accountant (individual) or a firm where majority of partners practicing in India are Chartered Accountants can be appointed as auditor for a company.

- **For LLP:**

  Where a firm including a limited liability partnership (LLP) is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorized to act and sign on behalf of the firm.

Disqualification of Auditors [Tumse na ho payega]

The following persons shall not be eligible for appointment as an auditor of a company, namely: —

- A body corporate, except LLP;
- An officer or employee of the company;
- Any partner/employee of officer or employee of company;
- A person who himself or his relative/partner is holding any security or interest in the company, or any company which is its holding, subsidiary, associate;
- A person whose relative is holding security or interest not exceeding Rs.l Lakh face value in companies as mentioned above.

  Note: This condition shall also be applicable in the case of a company not having share capital or other securities, wherever relevant. In the event of acquiring any security or interest by a relative, above Rs. 1 lac, the corrective action to maintain the limits (T one lac) shall be taken by the auditor within 60 days of such acquisition or interest.

- A person who or whose relative or partner is indebted to the company or its subsidiary or its holding or associate company or a subsidiary of such holding company, in excess of Rs.5 lakh shall not be eligible for appointment;
- A person who or whose relative or partner has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of Rs.l Lakh shall not be eligible for appointment;
- A person or a firm who, whether directly or indirectly, has "business relationship" with the company, or its subsidiary, or its holding or associate company;

Business Relationship means any transaction entered into for a commercial purpose, except -

(a) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts;

(b) commercial transactions which are in the ordinary course of business of the company at arm's length price like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

- A person whose relative is a director or is in the employment of the company as a director or key managerial personnel;
- A person who is in full time employment elsewhere;
- Person who is auditor of more than 20 companies;
- A person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction;
- a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company.

Note: Where a person appointed as an auditor of a company incurs any of the disqualifications mentioned as above after his appointment, he shall vacate his office and such vacation shall be deemed to be a casual vacancy in the office of the auditor.

Q4. M/s. C.S Horn & Co. is proposed to be appointed as auditors of Growth Limited. Mr. A, Mr. B and Mr. C are 3 partners of the firm. Mr. A's sister's husband holds securities in the Growth Limited of the face value Rs. 5 Lakh. Considering the provisions of the CA, 2013, can the firm be appointed as the auditors of the company?

A4. Section 141(3) read with Rule 10(1) of the Companies (Audit and Auditor) Rules, 2014 provides that a relative of an auditor may hold securities in the company only upto face value of Rs. 1 Lakh.

The prohibition applies only to the relatives, the definition of relative given under section 2(77) of the Act is

- Members of HUF
- Husband and wife
- Related in the prescribed manner

Father (including step father)

Mother (including step mother)

Son (including step son)

Son's wife Daughter

Daughter's husband Brother (including step brother)

Sister (including step sister)

Therefore sister's husband not covered under definition of Relative will not disqualify C.S. Hora & Co. for being appointed as auditors.

Q5. M/s. Nainee & Co. is the existing auditors of ABC Limited. Mr. L, Mr. M and Mr. N are 3 partners of the firm. One of the relatives of Mr. L holds securities in the ABC Limited. Considering the provisions

of the CA, 2013, can the firm continue as the auditors of the company ?

A5. Section 141(3) read with Rule 10(1) of the Companies (Audit and Auditor) Rules, 2014 provides that a relative of an auditor may hold securities in the company of face value not exceeding Rs. 1 Lakh. Hence, M/s. Nainee & Co. will not be disqualified from being the auditors of ABC Limited so long as the relative is holding security of ABC Limited of the face value of not more than Rs. 1 lakh. In case the value of the securities held exceeds Rs. 1 lakh, the same needs to be liquidated within 60 days of acquisition of interest, i.e. corrective action needs to be taken for the auditor not to suffer any disqualification under section 141.

Q6. A multi-disciplinary firm consists of 10 partners where 8 are Chartered Accountants, 1 Company Secretary and 1 Cost Accountant. Is the firm eligible for appointment as auditor?

A6. Yes. As per section 141(2) of the CA, 2013, a multi-disciplinary firm can be appointed as the auditors of the company, provided that only the partners who are chartered accountants are authorised to act and sign on behalf of the firm.

Q7. M/s. ABC & Co. a Chartered Accountancy firm having 2 partners is currently engaged in the audit of 40 companies. It has been approached by PQR Private limited and X Ltd (Listed) for accepting assignment as statutory audit. Can ABC & Co. accept such appointment?

A7. No, it can't as they are already on threshold of 20 companies per partner making it 40 already.

APPOINTMENT OF 1ST AUDITOR (Section 139 & Rule 3 of Companies (Audit and Auditors) Rules, 2014)

Every company shall appoint an individual or a firm as an auditor within 30 days of registration of the Company, who shall hold office till the conclusion of the first AGM.

Appointing Authority:

(a) Board of Director:

The 1st Auditor of the Company other than Government Company shall be appointed by the Board within 30 days from the date of incorporation.

(b) Members:

In case, the Board fails to appoint the 1st Auditor, then the members shall be informed by the Board and they shall appoint the same within 90 days from incorporation, who shall hold office till conclusion of 1st AGM.

Note: The Company shall inform the concerned auditor about his appointment and also file a notice of his appointment with the ROC in Form ADT-1 within 15 days from the date of his appointment.

APPOINTMENT OF SUBSEQUENT AUDITOR (Section 139(1) of Companies Act, 2013 & Rule 3)

Every company other than the Government Company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting.

Earlier, the appointment is subject to ratification by members at the 2nd, 3rd, 4th and 5th AGM.

If the members do not ratify the appointment then it would arise casual vacancy.

But as per the Companies (Amendment), Act, 2017, there will be no requirement of annual ratification of auditor's appointment at AGM.

Appointment of Auditor in Government Company

The appointment of auditor in Government Company (51% held by Govt. i.e. Central or State or combination of Central and State) shall be appointed as per the following provisions:

1st Auditor:

The 1st Auditor shall be appointed by the Comptroller and Auditor General (CAG) within 60 days from the date of incorporation.

In case of failure, the Board shall appoint auditor within next 30 days after 60 days from the date of Incorporation of the Company.

If Board fails to appoint then the Board shall inform to the members, who shall appoint the auditor within 60 days at an EGM.

Note: 1st Auditor shall hold office till conclusion of first Annual General Meeting.

Subsequent Auditors:

The CAG shall appoint the auditor within 180 days from the commencement of the financial year and the auditor so appointed shall hold his position till the conclusion of the Annual General Meeting.

MANNER OF APPOINTMENT OF AUDITOR (Rule 3 of Companies (Audit and Auditors) Rules, 2014)

If it is not mandatory for Company to constitute Audit Committee

The Board will take into consideration the qualification and experience of the individual or firm proposed to be appointed as an auditor and thereafter recommend the name to the auditor to the members to be appointed at AGM.

If it is mandatory for Company to constitute Audit Committee

If it is mandatory for Company to constitute Audit Committee under section 177 of the Companies Act, the manner of appointment of auditor will be as follows:

> The Audit Committee will take into consideration the qualification and experience of the individual or firm proposed to be appointed as an auditor and thereafter recommend the name to the Board of Directors.

> If the Board agrees with the recommendation of the Audit Committee, it will further the appointment of the auditor to the members to be appointed at AGM.

> If the Board disagrees with the recommendation of the Audit Committee, the following route shall be adopted.

The Board shall refer back the recommendation to the Audit Committee for reconsideration.

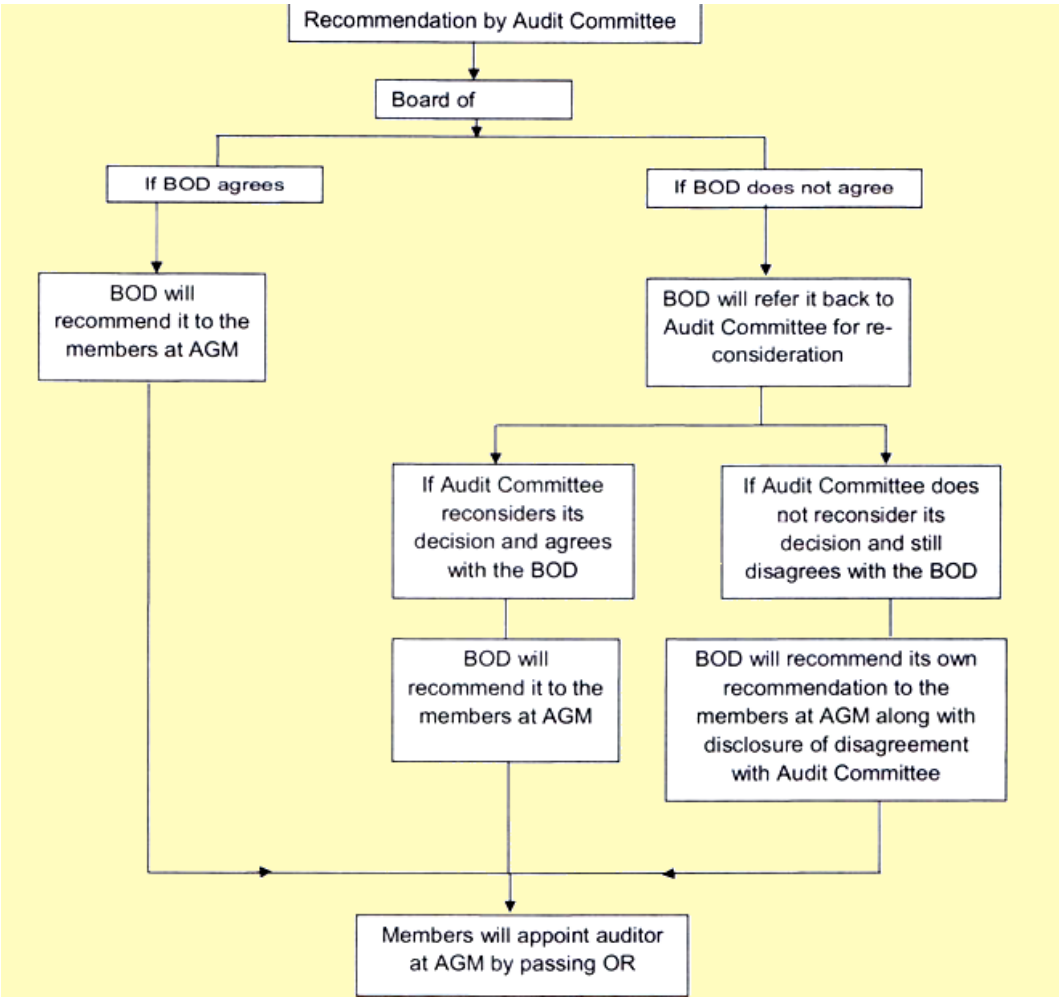
If the Audit Committee reconsiders its decision and agrees with the Board then the Board's recommendation will be proposed at the AGM.

If the Audit Committee does not reconsider its decision and stick to its original decision then the Board shall send its own recommendation to the AGM along with recorded reasons for disagreement.

Note: In case, a Company has an Audit Committee, then all appointments of Auditor including filling of casual vacancy, shall be made after taking into account the recommendations of the Committee.

SPACE FOR CLASS NOTES

MANNER OF APPOINTMENT OF AUDITOR



RE-APPOINTMENT OF RETIRING AUDITOR

A retiring auditor shall be re-appointed as auditor in the AGM except under the following circumstances:

(a) He is not qualified for re-appointment.

(b) He has given the company a notice in writing of his unwillingness to be re-appointed.

(c) A special resolution has been passed at that meeting appointing somebody else instead of him or providing expressly that retiring auditor shall not be re-appointed.

Note: Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

ROTATION OF AUDITORS (Section 139(2) Rule 5 of Companies (Audit and Auditors) Rules, 2014 Applicability of Rotation)

Rotation will apply to

- Listed companies;
- Unlisted public companies having paid up share capital of Rs. 10 crore or more;
- Private limited companies having paid up share capital of Rs. 50 crore or more;

Any Company having public borrowings from financial institutions, banks or public deposits of Rs. 50 crore or more.

Provisions of Rotation

As per provisions of rotation the above mentioned Companies shall not appoint or re-appoint an individual as auditor for more than 1 term of 5 consecutive years; and an audit firm as auditor for more than 2 terms of 5 consecutive years.

These auditors (either individual/audit firm) can be reappointed after cooling off period of 5 years.

Special Note: a break in the term for a continuous period of five years shall be considered as fulfilling the requirement of rotation;

Class of Company	Paid-up of share Capital/ Loan	Tenure		Cooling Period
		(Individual)	(Firm)	
Listed Companies	Irrespective of amount	5 years	2 terms of 5 years	5 years
Unlisted public Companies	Rs.10 Crore or more	5 years	2 terms of 5 years	5 years
Private Companies	Rs.50 Crore or more	5 Years	2 terms of 5 years	5 Years
Other Companies	Rs.50 Crore or more (Loan outstanding)	5 years	2 terms of 5 years	5 years

Note: 3years' transition period will be given to comply with this requirement.

Special Note:

(1) If a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years.

(2) Any other audit firm, having a common partner shall also not be appointed during cooling period.

(3) Firms existing under common network/brand name are also ineligible for appointment during cooling period.

Voluntary provisions regarding Rotation made by the Company

The members of a company can make provisions regarding rotation of the Individual Auditors or Firm, stating it in Articles of Association. It means the auditing partner and his team shall be rotated at such intervals as may be resolved by members.

Note: The audit shall be conducted by more than one auditor as decided by the Members of the Company.

Q8. Where the rotation requirements are not applicable to a company, can an auditor be appointed for a term of one year only?

A8. Irrespective of the applicability of rotation requirements under section 139(2) on a company, section 139(1) is applicable to all companies.

Section 139(1) states that every company needs to appoint an auditor at the first annual general meeting who shall hold office till the conclusion of the sixth annual general meeting i.e. one fixed term of 5 consecutive years.

Q9. On the expiry of the tenure of existing auditors (M/s. ABC & Co.), XYZ Limited, a public limited company considers to appoint M/s. PQR & Co. as their new auditors. Both the audit firms have a common partner Mr hi. Considering the provisions of the CA, 2013, can PQR be appointed as the auditors of XYZ Limited?

A9. No audit firm shall be appointed as auditors of a company if that audit firm has common partners to the other audit firm whose tenure has expired in a company in the immediately preceding financial year. Therefore, PQR & Co. is ineligible for being appointed as the statutory auditors of the company.

Q10. Will the answer to the above change if there is no common partner but both firms operate under one network/brand?

A10. The answer will not change. The incoming auditor shall not be eligible for appointment if the auditor or audit firm is under the same network of audit firms.

APPOINTMENT OF AUDITOR OTHER THAN RETIRING AUDITOR (Section 140(4) of Companies Act, 2013)

Special notice shall be required from members proposing to move a resolution at the next AGM to appoint a person other than the retiring auditor or to provide that the retiring auditor shall not be reappointed.

The special notice be served to the Company atleast 14 days before the AGM.

Special notice shall not be required in case where the retiring auditor has completed a consecutive tenure of five years or ten years as per section 139(2).

Important Points for special notice

1. On receipt of special notice for removing auditor, the Company should forthwith forward a copy of the same to the retiring auditor.
2. If the auditor makes a representation in writing to the company and requests for its notification to the members, the company shall —
   (a) State the fact of representation in any notice of resolution, and
   (b) Send copy of representation to all members,
   (c) If the copy of representation is not so sent, copy thereof should be filed with the ROC.
3. Such representation should be of a reasonable length and not too long.
4. For circulation to members, it should not be received by the company too late.
5. Auditor may require the company to read out the representation in the meeting if it is not so notified to members because it was too late or because of company's default.

CASUAL VACANCY IN THE OFFICE OF AUDITOR

If a vacancy in the office of auditor is caused by resignation or death or any other reason shall be treated as the causal vacancy.

(a) Power of Board:

The Board shall have power to fill the casual vacancy in the office of auditor within 30 days in all cases except:

(i) where the casual vacancy occurred due to resignation of the auditor, or

(ii) the company's accounts are not subject to audit by an auditor appointed by the CAG.

(b) Power of Members:

In case casual vacancy has occurred due to resignation, the Board will appoint an auditor within 30 days and such appointment should be approved in general meeting convened within 3 months of the recommendation of the Board.

(c) Power of CAG:

In case, a company whose auditors are to be appointed by CAG, such vacancy should be filled by the CAG within 30 days from the date of vacancy.

In case, the CAG fails to fill the vacancy within 30 days, the Board of Directors shall fill the vacancy within next 30 days.

Tenure of the Auditor filling UP casual vacancy

The auditor appointed to fill up casual vacancy shall hold the office upto conclusion of next AGM.

Note: Appointment of auditors to fill casual vacancy shall be made after considering the recommendation of the audit committee.

REMOVAL OF AUDITOR [NIKAL DO]

The auditor may be removed from his office before the expiry of the term only by:

(a) Prior approval from CG:

The Company has to obtain prior approval of the Central Government. (The Company shall file an application in Form ADT-2 within 30 days of resolution passed by the Board)

(b) Approval from Members:

The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution.

(c) Reasonable Opportunity:

The auditor concerned shall be given a reasonable opportunity of being heard.

Board passes BR	Within 30 days of passing BR 1 company shall file an application with CG in form ADT-2	Within 60 days of receipt of approval of CG, pass a SR in GM

RESIGNATION OF AUDITOR [WHO NIKAL GAYA]

The auditor who has resigned from the company shall file a statement in Form ADT-3 to ROC indicating the reasons and other facts with regard to his resignation as follows:

(a) Company other than Government Company:

The auditor shall within 30 days from the date of resignation, file a statement about the reasons of resignation to the Company and the ROC.

(b) Govt. Companies:

The Auditor shall within 30 days from the date of resignation, file a statement to the company and the ROC and also file same statement with CAG.

Penal provisions if not filing Statement: Fine: Minimum Rs.50,000 and Maximum Rs.5 lakh.

POWERS OF TRIBUNAL (Section 140(5) of Companies Act, 2013)

1. A National Company Law Tribunal (NCLT) can direct the company to change the auditor Suo moto or on an application from Central Government, or on an application from person concerned.
2. The NCLT will exercise such power only if it is satisfied that the Auditor of a Company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the Company or its directors or officers.
3. If the NCLT is satisfied that the auditor needs to be changed, it shall pass an order within 15 days of the receipt of application for removal of such auditor.
4. If the application for removal was made by CG, then CG will appoint an auditor in place of removed auditor.
5. The auditor so removed shall not be eligible to be appointed as an auditor of any Company for a period of 5 years from the date of passing of such order.
6. In addition to the removal he shall be liable for fraud under section 447.

REMUNERATION OF AUDITOR

The remuneration of the auditor shall be fixed in its general meeting or in such manner as may be determined therein.

The Board of Directors may fix remuneration of the 1st auditor.

The remuneration will be in addition to the out of pocket expenses incurred by the auditor in connection with the audit

of the company.

AUDITOR'S RIGHT TO ATTEND GENERAL MEETING

All notices of any general meeting shall be forwarded to the auditor and he must attend any general meeting either by himself or through his authorised representative and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

POWERS AND DUTIES OF AUDITORS [KAR SAKTE HAI]

Every auditor can access at all times to the books of accounts, vouchers and seek such information and explanation from the company and enquire such matters as he considers necessary.

Powers & Duties of the Auditors

(a) Inquire about the Loans & Advances:

The auditor shall inquire about the loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are not prejudicial to the interest of the company or its members.

(b) Transactions represented by book entries:

Auditor shall inquire about the transactions of the company which represented merely by book entries.

(c) Sale of investments:

Auditor shall inquire about the assets of the company (except an investment company or a banking company) including shares, debentures and other securities.

(d) Auditor must verify the cases where securities are sold at a price less than their cost of acquisition and if he finds that such sale is bona fide and the price realised is considered to be reasonable, having regards to the circumstances of each case, no further reporting is required.

(e) Loans and Advances shown as deposits:

Auditor must verify the loans and advances made by the company which have been shown as deposits.

(f) Charging of Personal expenses to revenue account:

Auditor must ensure that no personal expenses of directors and officers of the company have been charged to revenue account.

AUDIT REPORT [LIKH K DEUNGA]

Auditor shall make a report to the members on the accounts examined by him and on every financial statement which is required to be laid in the AGM of the company.

The Audit report should take into consideration the provisions of the Companies Act, the Accounting and Auditing standards.

The Audit report should state that to the best of his information and knowledge, the said accounts and financial statements give a true and fair view of the state of the company's affair as at the end of the financial year and the profit or loss and the cash flow for the year.

Auditor's report shall also state other details which are mentioned below:

(a) whether he has sought and obtained all the information and explanations which were necessary and if not, the details thereof and the effect of such information on the financial statements;

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

(c) whether the branch audit report prepared by a person other than the company's auditor has been sent to him;

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

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

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

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

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

connected therewith;

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

Auditor's Report shall also include their views and comments on the following matters, namely: —

(a) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement;

(b) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long-term contracts including derivative contracts;

(c) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.

(d) whether the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8th November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of accounts maintained by the company.

The auditor is required to provide the reasons, where any of the matters required to be included in the Audit Report is answered in negative or with a qualification.

Signing of Audit Report

Auditor shall sign the auditor's report of the company.

Any qualifications, observations or comments on financial transaction matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

Special Note: It is the duty of the auditor to sign the audit report and provide it to the Company

Q11. An auditor of a company signed the balance sheet, profit and loss account and schedules/notes and furnished the auditor's report on the same date on which the reports were signed by the directors on behalf of the Board. One of the directors raised objection stating that the audit cannot be completed and certified in a day. Do you agree with the director and if not, why? (4 marks) Dec 2012

A11. Section 143(1) of the Companies Act, 2013 says that the auditors are having right to examine all times to the: (a) Books of accounts (b) Balance Sheet (c) Profit and Loss account (d) Vouchers and (e) Every other document declared by this Act.

If the auditor signs the balance sheet on the same date on which the directors have approved it, it may not be inferred from the circumstances that the auditor has not performed about efficiently.

Therefore, the objection of director is not valid.

Q12. Peculiar Ltd., an unlisted company, did not prepare its financial statements for the year ended 31st March, 2016 in conformity with some of the mandatory accounting standards.

With reference to the provisions of the Companies Act, 2013, state the responsibilities of the directors and statutory auditors of the company in this regard. Dec 2016, 4 marks

A12. As per Section 129 of the Act, preparation of the Financial Statements is the Responsibility of the Management. Such financial statements shall be in accordance with the accounting standards. Where the financial statements of a company do not comply with the accounting standards, the company shall disclose in its financial statements, the deviation from the accounting standards, the reasons for such deviation and the financial effects, if any, arising out of such deviation.

Further as per section 135(5), the Directors' Responsibility statement which is a part of Board's Report shall state that, the applicable accounting standards had been followed along with proper explanation relating to material departures; in the preparation of the annual accounts.

In addition to the above the Section 143 states that the Auditor of the Company also has a duty to report in his Auditor's Report whether in his opinion the Financial Statements comply with applicable

Accounting Standard.

Accordingly, every auditor must comply with the auditing standards while performing the responsibilities of Auditing.

Q13. Mr. Sharp, auditor of the Happy Future Ltd. refused to provide the Audit Report of the financial year 2016-17, on the grounds that the audit fee for the financial year 2015-16 is still unpaid. Can he do so?

A13. No, Mr. Sharp cannot withhold the audit report for the reason of non-payment of audit fee, as it is his duty to sign and provide audit report. He can sue the Company to recover his pending payment.

BRANCH AUDIT

The Accounts of branch office can be audited by:

(a) The company's auditor; or

(b) Any other person, qualified to be appointed as an auditor as per the provisions of the Act as branch auditor; or

(c) In case of foreign branch, by the company's auditor or by an accountant or a competent person appointed in accordance with the prevailing laws of the foreign country.

The branch auditor shall prepare a report on the accounts of the branch examined by him and the company's auditor shall deal with such report in his audit report in a manner as he considers necessary.

Duties and powers of the company's auditor

(a) The duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor i.e. right of access to books of accounts, ensure about the mandatory books of accounts maintained, prepare auditors' report and state the reasons of qualification, if any.

(b) The branch auditor shall submit his report to the company's auditor.

COMPLIANCE WITH AUDIT STANDARDS

Every auditor must comply with the auditing standards as issued by the Institute of Chartered Accountants of India (ICAI) and the National Financial Reporting Authority (NFRA).

Till date the Auditing Standards are notified by the Central Government, the auditing standards specified by the ICAI are deemed to be the auditing standards.

PROHIBITED SERVICES BY AUDITOR (Section 144 of the Companies Act, 2013) [Tum kar hi nahi sakte]

An auditor shall provide only such services which are approved by the Board of Directors/audit committee, but which shall not include any of the following services:

(a) accounting and book keeping services;

(b) internal audit;

(c) design and implementation of any financial information system;

(d) actuarial services;

(e) investment advisory services;

(f) investment banking services;

(g) rendering of outsourced financial services

(h) Managerial Services;

(i) Other prescribed services.

Note: The above mentioned services shall not be rendered by the Statutory Auditor whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company.

REPORT OF FRAUD BY AUDITOR (Section 143(12) to 143(15) and Rule 13)

If amount involved in fraud is of Rs. 1 Crore or more

If an auditor of a company has reason to believe that fraud involving an amount of Rs. 1 Crore or above, is being or has been committed against the company by its officers or employees he shall report it to CG.

Course of Action

1. The auditor shall report the matter to the Board or the Audit Committee, immediately but not later than 2 days of his knowledge of the fraud.
2. The Board should reply its observation to the above within 45 days.
3. The Auditor should forward his report along with reply of Board or Audit Committee and his comments to the CG within 15 days from the date of receipt of such reply or observations.

Note: In case the auditor fails to get any reply or observations from the Board or the Audit Committee within 45 days, he shall forward his report to the CG.

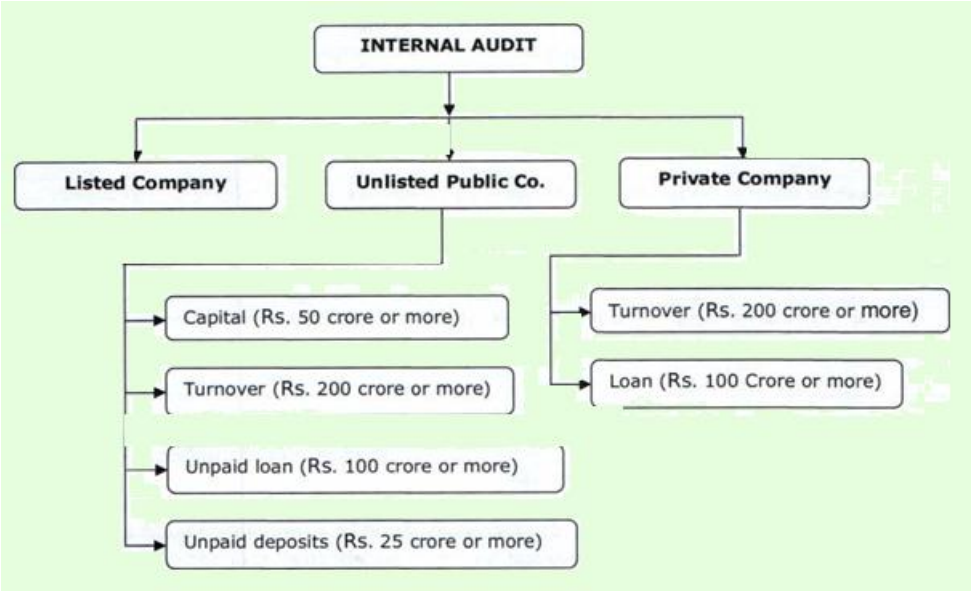
If amount involved in fraud is less than Rs. 1 Crore

If an auditor of a company has reason to believe that fraud involving an amount of less than Rs. 1 Crore, is being or has been committed against the Company by its officers or employees he shall report the matter to the Board or the Audit Committee, immediately but not later than 2 days of his knowledge of the fraud, which should also be reported in the Director's Report.

Note: The provision of this ride shall also apply, mutatis mutandis, to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively.

INTERNAL AUDIT (Section 138 of the Companies Act, 2013)

Applicability of Internal Audit [khud se hi karo]



Section 138: Internal Audit applies to all companies as under:

1. Every listed company;
2. Every unlisted public company having:
   (a) Paid-up share capital of Rs.50 crore or more during the preceding financial year; or
   (b) Turnover of Rs.200 crore rupees or more during the preceding financial year; or
   (c) Outstanding loans from banks or public financial institutions exceeding Rs.100 crore or more at any point of time during the preceding financial year; or
   (d) Outstanding deposits of Rs.25 crore or more at any point of time during the preceding financial year; and

3. Every private company having:
   (a) Turnover of Rs.200 crore or more during the preceding financial year; or
   (b) Outstanding loans from banks or public financial institutions exceeding Rs.100 crore or more at any point of time during the preceding financial year.

Note: An existing company covered under the above parameter shall comply within 6 months with the provisions of Internal Audit.

Who can be appointed as Internal Auditor?

The following professionals may conduct the Internal Audit of the above mentioned Companies:

(a) a Chartered Accountant; or
(b) a Cost Accountant; or
(c) Other professional as may be decided by the Board of Directors to conduct internal audit of the functions and activities of the Company.

For conducting the internal audit by the above mentioned professional, the Internal Auditor should have knowledge about:

(a) Legal and regulatory framework within which the auditee entity operates.
(b) Accounting, internal control systems and procedure alongwith accounting policies.
(c) Determine the effectiveness of internal control and check procedures adopted by the entity.
(d) Understand the business and other technical details of the auditee entity.
(e) Determine nature, timing and extent of procedures to be carried out or performed.

Q14. Answer the following by explaining the provisions of the Companies Act, 2013 relating to 'internal audit':
1. Whether a private company is mandatorily required to appoint an internal auditor ?
2. Who may be appointed as an internal auditor? Whether a Practicing Company Secretary (PCS) can be appointed as an internal auditor? 2015 - June (4 marks)

A14. A Practicing Company Secretary can be appointed as internal auditor of any company as per the provisions of section 138 of the Companies Act, 2013.

SECRETARIAL AUDIT (Section 204 of the Companies Act, 2013) [laws ko bhi check karo]

Secretarial Audit means correction and verification of secretarial records and compliances to be maintained by the Company.

In other words, secretarial audit is a compliance audit and it is a part of total compliance management in an Organisation. It is an effective tool for corporate compliance management.

It helps to detect non-compliance and to take corrective measures.

Secretarial Audit is a process to check compliance with the provisions of various laws and rules/ regulations/procedures, maintenance of books, records etc., by an independent professional to ensure that the company has complied with the legal and procedural requirements and also followed the due process. It is essentially a mechanism to monitor compliance with the requirements of stated laws.

1st time, the Companies Act, 2013 gives statutory recognitions to the Secretarial Audit.

As per section 204 of the Companies Act, 2013, every listed company and other class of companies as notified have to annex a Secretarial Audit Report to its Board Report.

Applicability of Secretarial Audit:

The following companies are required to do the secretarial audit:

(a) Every listed companies; or
(b) Every public company having a paid-up share capital of Rs.50 crore or more; or
(c) Every public company having a turnover of Rs.250 crore or more.

Objectives of Secretarial Audit:

The objective of secretarial audit is as follows:

- To check & report on compliances of applicable laws and Secretarial Standards;
- To point out non-compliances and inadequate compliances;
- To protect the interest of various stakeholders i.e. the customers, employees, society etc;
- To avoid any unwarranted legal actions/penalties by law enforcing agencies and other persons as well.

Scope of Secretarial Audit:

The scope of Secretarial Audit comprises verification of the compliances under the following enactments, rules, regulations, notifications and guidelines:

> The Companies Act, 2013 (the Act) and the Rules made thereunder
> The Securities Contracts (Regulation) Act, 1956 and the Rules made under that Act;
> The Depositories Act, 1996 and the Regulations and Bye-laws framed under that Act;
> The Foreign Exchange Management Act, 1999 and the Rules and Regulations made thereunder;
> Securities and Exchange Board of India Act, 1992 along with its regulations;
> Other applicable laws depending upon industry location, etc;
> Adherence to Secretarial Standards;
> Board Structure, Material event etc.

Who will conduct the Secretarial Audit of the Companies? [Kaam mila hame]

Only a practicing company secretary can conduct the secretarial audit of the Companies.

It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records.

Appointing Authority

The Secretarial auditor is appointed by Board of Directors, and he submits his secretarial report to the Board which is annexed to the Director's Report.

Note: Secretarial Audit should be an independent, objective assurance intended to add value and improve an organization's operations. It helps to accomplish the organization's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes. The Board of Directors shall explain, in their report, in full any qualification made in the Secretarial Audit Report.

COST RECORDS & AUDIT (Section 148 of the Companies Act, 2013)

The Central Government may direct for conducting cost audit of certain class of companies which are engaged in the production of such goods or providing such services relating to the utilization of material or labour or to other items of cost.

If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies.

Who will conduct the Cost Audit of the Companies?

The cost audit shall be conducted by a Cost Accountant who shall be appointed by the Board of Directors.

Note: Prior to Companies (Amendment) Act, 2017, Cost Auditor shall be cost accountant in practice.

No person appointed as a Cost auditor of the company shall be appointed for conducting the audit of cost records and the auditor conducting the cost audit shall comply with the cost auditing standards.

The qualifications, disqualifications, rights, duties and obligations applicable to auditors shall also apply to a cost auditor and it shall be the duty of the company to give all assistance and facilities to the cost auditor for auditing the cost records of the company.

Note: The report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors of the company.

A company shall within 30 days from the date of receipt of the cost audit report, furnish with the Central Government

with such report along with full information and explanation on every reservation or qualification.

The Companies (Cost Records and Cost Audit) Rules. 2014

(a) Applicability for cost audit'. The Central Government may direct for the audit of cost records of certain class of companies.

(b) Maintenance of records: Every company covered under these rules including all units and branches thereof, shall, in respect of each financial year commencing on or after the 1st day of April, 2014, maintain cost records in Form CRA-1.

(c) Cost audit: Every company covered under these rules shall appoint a cost auditor within 180 days from the commencement of every financial year.

(d) Qualification of Cost audit Report: Every cost auditor, who conducts an audit of the cost records of a company, shall submit the cost audit report along with his or its reservations or qualifications or observations or suggestion in Form CRA-3.

CHAPTER 9

TRANSPARENCY & DISCLOSURES

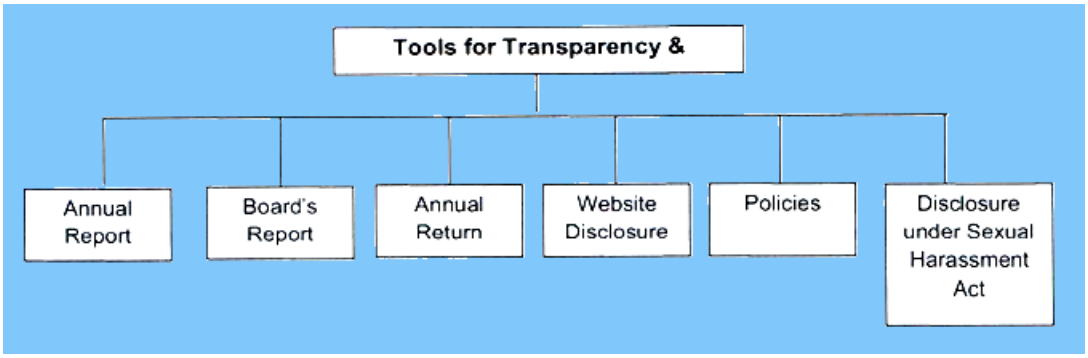
The directors are holding the position of trust and they are under obligation to manage the business efficiently and effectively for the purpose to maximize the wealth of shareholders.

Shareholders expect certain level of transparency and disclosure from the Company and the Board.

Earlier where Board's Report or Director's Report played an important role for the stakeholders to judge or analyze the performance and corporate governance measures adopted by the company.

Today the ambit of mandatory disclosures by the corporates have increased manifold and includes disclosure under the Companies Act, 2013, SEBI (LODR) Regulations, 2015, Sexual Harassment (Prevention, Prohibition and Redressal) Act, 2013 etc.

Various Tools for Transparency and Disclosures



I. ANNUAL REPORT [saal bhar ka lekha jokha]

Annual Report is a comprehensive report issued by the Companies to its shareholders and stake holders. The objective of the report is to disclose about the financial and other aspects to the Shareholders and other stake holders.

Special Note: As per Regulation 34 of SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015, a listed entity shall submit the annual report to the stock exchange within 21 working days of its being approved and adopted in the annual general meeting

Content of the Annual Report

1. Audited Financial Statement: Audited financial statements i.e. balance sheets, profit and loss accounts etc. and Statement on Impact of Audit Qualifications, if applicable.
2. Consolidated Financial Statement: Consolidated financial statements audited by its statutory auditors.
3. Cash Flow statement: cash flow statement presented only under the indirect method as prescribed in Accounting Standard-3 or Indian Accounting Standard 7, as the case may be.
4. Director's report: Detailed Board Report as per Section 134 of the Companies Act, 2013.
5. Management discussion and analysis report: Applicable to listed entities.

This can be a part of director's report or an addition to it.

6. Business Responsibility Report: Applicable to the top 500 listed entities based on market capitalization (calculated as on March 31 of every financial year).
7. Other Disclosure: It should contain any other disclosures specified in Companies Act, 2013 along with other requirements as specified in Schedule V of above mentioned regulations.

Additional Disclosure in Annual Report as per the SEBI (Listing Obligation Disclosure Requirement) [SEBI (LODR)] Regulations, 2015

1. Related Party Disclosure:
   The listed entity (except listed banks) shall make disclosures in compliance with the Accounting Standard on "Related Party Disclosures".
2. Management & Discussion Analysis:
   This shall include the following along with its financial impact:
   - Industry structure and developments.
   - Opportunities and Threats.
   - Segment-wise or product-wise performance.
   - Outlook
   - Risks and concerns.
   - Internal control systems and their adequacy.
   - Discussion on financial performance with respect to operational performance.
   - Material developments in Human Resources/Industrial Relations front, including number of people employed.
3. Corporate Governance Report:
   This shall include the following:
   - A brief statement on listed entity's philosophy on code of governance.
   - Details of Board of Directors and their meetings
   - Details of Audit Committee and their meetings
   - Details of Nomination & Remuneration Committee and their meetings.
   - Details about Remuneration to Directors
   - Details of Stakeholders Relationship Committee and their meetings and grievances received and disposed of the stakeholders.
   - Details of General Meetings held during the year.
   - Means of Communication used by the Company for communication & Disclosures
   - General Information for shareholders
   - Other Disclosures
4. Declaration by the chief executive officer:
   That all the members of board of directors and senior management personnel have affirmed compliance with the code of conduct of board of directors and senior management.
5. Compliance certificate:
   A compliance certificate from the Auditors or the Company Secretary in Practice should be annexed to the Director's Report that the Company has fulfilled the Corporate Governance requirements.

Dissemination or Distribution of Annual Report to the Shareholders

According to Regulation 36 of SEBI (LODR) the listed entity shall send the annual report to the shareholders atleast 21 days before the Annual General Meeting.

Mode of sending Annual Report

> Soft copies of full annual report to all those shareholders who have registered their email addresses for the purpose;

> Hard copy of statement containing the salient features to those shareholders who have not so registered;
> Hard copies of full annual reports to those shareholders, who request for the same.

II. BOARD'S REPORTS AND ITS DISCLOSURES- Section 134 of the Companies Act, 2013

The financial statement including consolidated financial statement should be approved by the Board of Directors before they are signed and submitted to auditors for audit report.

The Board's Report shall be attached to every copy of financial statement laid before the company in the Annual General Meeting.

The following documents shall be attached with every financial statement of the Company which shall be laid before an Annual General Meeting, a report by its Board of Directors, which shall include:

Content of the Board's Report

1. Extract of Annual return:

   Extract of the annual return in Form MGT 9 to be attached with the Board's Report including:

   (a) Number of meetings of the Board.
   (b) Directors' Responsibility Statement.
   (c) A statement on declaration given by independent directors.
   (d) Company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes of independence of a director and any other matter.
   (e) Explanations by the Board on every qualification, reservation or adverse remark made by the auditors or by practicing company secretary in his secretarial audit report.
   (f) Particulars of loans, guarantees or investments.
   (g) Related parties transactions.
   (h) The state of the company's affairs.
   (i) The amount, if any, which it recommends should be paid by way of dividend.
   (j) Material changes and commitments, if any.
   (k) The conservation of energy, technology absorption, foreign exchange earnings and outgo.
   (L) A statement indicating development and implementation of a risk management policy for the company including identification of elements of risk.

2. The Directors' Responsibility Statement

   The Director's responsibility Statement includes the statement about:

   (a) The applicable accounting standards had been complied with along with proper explanation relating to material departures;
   (b) The directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
   (c) The directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;
   (d) The directors had prepared the annual accounts on a going concern basis; and
   (e) The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

   Note: Internal financial controls as the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the

timely preparation of reliable financial information.

3. Independent Director:

An Independent Director is a person who is not related to the promoters or the other members of the company.

An independent director shall hold office for a term up to 5 consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

4. Audit Committee:

Board's Report shall disclose the composition of audit committee and also discloses the recommendation of the audit committee which is not accepted by the Board along with reason thereof.

5. Vigil Mechanism:

It is the whistleblower provision which is a mandatory requirement.

This mechanism would enable a company to evolve a process to encourage ethical corporate behavior.

Every listed company shall establish a Vigil mechanism for their Directors and Employees to report their genuine concern or grievances.

6. Nomination and Remuneration committee:

The Board's Report shall disclose the composition of Nomination and Remuneration Committee and also discloses the recommendation of the Nomination and Remuneration Committee.

7. Secretarial Audit for Bigger Companies:

Every listed company and other prescribed companies shall annex the secretarial audit report given by a Company Secretary in practice with Board's Report.

The Board in its report shall explain any qualification or other remarks made by the Company Secretary in Practice.

8. Disclosures about CSR Policy:

The disclosure of contents of Corporate Social Responsibility Policy in the Board's report and on the company's website.

9. Conservation of energy, technology absorption, foreign exchange earnings and outgo:

Details of steps taken by the Company for energy & technology absorption and foreign exchange earnings and spending during the financial year to be disclosed in such manner as may be prescribed.

10. Statement of affairs of Company:

The profit or loss earned during the year.

11. Dividend:

The dividend proposed if any for the financial year should be disclosed in the Board's Report.

12. Reserve:

Transfer if any to the Reserve during the financial year should be disclosed in the Board's Report.

13. Explanations or comments by the Board on every Qualification, reservation or adverse remark or disclaimer made by Auditor and Secretarial Auditor:

The Board should give explanation to any qualification reservation or adverse marks given by the auditor in his auditor's report and by Secretarial Auditor in his secretarial report.

14. Particulars of loans, guarantees or investments under section 186:

Details about loans given or guarantee security given by the Company or any investment done by the Company shall be disclosed in the Auditor's Report.

15. Related party Contracts:

Any contracts entered by the Company which are covered under Section 188 of the Companies Act should be disclosed.

16. Disclosure about issue of Sweat Equity Shares:

The Board of Directors shall, inter alia, disclose in the Directors' Report for the year in which such shares are issued, the following details of issue of sweat equity shares, namely:

(a) the class of director or employee to whom sweat equity shares were issued.

(b) the class of shares issued as Sweat Equity Shares.

(c) the number of sweat equity shares issued to the directors, KMP or employees showing separately the number of such shares issued to them.

(d) the reasons or justification for the issue.

(e) the principal terms and conditions for issue of sweat equity shares, including pricing formula.

17. Disclosure about issue of shares under ESOP and ESPS:

The Board of Directors shall disclose the following details about ESOP & ESPS in the Directors' Report for each year:

(a) options granted;

(b) options vested;

(c) options exercised;

(d) the total number of shares arising as a result of exercise of option;

(e) options lapsed;

(f) the exercise price;

(g) variation of terms of options;

(h) money realized by exercise of options;

(i) total number of options in force;

(j) employee wise details of options granted to—

(a) key managerial personnel;

(b) any other employee who receives a grant of options in any 1 year of option amounting to 5% or more of options granted during that year.

(c) identified employees who were granted option, during any 1 year, equal to or exceeding 1% of the issued capital (excluding outstanding warrants and conversions) of the company at the time of grant.

18. Disclosure of shares issued with differential rights:

If the Company has issued any equity shares with differential rights during the financial year, the details of the same should be mentioned in the Report.

Signing and Dating of Board's Report

The Board's report and its annexure shall be signed by its Chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least 2 directors, one of whom shall be a managing director (MD), or by the director where there is one director.

A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of:

(a) any notes annexed to or forming part of such financial statement;

(b) the auditor's report; and

(c) the Board's report.

Q1. The Board of Directors of Charming Ltd. seek your advice on the matters to be included in the directors' responsibility statement forming part of the company's annual report to shareholders. As the Company Secretary of Charming Ltd., advise the Board. 4 marks 0une, 2015)

A1. Director's responsibility statement is a part of annual report (Board's report) which must be sent to shareholders. The Director's responsibility Statement includes the statement about:

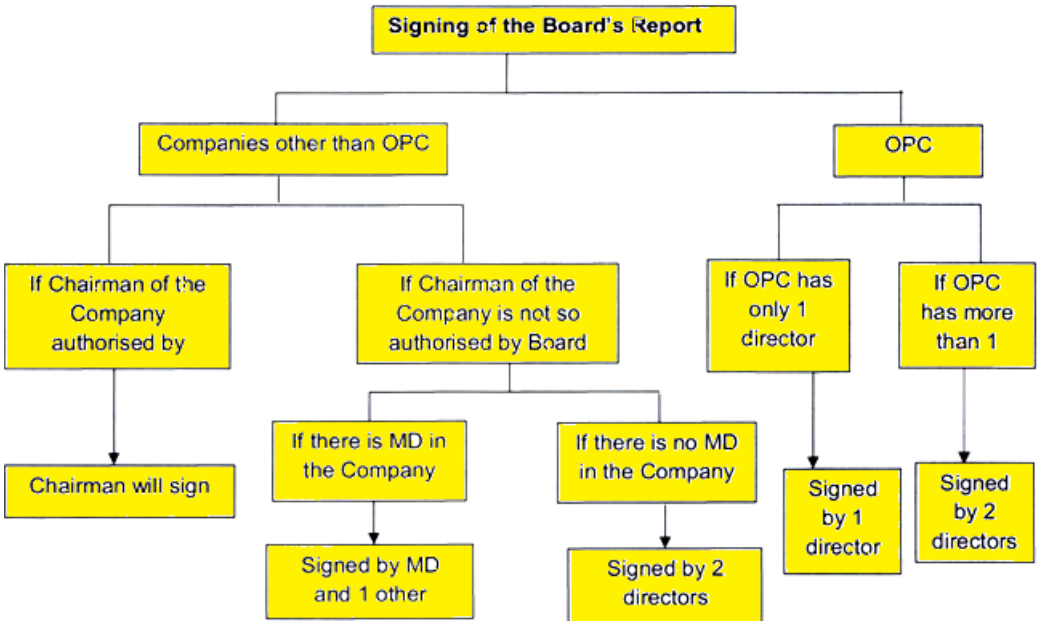
(a) The applicable accounting standards had been complied with along with proper explanation relating to material departures;

(b) The directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and pmdent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;

(c) The directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;

(d) The directors had prepared the annual accounts on a going concern basis; and

(e) The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.



Filing of copy of Financial Statement along with Board's Report

After the financial statement has been laid before the company at an AGM, a copy of the financial statement, including consolidated financial statement, if any, along with all documents required to be annexed or attached, should be filed with the ROC within 30 days from the date of AGM.

III. ANNUAL RETURN

As per section 92 of the Act, every company shall prepare a return in E-form MGT 7 containing the required particulars as they stood on the close of the financial year.

Filing of Annual Return:

The annual return should be filed with the Registrar within 60 days from the date on which Annual General Meeting (AGM) is actually held or from the last day on which AGM should have been held.

Signing of Annual Return:

The Annual Return shall be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

In case of One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

Contents of Annual Return:

Its members and debenture-holders along with changes therein since the close of the previous financial year;

Its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;

Meetings of members or a class thereof, Board and its various committees along with attendance details;

Remuneration of directors and key managerial personnel;

Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;

Matters relating to certification of compliances, disclosures as may be prescribed.

Abridged Annual Return

Central Government may prescribe abridged form of annual return for "One Person Company, small company and such other class or classes of companies as may be prescribed".

Certification of Annual Return in case of Listed and Specified Companies:

The annual return, filed by a listed company or, by a company having paid-up capital of ten crores rupees or more or turnover of fifty crores rupees or more, shall be certified by a company secretary in practice, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act.

IV. WEBSITE DISCLQSURE

Companies Act, 2013 does not mandate companies to have an active website, but SEBI (LODR), 2015 requires all the listed entities shall maintain a functional website containing the following information:

- details of its business;
- financial information including complete copy of the annual report including balance sheet, profit and loss account, director's report etc;
- contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances;
- email address for grievance redressal and other relevant details;
- name of the debenture trustees with full contact details;
- the information, report, notices, call letters, circulars, proceedings, etc concerning non- convertible redeemable preference shares or non-convertible debt securities;
- all information and reports including compliance reports filed by the listed entity;
- information with respect to the following events:
  - > default by issuer to pay interest on or redemption amount;
  - > failure to create a charge on the assets;
  - > revision of rating assigned to the non-convertible debt securities:

Note: The website of the listed entity shall disclose correct and updated content at any given point of time.

V. POLICIES

Both Companies Act, 2013 and SEBI (LODR) Regulation, 2015 lays down formulation of certain policies.

Policies under Companies Act, 2013

Corporate Social Responsibility Policy	Formulated by Companies which are required to form CSR Committee under section 135 of the Act. Refer Chapter 7

Whistle Blower Policy	Formulated by every listed company and all companies which: (i) accept deposits from the public; (ii) have borrowed money from banks and public financial institutions in excess of Rs. 50 Crores.
Policy for formal evaluation of the Board/ Committee	Formulated by every Listed Company and all Public Companies having: Paid up capital of Rs. 10 Crores or more; OR - Turnover of Rs. 100 Crores or more, OR - Aggregate of outstanding loans or borrowings or debentures or deposits exceeding Rs. 50 Crore or more.
Policy on directors' appointment & remuneration of the directors, KMP, etc.	Formulated by every Listed Company and all Public Companies having: - Paid up capital of Rs. 10 Crore or more; OR - Turnover of Rs. 100 Crore or more, OR Aggregate of outstanding loans or borrowings or debentures or deposits exceeding Rs. 50 Crore or more.

Policies under SEBI (LODR) Regulations, 2015

As per the Listing Regulations, all listed entities are required to frame following policies:

- Policy for preservation of documents
- Policy for determining material subsidiary
- Policy on materiality of related party transactions
- Policy for determination of materiality
- Archival Policy
- Vigil Mechanism/ Whistle Blower policy
- Policy on diversity of board of directors
- Dividend Distribution Policy

VI. DISCLOSURE REQUIREMENTS UNDER THE SEXUAL HARRASMENT OF WOMEN AT WORKPLACE (PREVENTION. PROHIBITION & REDRESSAL) ACT. 2013

The Act mandates that all companies having more than 10 women employees shall disclose the following annually

(a) Number of complaints of sexual harassment received in the year;
(b) Number of complaints disposed off during the year;
(c) Number of cases pending for more than ninety days;
(d) Number of workshops or awareness program against sexual harassment carried out;
(e) Nature of action taken by the employer or District Officer.

Special Note: Companies as a practice include this disclosure in the Board's Report

Liability for mis-statement (Section - 448 of the Companies Act, 2013)

If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of the Companies Act, 2013 or the rules made thereunder, any person makes a statement,—

(a) which is false in any material particular, knowing it to be false; or

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447 and as per this section, any person who is found to be guilty of fraud shall be punishable with imprisonment for 6 months to 10 years and fine upto 3 times of amount of fraud.

CHAPTER 10

AN OVERVIEW OF INTER CORPORATE LOANS, INVESTMENT, GUARANATEE & SECURITY, RELATED PARTY TRANSACTION

The Inter Corporate Loan & Investment is very prevalent in the current Market Scenario.

It is the easiest method to take loan by one company from another.

As per Section 186 of the Companies Act, 2013, a company can make investment up to 2 layers of investment companies except acquisition of any foreign company.

A Company can give loan and make investment upto 60% of paid-up share capital plus free reserves and securities premium account or 100% of free reserves and securities premium account, whichever is more.

INTER CORPORATE LOANS & INVESTMENTS (Section 186 of the Companies Act, 2013)

INTER-CORPORATE LOAN & INVESTMENT UPTO TWO LAYERS Section 186(1) of the Companies Act, 2013

[Investment in other body corporate]

A company shall make investment not more than two layers of investment companies.

However, the aforesaid provisions shall not be applicable in case:

(i) Foreign Company incorporated outside India;

(ii) A subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law.

No Company shall, directly or indirectly:

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire, by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more unless the same is previously authorised by a special resolution passed in a general meeting.

Note:

1. Person here does not include any individual who is in employment of the Company.
2. Meaning of Free Reserve

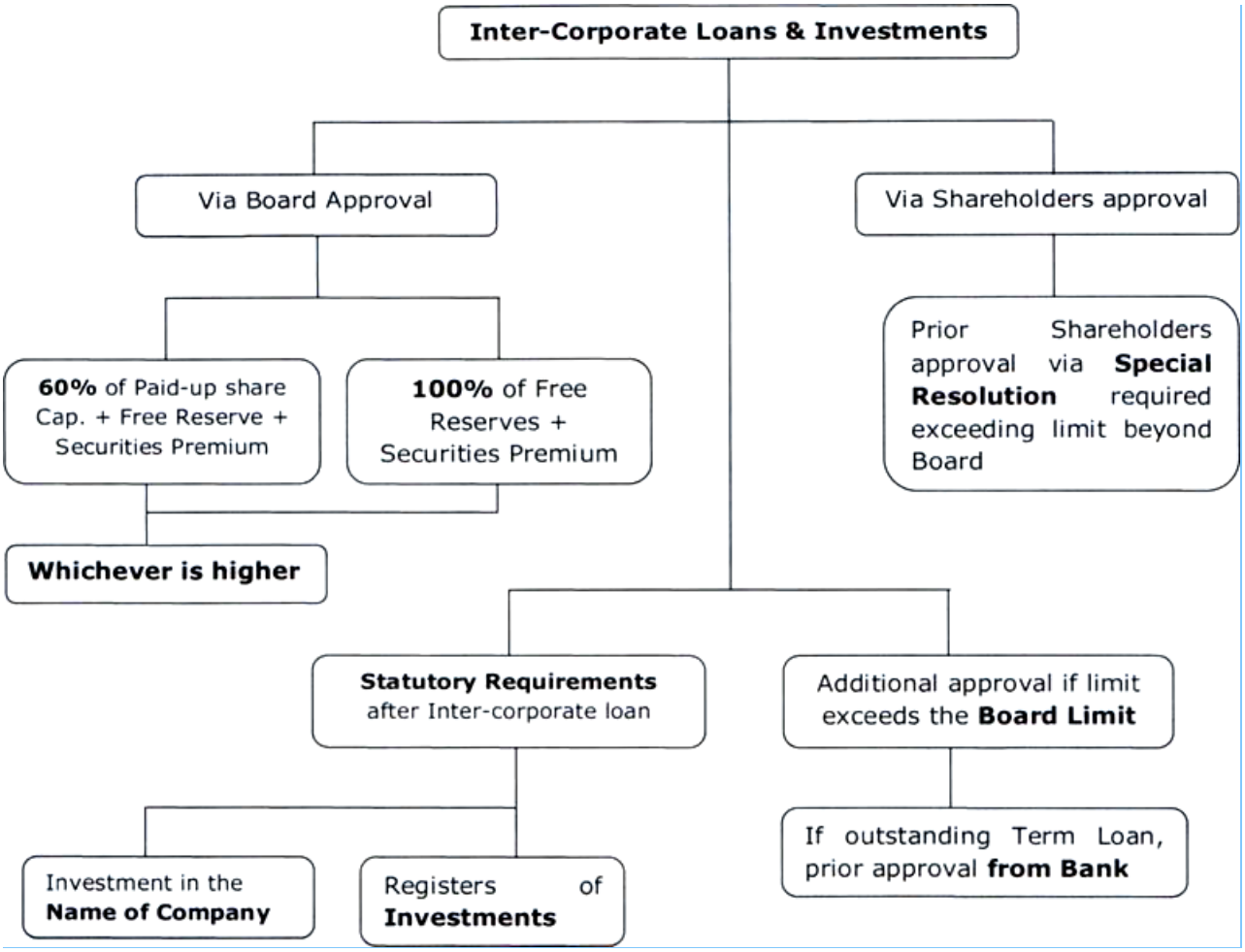
Section 2(43) "free reserves" means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

But does not include

Any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or

Any change in carrying amount of an asset or of a liability recognised in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value Coverage of Section 186

LIMITS ON LOAN, INVESTMENT, SECURITY, GUARANTEE Section 186(2) of the Companies Act, 2013



Section 186 covers the following:

- Loan given by Company to any person (including body corporate), whether directly or indirectly.
- Guarantee given by Company to any person who has provided loan to any other person.
- Security provided by Company to any person who has provided loan to any other person.

Investments in any Body Corporate done by the Company.

Non-Applicability of Section 186

The section will not apply:

1. To any loan made, any guarantee given or any security provided or any investment made by:

   Insurance company in the ordinary course of its business, or Banking company in the ordinary course of its business, or Housing finance company in the ordinary course of its business, or

   A company established with the object of and engaged in the business of financing industrial enterprises or infrastructural facilities

2. To any investment:

   Made by an investment company;

   Right Issue

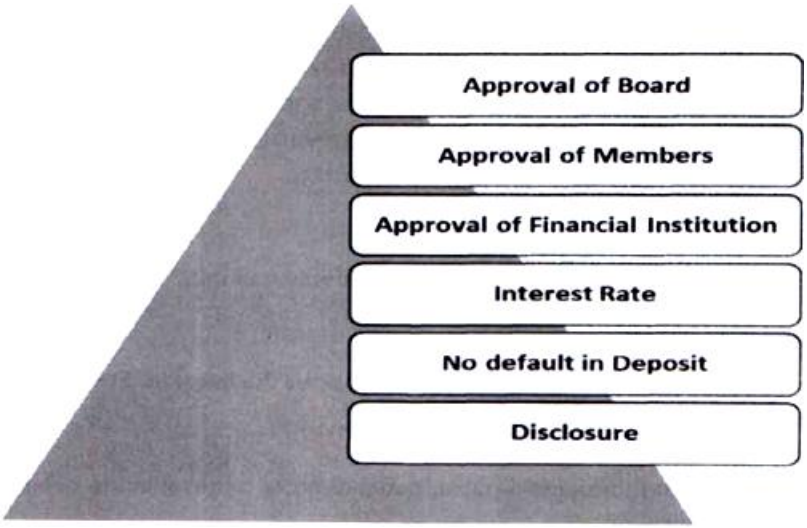
3. To any Loan or Investment

Made by NBFC

Exemption from applicability of Section 186 to Government Companies

- Government Company engaged in defence production;
- Government company, other than a listed company, in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before making any loan or giving any guarantee or providing any security or making any investment under the section.

PROCEDURE UNDER SECTION 186



I. Approval of the Board

a. The approval of the Board is required by passing an unanimous resolution at Board Meeting only.
b. The approval should be taken prior of making any loan, security, guarantee, investment, irrespective of amount involved.
c. The essential ingredients of the approval by Board is:
d. It should be Prior to making such loan, security, guarantee, investment, etc. (means cannot be ratified later)
e. It should be Unanimous approval
f. It should be taken only at Board Meeting (means cannot be passed by circular)

II. **Approval of Members by passing Special Resolution**

a. A prior approval of the Members is required by passing Special Resolution in General Meeting if the aggregate of the loans, investments, guarantee or security so far provided along with the investment, loan, guarantee or security proposed to be made, exceed the specified limit given under this section.

When is the approval required?

Loan, Investment, Security, Guarantee already made	+	Loan, Investment, Security, Guarantee proposed to be made	>	Limit given u/s 186(2)

Limit u/s 186(2)

(a) 60% of Paid up share capital, Free Reserve & Securities premium account

(b) 100% of Free Reserve & Securities premium account, whichever is higher.

Cases in which no approval of the members is required No approval of the members is required in following cases:
When a Holding Company gives Loans to its wholly owned subsidiary, Joint Venture Co.
When a Holding Company gives security/guarantee to third party who has given loan to the wholly owned substitute Joint Venture Co.
When Holding Company acquires shares in the Wholly owned subsidiary
A resolution passed at a general meeting to give any loan or guarantee or investment or providing any security or the acquisition shall specify the total amount up to which the Board of Directors are authorised to give such loan or guarantee, to provide such security or make such acquisition.

Special Note: Where the companies are not having share capital (guarantee companies) then the computation shall be based upon the free reserves available with the company.

III. Approval of Financial Institution

A prior approval of the Financial Institution from which the Company has acquired term loan has to be obtained.
Note: The prior approval of Public Financial Institution or Bank shall not be required where the aggregate of loans and investments does not exceed the limit as specified above and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

IV. Rate of interest:

Loan given under inter-corporate loan shall carry the rate of interest not lower than the prevailing yield of one year, three-year, five-year or ten-year Government Security closest to the tenure of the loan.
The condition of minimum interest rate is not applicable in following cases:

- Section 8 Company
- Company in which 26% or more paid up share capital is held by CG or SG or both.
- If loan is provided by such company for funding Industrial Research and Development projects in furtherance of objects as stated in its memorandum of association.

V. No subsisting Default with respect to repayment of deposits

No company, which is in default in repayment of any deposits accepted before or after the commencement of the Companies Act, 2013 or in payment of interest thereon, shall give any loan or give any guarantee, or provide any security or make an acquisition till such default is subsisting.

VI. Disclosure in financial statements

The Company shall disclose to the members in the financial statement the full particulars of the loans given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

Penalty for Contravention of Section 186

If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 5,00,000/- and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 1,00,000/- .
Every company giving loan or giving a guarantee or providing security or making an acquisition shall maintain a register in Form - MBP-2 which shall contain such particulars as may be prescribed.

INVESTMENTS IN THE NAME OF THE COMPANY(Section 187 of Companies Act, 2013)

All investments made or held by a company in any property, security or other asset shall be made and held by it in its own name.

The company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

Where the shares of a company were registered in the joint names of the company and one of its directors, it was held that the director was a nominee of the company for that purpose and could only act jointly as he had no rights of his own.

If company holds shares in dematerialised form, the name of depository is entered in the register of members as member of the company and the name of the investing company as the beneficial owner of the said shares.

Register of investments not held in company's own name

Any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall maintain a register which shall contain such particulars as may be prescribed and such register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose.

Therefore, a company is only required to maintain a register for securities not held in the name of the company, when the investments are held in the name of a depository.

Q1. As on 31st March, 2010, the balance sheet of ABC Ltd. shows the following: Amount in Crores (Rs.)

Paid-up share capital	30
Reserves and surplus	40
Reserve for redemption of debenture	20
Capital reserve	10

The company made loan/stood guarantee for loans to other companies as below:

Loan to DEF Ltd.	Rs.15 crore
Guarantee given on behalf of GHK Ltd.	Rs.5 crore
LKP Ltd. approached ABC Ltd. for loan of an amount of	Rs.20 crore

Advise the management of ABC Ltd. as to whether the company can give loan ofRs.20 crore to LKP Ltd.

4 marks (June, 2011)

A1. Section 186 of the Companies Act, 2013 : No Company shall, directly or indirectly:

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire, by way of subscription, purchase or otherwise the securities of any other body corporate, exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more unless the same is previously authorised by a special resolution passed in a general meeting.

The paid-up capital of ABC Ltd. is Rs.30 Cr. and its free reserves is Rs.40 Cr. Board of Directors of ABC Ltd. therefore, can give loan/guarantee upto.

60% of (30 + 40) crore = 42 crore or 100% of 40 crore = 40 crore whichever is more. Hence Rs.42 crore is limit beyond which the company needs shareholders' approval for giving loan/guarantee.

Existing loans and guarantee-

Loan to DEF Ltd.	Rs. 15 Crore
Guarantee to GHK Ltd.	Rs. 15 Crore
Total	Rs.30 Crore
Proposed loan to LKP Ltd.	Rs.20 Crore
Total	Rs.50 Crore

In the given situation, Board of Directors is authorised upto Rs.42 Crore to give loan to other companies. And if Company proposes to give loan to LKP (i.e. more than the authority of Board) requires approval of the shareholders by a special resolution.

Q2. The Board of Directors of an Indian company passed a resolution for incorporation of a company in Mauritius with the initial paid-up capital of Rs.10,000. Comment whether investment to be made in the Mauritius Company is exempt from the provisions of Section 186 of Companies Act, 2013. 4 marks (June, 2006)

A2. Investment made by the company for incorporation of a company in Mauritius has to be within the prescribed parameters and not exempt under the Companies Act, 2013.

However, further investment in Mauritius company, if any (after making it a wholly owned subsidiary) will be exempted.

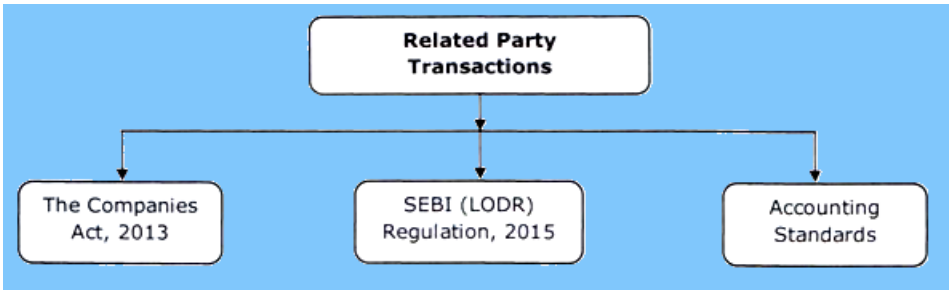
RELATED PARTY TRANSACTION (Section 188 of the Companies Act, 2013)

[apno k sath transaction kiya]

The concept of related party transactions is captured under the Companies Act, 2013 or previous company law for the purpose to protect the interest of the General Public (other than promoter's Investors).

Related party transaction means any transaction with a company where a director or his relative is directly or indirectly interested in such transactions.

The legal provisions in connection with related party transactions have been covered under three places i.e. The Companies Act, 2013 (Applicable to Companies), SEBI (Listing Obligation Disclosure Requirement) Regulations, 2015 (Applicable to listed Companies) & Accounting Standard (AS-18).



Related Party Transactions under the Companies Act, 2013

A transaction shall be treated as the related party transaction if it is made between a Company and its directors or their relative, KMP or their relative, with a firm or company in which directors are interested.

For understanding the entire concept of Related Party Transactions, we have to know the meaning of the following terms:

(a) Related Parties
(b) Related Party Transactions
(c) Office or Place of profit
(d) Arm's Length transactions

Related parties (Section 188 of the Companies Act, 2013) [apne wale]

A related party means and includes:

(a) A director or his relative,
(b) Key Managerial Personnel or their relative,
(c) A firm in which a director, manager or his relative is a partner,
(d) A private company in which a director or manager is a director or member,
(e) A public company in which a director or Manager is a director or holds along with his relatives more than 2% of its paid-up share capital.
(f) A person on whose advice, directions or instruction (except given in professional capacity) a director or manager is accustomed to act,
(g) A holding/subsidiary or associate company, subsidiary's subsidiary, and such person as would be prescribed.

Note: Read the above definition in connection with a company because there is no such clarity given in section 188 of the Companies Act, 2013.

Related parties transaction (Section 188(1) of the Companies Act, 2013)

The following contracts or arrangements come under the category 'related party transactions':

(a) Sale, purchase or supply of any goods or materials;
(b) Selling or otherwise disposing of, or buying, property of any kind;
(c) Leasing of property of any kind;
(d) Availing or rendering of any services;
(e) Appointment of any agent for purchase or sale of goods, materials, services or property;
(f) Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
(g) Underwriting the subscription of any securities or derivatives thereof, of the company.

Office or Place of profit means any office or place:

(i) For Director: where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;
(ii) For Individual: where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise.

Arm's length transaction [apno ko paraya hi samjo]

Arm's length transaction means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

In simple words, it means a transaction which is made at the market price (without giving any special discount or concession) that is Arm's length transaction between a company or related parties.

In other words, Arm's length transaction would mean transaction between two related or affiliated parties that is conducted

as if they were unrelated.

The concept of an arm's length transaction is to ensure that both parties in the deal are acting in their own self-interest and are not subject to any pressure from either party.

How to enter into Related Party Transactions or Contracts: Rule 15 of the Companies (Meeting of Board and its Powers) Rules, 2014.

A company shall enter into any related party transaction subject to the following conditions:

Agenda for Board meeting: Where a related party transaction is to be approved by the Board of Directors in their meeting, the Agenda of Board should disclose:

(a) The name of the related party and nature of relationship;

(b) The nature, duration of the contract and particulars of the contract or arrangement;

(c) The important terms of the contract or arrangement including the value;

(d) Any advance paid or received;

(e) The method of determining the pricing and other commercial terms;

(f) Any other information relevant or important for the Board on the proposed transaction.

Non-presence of Interested Director: An interested director shall not be present and voting at the meeting during discussions on the subject-matter of the resolution relating to such contract or arrangement in which he is interested.

This restriction will not apply to a Company in which 90% or more members in number are relatives of promoters or are related party.

Approval from shareholders: The prior approval from shareholders via Ordinary resolution as is required in the following circumstances:

1. A company having a paid-up share capital of Rs.10 crore or more; or
2. A company shall not enter into a transaction or transactions except the prior approval in Ordinary resolution, where the transaction or transactions to be entered into:

Threshold of Transaction Value for Member's Approval

Type of Transaction	Value
Sale, purchase, supply of any goods or material (directly or indirectly through agent)	10% or more of Turnover or Rs. 100 Crore, whichever is lower.
Selling or otherwise disposing of, or buying, property of any kind (Directly or through agent)	10% or more of net worth or Rs. 100 Crore, whichever is lower.
Leasing of property of any kind	10% or more of Turnover or 10% or more of net worth or Rs. 100 Crore, whichever is lower
Availing or rendering of any services (Directly or through agent)	10% or more of the net worth or Rs. 50 Crore, whichever is lower
Appointment to any office or place of profit in the company, its subsidiary company or associate company	Monthly remuneration exceeding Rs. 2.5 Lakh

Underwriting the subscription of any securities of the company or derivatives thereof	Exceeding 1% of the net worth.

THE COMPANIES (AMENDMENT) ACT, 2015

(a) The Audit Committee may make omnibus (all power) approval for related party transaction proposed to be entered into by the company.

(b) Related Party Transactions (RPT) between holding company and its wholly owned subsidiary does not require any approval from the members, even of the holding company.

Special Note: In case of any ordinary course of business and on the arm's length transaction basis, then there is no requirement of obtaining approval from the audit committee

Exemption from Section 188

a) Government company in respect of contracts or arrangements entered into by it with any other Government company;

b) Government company other than a listed company, in respect of contracts or arrangements other than those referred to in clause (a), in case such company obtains approval of the Ministry of Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before entering into such contract or arrangement.

Related Party Transactions under the SEBI (LODR) Regulations. 2015

SEBI (Listing Obligation Disclosure Requirements) Regulations, 2015 requires to all listed companies for making compliances for relating to related party transactions.

A related party transaction is a transfer of resources, services or obligations between a listed entity and a related party, regardless of whether a price is charged.

As per LODR, "related party" means a related party as defined under sub-section (76) of section 2 of the Companies Act, 2013 or under the applicable accounting standards.

Formulation of Policy:

The listed Company shall formulate a a policy on materiality of related party transactions and on dealing with related party transactions which shall also be placed on the website of the company.

Note: A transaction with a related party shall be considered material if the transaction to be entered into individually or taken together with previous transactions during a financial year, exceeds 10% of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

Prior approval from Audit Committee:

All Related Party Transactions shall require prior approval of the Audit Committee.

Audit Committee can grant omnibus approval for related party, provided the terms and condition under regulations are followed.

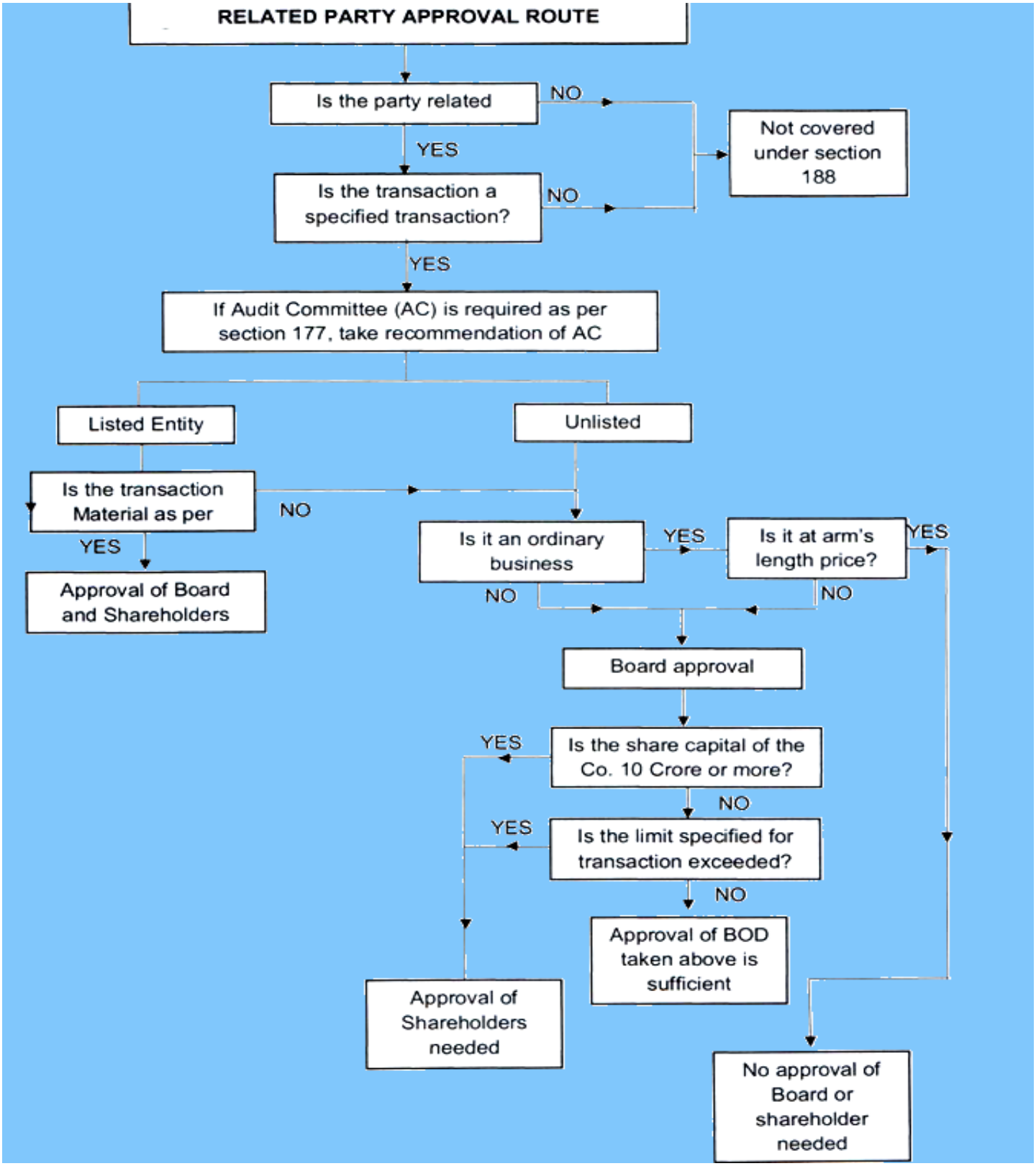
Approval from shareholders: All material related party transactions shall require approval of the shareholders through resolution and the related parties shall abstain from voting on such resolutions.

Disclosures of Related Party Transactions:

1. Details of all material transactions along with related parties shall be disclosed quarterly along with the compliance report on corporate governance.

2. The company shall disclose the policy on dealing with Related Party Transactions on its website and also in the Annual Report.

SPACE FOR CLASS NOTES



Related Party Transactions under Accounting Standard (AS-18 issued by ICAI)

Objects of AS-18: AS-18 has been made for the following objectives:

(a) Disclosure of related party relationships and

(b) Disclosure of transactions between a reporting enterprise and its related parties.

Applicability: AS-18 is mandatorily applicable on or after 1st April, 2001.

Disclosures: Name and nature of the related party relationship should be disclosed by the reporting enterprise:

(a) The name of the transacting related party,

(b) A description of the nature of transactions and relationship between the parties,

(c) Volume of the transactions either as an amount or as an appropriate proportion,

(d) Any other elements of the related party transactions necessary for an understanding of the financial statements,

(e) Outstanding items and provisions pertaining to related parties at the balance sheet date,

(f) Amounts written off in respect of debts due from or to related parties.

CHAPTER 11
Registers and Records

A company has to maintain various registers for meeting the requirement for statutory & management purposes.

A company has also to file many returns with the regulatory authorities based on the requirements of the Companies Act, 2013. The objective behind such returns is not only statutory requirement, but these are also helpful for the smooth functioning of the company.

These returns have to file on quarterly basis, half yearly basis, annual basis or event basis.

STATUTORY BOOKS/REGISTERS [maintain karna hi hai]

Every company incorporated must maintain and keep certain records, registers & other documents at its registered office of the Company.

The companies have to file certain returns & documents with the Registrar of Companies within certain specified time limits and with the prescribed filing fees.

These books are known as Statutory Books.

Every company is required to keep the following records & Registers at its registered office:

(a) Register of securities bought back.
(b) Register of deposits.
(c) Register of charges.
(d) Register of members.
(e) Index of members.
(f) Register of debenture holders.
(g) Index of debenture holders, j
(h) Register and index of beneficial owners.
(i) Register of sweat equity shares.
(j) Annual Return.
(k) Register of Postal Ballot.
(L) Books containing minutes of general meeting and of Board and of committees of Directors.
(m) Books of accounts.
(n) Register of Directors/Key Managerial Personnel.
(o) Register of contracts with companies/firms in which directors are interested.

Register of charges:

Every company shall keep at its registered office a register of charges in Form No. CHG.7 which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed.

The entries in the register of charges maintained by the company shall be made after the creation, modification or satisfaction of charge.

The register of charges shall contain the particulars of all the charges registered with the ROC on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.

All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorised by the Board for the purpose.

The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

A copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

Register of Members

Every company to keep and maintain the following registers along with the Index thereof:

(a) Register of members for each class of equity and preference shares (separately);
(b) Register of debenture holders;
(c) Register of any other security holders; and
(d) Foreign register of members and debenture holders etc.

Every company shall, from the date of its registration, keep and maintain a register of its members in one or more books in Form No. MGT.1.

In case of existing companies, registered under the erstwhile Companies Act, 1956, particulars shall be complied within six months from the date of commencement of rules of the Companies Act, 2013.

The register of members shall contain the following particulars in respect of each member -

(a) Name of the member;
(b) Address,
(c) e-mail address;
(d) Permanent Account Number or CIN;
(e) Father's/Mother's/Spouse's name;
(f) Occupation;
(g) Status;
(h) Nationality;
(i) In case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee;
(j) Date of becoming member;
(k) Date of cessation;
(L) Amount of guarantee and instructions etc.

In the case of existing companies, registered under the erstwhile Companies Act, 1956, particulars shall be complied within six months from the date of commencement of these rules.

Place of Keeping Books of Account (Section 128 of the Companies Act, 2013)

Every company to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office.

However, all or any of the books of accounts may be kept at such other place in India as the Board of Directors may decide.

When the Board so decides the company is required within seven days of such decision to file with the Registrar a notice in writing giving full address of that other place.

Maintenance of Books of account in electronic form

The maintenance of books of account and other books and papers in electronic mode is permitted and is optional.

Such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent use.

The information contained in the records shall be retained completely in the format in which they were originally

generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.

The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.

The information in the electronic record of the document shall be capable of being displayed in a legible form.

There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law:

The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.

The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement:

(a) The name of the service provider;

(b) The internet protocol address of service provider;

(c) The location of the service provider;

(d) Where the books of account and other books and papers are maintained on cloud.

Books of Account in Respect of Branch Office

The branches of the company in India or outside India shall also keep the books of account in the same manner as specified above, for the transaction effected at the branch office.

Further the branch offices are required to send the proper summarized return at quarterly intervals to the company at its registered office and kept open to directors for inspection.

Copies of the Registers and Annual Return

Copies of the registers or entries therein and annual return may be given to any member, debenture-holder, other security holder or beneficial owner of the company on payment of such fee as may be given in the AOA of the company but not exceeding rupees ten for each page.

Preservation of Register of Members etc, and Annual Return

The register of members (Foreign Members) along with the index shall be preserved permanently and shall be kept in the custody of the company secretary or any other person authorized by the Board; and

The register of debenture holders (Foreign debenture holders) or any other security holders along with the index shall be preserved for 15 years from the date of redemption of debentures or securities.

Copies of all annual returns and copies of all certificates and documents required to be attached with it shall be preserved for 8 years from the date of filing with the ROC.

Register of Directors & KMP & their Shareholding (Section 170 of the Companies Act, 2013)

Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel as may be prescribed and which shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies.

Non-applicability:

The section shall not apply to Government Company in which the entire share capital is held by the CG, or by any SG or Both.

Members' Right to Inspect the Register of Director & KMP & their shareholding

Section 171 of the Companies Act, 2013

1. The register of directors and Key Managerial Personnel (KMP) kept under section 170 shall be open for inspection during business hours and the members shall have the right to take extracts therefrom and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(l)(a)]
2. Such register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting.[Section 171(l)(b)]
3. If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required thereunder.

Non-applicability: The section shall not apply to Government Company in which the entire share capital is held by the CG, or by any SG or Both.

Preservation of Registers and Records in case of Listed Entity

In case of listed entities SEBI (LODR), requires certain policies to be adopted by the companies for the purpose of preserving documents.

A. Policy for preservation of documents

Regulation 9 of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 provides following for preservation of documents:

The listed entity shall have a policy for preservation of documents, approved by its board of directors, classifying them in at least two categories as follows—

- documents whose preservation shall be permanent in nature;
- documents with preservation period of not less than eight years after completion of the relevant transactions:

PROVIDED that the listed entity may keep documents in electronic mode.

B. Preservation of documents as per the Archival Policy

Every listed entity shall disclose on its website all such events or information as provided under the provisions of Regulation 30 and such disclosures shall be hosted on the website of the listed entity for a minimum period of five years and thereafter as per the archival policy of the listed entity, as disclosed on its website.

CHAPTER 12
CORPORATE REORGANIZATION

A company may decide to accelerate its growth by developing into new business areas.

Once a company has decided to enter into a new business area, it has to explore various alternatives to achieve its aims.

Corporate restructuring is one of the methods to achieve this objective.

Mergers, demerger, amalgamation, compromise and arrangements are the different modes of corporate restructuring.

The Chapter can broadly be categorised into 3 Parts:

- Merger/ Compromises/ Arrangement/ Amalgamation
- Oppression Mismanagement
- Winding up

Part I - Merger/ Compromises/ Arrangement/ Amalgamation

CONCEPT OF CORPORATE RESTRUCTURING

"Corporate restructuring" is a comprehensive process by which a company can consolidate its business operation and strengthen its position for achieving its short-term and long-term corporate objectives.

The corporate restructuring includes the merger, demerger & Amalgamation.

Merger: A merger can be defined as the fusion or absorption of one company by another.

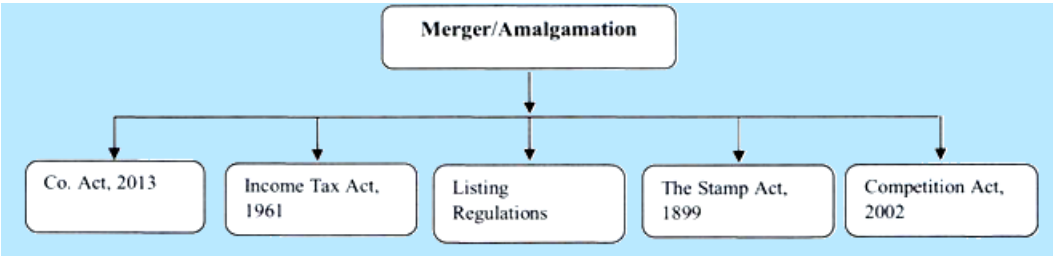
In other words, merger is fusion of two or more entities and it is a process in which the identity of one or more entities is lost.

Amalgamation: It is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

Demerger: It is a legal process through which one company splits its two divisions in two separate companies.

REGULATORY FRAMEWORK FQR MERGER/AMALGAMATION

Considering the merger/amalgamation with a Company Registered under the provisions of Companies Act, the regulatory frameworks are:



(a) The Companies Act, 2013 and its rules:
The Companies Act, 2013 and its rules cover the procedural aspect of merger/amalgamation of two or more companies.

The following sections cover entire procedural aspects of Merger/Amalgamation:

(i) Section- 230: Power to compromise or make arrangements with creditors and members.
(ii) Section 231: Power of Tribunal to enforce compromise or arrangement.
(iii) Section 232: Merger and amalgamation of companies.
(iv) Section 233: Merger or amalgamation of certain companies.
(iv) Section 234: Merger or amalgamation of company with foreign company.
(v) Section 235: Power to acquire shares of shareholders dissenting from scheme or contract approved by majority.
(vii) Section 236: Purchase of minority shareholding.
(viii) Section 237: Power of Central Government to provide for amalgamation of companies in public interest.
(ix) Section 238: Registration of offer of schemes involving transfer of shares.
(x) Section 239: Preservation of books and papers of amalgamated companies.
(xi) Section 240 deals with liability of officers in respect of offences committed prior to merger, amalgamation, etc.

(b) Income Tax Act, 1961: The Income Tax Act, 1961 gives tax reliefs to amalgamating/ amalgamated companies with regard to carry forward of losses, exemptions from capital gains tax etc.

Example: When a loss making company merges with a profit making company, the profit making company may claim the benefits of accumulated losses of the loss making company after merger.

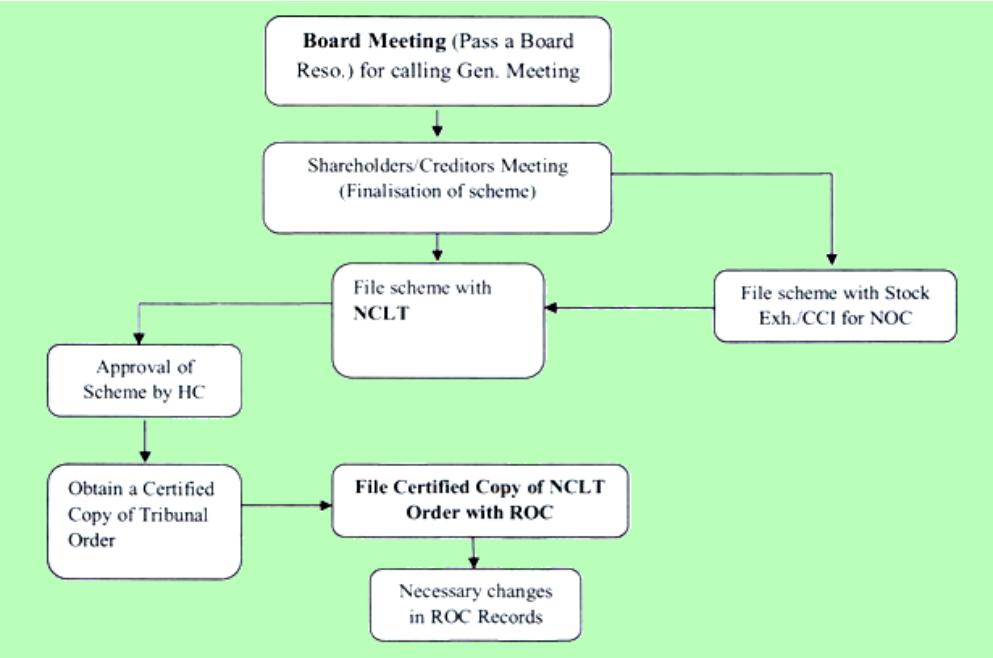
Accordingly, the profit making company will be liable to pay less income-tax on its net profits.

(c) Listing Obligation Disclosure Requirement: Every listed Company has to comply with applicable provision of listing regulation Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 and its amendment, if any.

(d) The Indian Stamp Act, 1899: This Act applies in relation to payment of Stamp duties on transfer of undertaking through a merger or demerger.

(e) The Competition Act, 2002: In certain cases, prior permission is required from the Competition Commission of India (CCI), New Delhi.

PROCESS OF MERGER AND AMALGAMATION



APPROVALS FOR COMPROMISES AND ARRANGEMENTS

(a) Board's Approval:

The 1st step towards a scheme of amalgamation is the approval of the scheme by Board of Directors.

(b) Shareholder's Approval:

If a majority in number representing 75% in value of the creditors, or members, as the case may be, present and voting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or all the members, as the case may be, and also on the company.

(c) Tribunal's Approval:

Approval from Tribunal is mandatory for giving effect to any scheme of merger, amalgamation or demerger etc.

COMPROMISE OR ARRANGEMENT WITH MEMBERS OR CREDITORS:

Complete provisions of companies act. 2013

Who may apply for Compromise and Arrangement?

(a) Application by Company

(b) Application by Members or Creditors:

An application for compromise or arrangement with creditor or member or both may be made to the Tribunal either by a creditor or member when it is Going Concern.

Case Law: **Oceanic Steam Navigation Co**.

In this case, it was held that a compromise or arrangement between a company and its creditors or any class of them, or its members or any class of them and provides machinery whereby such a compromise or arrangement may be binding on dissentient (not favoring) persons by an order of the court.

(c) Application by Liquidator:

An application for compromise or arrangement may be made to the High Court by the liquidator of the company before or after it is being wound-up by the High Court.

Note: Arrangement includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

Direction by Tribunal to conduct Meeting:

On receiving the application the Tribunal may give directions for holding the Meeting.

Affidavit by the applicant:

The applicant should provide affidavit:

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than 75% of the secured creditors in value, including:

- A creditor's responsibility statement;
- Safeguards for the protection of other secured and unsecured creditors;
- Report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
- Where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
- A valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Notice of the meeting:

On receiving the application when the tribunal decides to call the meeting, notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by

- a statement disclosing the details of the compromise or arrangement,
- a copy of the valuation report, if any, and
- explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders, and
- the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
- such other matters as may be prescribed.

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers.

Who can object to the scheme?

(a) A person who holds not less than 10% of the shareholding or

(b) A person who is having outstanding debt amounting to not less than 5% of the total outstanding debt

Note: the above percentages shall be counted as per the latest audited financial statement.

Notice to be sent to the regulators:

Section 230(5) states that a notice along with all the documents in such form as may be prescribed shall also be sent to:

- the Central Government,
- the income-tax authorities,
- the Reserve Bank of India,
- the Securities and Exchange Board,
- the Registrar,
- the respective stock exchanges,
- the Official Liquidator,
- the Competition Commission of India

Note: if necessary, and such other sectorial regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of 30 days from the date of receipt of such notice.

Approval of the scheme:

The scheme will be approved if a majority in number representing 3/4th in value of the creditors, or members, as the case may be, present and voting, agree to any compromise or arrangement.

Note: Such order shall be binding on the company, all the creditors, or class of creditors or members or class of members or on the liquidator and the contributories of the company.

Order of the tribunal sanctioning the scheme: An order may be passed by the Tribunal for sanctioning the scheme.

Order of tribunal to be filed with ROC:

Section 230(8) states that the order of the Tribunal shall be filed with the ROC by the company within a period of 30 days of the receipt of the order.

Power of the tribunal to enforce compromise or arrangement:

Once the Tribunal passes the order of compromise or arrangement it also has power to supervise the implementation of the compromise or arrangement or give such directions to ensure proper implementation of the scheme.

Note: If the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.

MERGER AND AMALGAMATION OF COMPANIES

(Section -232 of the Companies Act, 2013)

Tribunal's power to call meeting:

With respect to merger or amalgamation, when an application is made to the Tribunal U/S 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal:

- that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and
- that under the scheme, the whole or any part of the undertaking, property or liabilities of any company ("Transferor Company") is required to be transferred to another company ("Transferee Company"), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct.

Circulation of documents:

Section 232(2) states that when an order has been made by the Tribunal, merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:

- The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

- Confirmation that a copy of the draft scheme has been filed with the Registrar;
- A report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
- The report of the expert with regard to valuation, if any;
- A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Sanctioning of scheme by tribunal:

Section 232(3) states that the Tribunal, after satisfying itself that the procedure has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:

(a) The transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

(b) The allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are

to be allotted or appropriated by that company to or for any person.

No transferee company can hold shares in its own name or under any trust. A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

(c) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(d) Dissolution, without winding-up, of any transferor company;

(e) The provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(f) Where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines, the allotment of shares of the transferee company to such shareholder shall be in the manner specified;

(g) The transfer of the employees of the transferor company to the transferee company;

(h) When the transferor company is a listed company and the transferee company is an unlisted company,

the transferee company shall remain an unlisted company until it becomes a listed company;

if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal;

The amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

Auditor's certificate:

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards.

Transfer of property or liabilities:

An order for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

Certified copy of the order to be filed with ROC:

Every company in relation to which the order is made shall file a certified copy of the order with the ROC for registration within 30 days of the receipt of certified copy of the order.

Effective date of the scheme:

The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at any later date.

Annual statement to be filed with ROC every year until the completion of the scheme:

Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the ROC every year duly certified by a CA/CMA/CS in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

Punishment:

If a transferor company or a transferee company contravenes the provisions of merger or amalgamation, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 25 Lakh and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than Rs. 1 lakh rupees but which may extend to Rs.3 lakh, or with both.

MERGER AND AMALGAMATION OF CERTAIN COMPANIES

Section 233 prescribes simplified procedure for Merger or amalgamation of

- 2 or more small companies or
- between a holding company and its wholly-owned subsidiary company or
- such other class or classes of companies as may be prescribed.

MERGER OF SMALL COMPANIES/HOLDING AND SUBSIDIARY COMPANIES:

A scheme of merger or amalgamation may be entered into between 2 or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:

- **Notice for inviting Objection:**
  A notice of the proposed scheme inviting objections or suggestions from the ROC and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within 30 days is issued by the transferor company or companies and the transferee company;

- **Approval by members:**
  The objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least 90% of the total number of shares;

- **Filing of declaration of insolvency:**
  Each of the companies involved in the merger files a declaration of solvency with the ROC of the place where the registered office of the company is situated; and

- **Approval by creditors**:
  The scheme is approved by majority representing 9/10 in value of the creditors or class of creditors of respective companies.

- **Transferee Company to file a copy of scheme:**
  The transferee company shall file a copy of the scheme so approved with the Central Government, ROC and the Official Liquidator where the registered office of the company is situated.

- **Central Government to issue confirmation order, where there are no objections or suggestions from registrar or official liquidator:**
  On the receipt of the scheme, if the ROC or the

  Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

  If the ROC or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of 30 days.
  If no such communication is made, it shall be presumed that he has no objection to the scheme.

- **Application by Central Government:**
  If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of 60 days of the receipt of the scheme stating its objections and requesting that the Tribunal may consider the scheme.

- **Tribunal's Action to Central Government's application:**
  On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit.

- **ROC having jurisdiction over Transferee Company has to be communicated**:
  A copy of the order, confirming the scheme shall be communicated to the ROC having jurisdiction over the transferee company.

- **Transferee Company to file an application with ROC along with the scheme registered:**
  The transferee company shall file an application with the ROC along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital.

CROSS BORDER MERGERS (Section - 234 of the Companies Act, 2013) [firangi se shadi]

Merger or amalgamation of a Company with a foreign company is subject to the provisions of any other law for the time being in force, a foreign company may, with the prior approval of the RBI, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Foreign Company means any company or body corporate incorporated outside India whether having a place of business in India or not.

MERGER OR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST (Section - 237 of the Companies Act, 2013) [samaj ki bhali k liye]

Power of Central Government to provide for amalgamation of Companies

When the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company.

Interest or rights of members, creditors, debenture holders not to be affected:

The rights of every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall and after the amalgamation be nearly same.

In case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent.

Appeal to tribunal:

Any person aggrieved by any assessment of compensation made by the prescribed authority may, within a period of 30 days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

Conditions for order:

No order shall be made under this section unless—

(a) A copy of the proposed order has been sent in draft to each of the companies concerned;

(b) The time for preferring an appeal has expired, or where any such appeal has been preferred, the appeal has been finally disposed off;

(c) The Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than 2 months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof;

(d) Copies of order to be laid before each house of Parliament; and

(e) Registration of offer of schemes involving transfer of shares.

Case Law: **Webneuron Services Ltd.**

Facts: Webneuron Services Limited (" Transferor Company") sought approval to a scheme of amalgamation with a transferee company. The Transferor Company had conducted a general meeting where the shareholders had approved the proposed scheme.

However, an ex-employee of the Transferor Company filed an application with Delhi High Court opposing the scheme of amalgamation on the ground that the Company had not paid employees' outstanding dues of I NR 448,040.

Judgment: In this case, the court held that Objection of the employee was overruled and the scheme was sanctioned.

The reason given was that the transferor company had, in accordance, with the direction of the court, deposited an amount of Rs. 4,48,040 with the Registrar General of the court and in case the ex-employee was found entitled to the amount, he could get it with interest.

The terms and conditions of service of the employees of the transferor company were not affected and there was no legal hurdle in sanctioning the proposed scheme of amalgamation.

Q1. A transferor company got approval for a scheme of amalgamation with the transferee company. An amount ofRs.5 lakh was deposited by the transferor company on the direction of the Court/Tribunal for settling the dues of employees. An ex-employee of the transferor company objected to the amalgamation citing that he is also entitled for the claim in the amount deposited. Will he succeed? Give reasons. (4 marks){Dec, 2016)

A1. The employee will not succeed.

In a decided case of Webneuron Services Ltd., the objection of the employee was overruled by the High Court and the scheme was confirmed by the High Court.

The reason was that the transferor company had deposited in accordance with the direction of the Court, the amount with the Registrar General of the Court and in case the ex-employee was found entitled to the amount, he could get it with interest.

In this case, the scheme of amalgamation will be allowed and the ex-employee can get the amount claimed with interest.

Q2. A demerger scheme was approved by the shareholders, secured and unsecured creditors. The scheme was neither in violation of any law nor against public interest. However, Accounting standard—14 is applicable was not adopted. Whether the scheme can be sanctioned? Explain.

A2. This question is based on a case that was decided by the Gujarat High Court.

Case Law: Gallops Realty Pvt. Ltd.

In this case, the Court held that Accounting standard is only applicable to amalgamation not to de-merger. Therefore, the file scheme was not in contravention of any law nor against the public interest.

Further, this scheme was also approved by shareholders, secured and unsecured creditors.

Part II - Oppression and Mismanagement

[gunah]

Democracy is always a better governance structure as compared to any other set up.

It preserves the rights of every one either majority or minority.

Most of the set ups are always preserving the rights of the section to whom it is presenting.

The oppression of minority is a normal thing everywhere either in economics or politics or in the companies.

The greed for money is that the companies are mismanaged for personal gains.

This greed lies with the majority holders.

The best set up for a company is that in which the minority rights are protected and also in which the mismanagement is avoided.

Presently, the concept of shareholders' democracy means the shareholder's supremacy in the governance of the business and affairs of corporate sector either directly or indirectly.

The powers for governing a company are divided into two parts:

- Board of Directors who exercise their powers via Board Meetings
- Shareholders who exercise their powers via General Meetings

Shareholder's Power

The shareholder's powers enumerated at different places in Company Law are as follow—

(a) Alteration of Memorandum of Association and Articles of Association.

(b) To reduce the share capital of the company.

(c) To shift the registered office of the company outside from one State to another State.

(d) To appoint auditors in case of companies where 25% or more of the paid-up share capital is held by Central/State Government or public financial institutions or any of their constituents.

(e) To approach Central Government for investigation into the affairs of the company.

(f) Appointment of sole selling agents where paid-up share capital is beyond Rs.50 lakh.

(g) To allow a director, partner or his relative to hold office or place of profit.

(h) To make loans, to extend guarantee or provide security to other companies or make investment beyond the limit specified.

(i) To appoint directors.

(j) To increase or reduce the number of directors within the limits laid down in AO A.

(k) To cancel, redeem debentures etc.

(L) To make contribution to funds not related to the business of the company.

Powers of Majority

Every member of a company which is limited by shares, holding any equity shares shall have a right to vote in respect of such capital on every resolution.

Member's right to vote is recognised as right of property and the shareholder may exercise it as he thinks fit according to his choice and interest.

Section 47 of the Companies Act, 2013:

(a) Every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and

(b) His voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

Therefore, the majority of the members enjoy the supreme authority to exercise the powers of the company and generally to control its affairs.

Limitations of power for the majority of members:

(a) The power of the majority of members is always subject to the Company's MOA & AOA.

(b) The resolution of a majority must not be inconsistent with the provisions of the Companies Act, 2013 or constitute a fraud on minority depriving their legitimate rights.

Principle of Non-interference

This principle says that the court will not intervene at the instance of shareholders in matters of internal administration, and will also not interfere with the management of a company by its directors till the time they are acting within the powers of the articles of the company.

Whereas the company law provides for adequate protection for the minority shareholders when their rights are crushed by the majority of shareholders but the protection of the minority is not generally available when the majority does anything within their power.

Case Law: **Rule in Foss v. Harbottle**

Facts: There are two shareholders (Foss and Turton) filed a suit.

They alleged that the director of the Company had carried out various fraudulent and illegal transactions whereby the property of the company was wasted and lost.

On the basis of such allegations, the minority shareholders brought an action against the directors of the Company.

The majority shareholders resolved the action taken by the directors alleging that they were not responsible for the loss to the Company.

Judgment: In this case, the court dismissed the suit filed against the directors of the Company since the acts of directors were confirmed by the majority of shareholders of the company.

In this case, the court further observed that if the alleged wrong can be confirmed or ratified by a simple majority of the members in a General Meeting, then the court will not interfere.

It was further stated on the basis of privity of contract the right party to sue is the company and not the 2 shareholders. The Company represented by majority shareholder shall file the suit to claim relief.

Advantages of the Rule in Foss v. Harbottle

(a) Recognition of the separate legal personality of a company.

(b) It preserves the right of majority to decide how the affairs of the company shall be conducted. It is fair that the wishes of the majority should prevail.

(c) Multiplicity of futile suits can be avoided.

(d) Litigation at suit of a minority is futile if the irregularity complained of is one which can be subsequently ratified by the majority.

Exceptions to the Rule in Foss v. Harbottle

The cases in which the majority rule does not prevail are commonly known as exceptions to the rule in Foss v. Harbottle and are available to the minority.

(a) Ultra Vires Acts: Where the directors representing the majority of shareholders perform an illegal or ultra vires act for the company, an individual shareholder has right to bring an action.

The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company.

(b) Fraud on Minority: Where an act done by the majority amounts to a fraud on the minority; an action can be brought by an individual shareholder.

(c) Wrongdoers in Control: If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court.

(d) Resolution requiring Special Majority but is passed by a simple majority: A shareholder can sue if an act requires a special majority but is passed by a simple majority.

Simple or rigid, formalities are to be observed if the majority wants to give validity to an act which purports to impede the interest of minority.

(e) Personal Actions: Individual membership rights cannot be invaded by the majority of shareholders.

An individual shareholder can insist on the strict compliance with the legal rules, statutory provisions.

Provisions in the memorandum and the articles are mandatory in nature and cannot be waived by a bare majority of shareholders.

An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election.

(f) Breach of Duty: The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company.

(g) Prevention of Oppression and Mismanagement: The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement.

PREVENTION OF OPPRESSION AND MISMANAGEMENT (Sections 241 to 246)

The words "oppression" and "mismanagement" are not defined in the Companies Act, 2013 & the erstwhile Companies Act, 1956.

Meaning of Oppression

Oppression means unjust or cruel exercise of the authority or power especially by the imposition of burdens or the conditions.

An attempt to force new and more risky objects upon an unwilling minority may in circumstances amount to oppression.

In other words, "oppression" means any act done by "the majority who exercised their authority wrongfully, in a manner burdensome, harsh and wrongful".

Application against Oppression & Mismanagement

An application against Oppression & Mismanagement can be made in the following manner:

Application made to: Tribunal

Application made by: The applicant against oppression & mismanagement can be made:

• By Members

Any member of a company, who has right to apply under section 244, may apply to the Tribunal for complaints that—

1. The affairs of the company have been or are being conducted -
   - in a manner prejudicial to public interest, or
   - in a manner prejudicial to member or members, or
   - in a manner prejudicial to the interests of the company; or

2. The material change, has taken place in the management or control of the company, whether by
an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or
In any other manner whatsoever (But not change in creditors or debenture holders)

• By Central Government

The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order.

Right to apply against Oppression & Mismanagement Section 244, (Companies Act, 2013)

As mentioned above application against Oppression & Mismanagement can be made by Members.

The required number of members to make a valid application is as follows:

Application made to: Tribunal

Application made by: The application against oppression & mismanagement can be made:

In the case of a company having a share capital (Minimum Members)	In the case of a company NOT having a share capital (Minimum Members)
Lowest of	
100 members	
1/ 1Cfth of the total number of members	115th of the total number of members
- Members holding 1110th of the Issued Share Cap	

Note: (1) The applicant or applicants has or have paid all calls and other sums due on his or their shares;
(2) If shares are held by two or more persons jointly, they shall be counted only as one member.

Special Note: Tribunal may, waive the requirement of minimum members, if it deems fit.
Where members of a company are entitled to make an application in above case, any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

Q3. A petition signed by 100 members of a company has been moved to Company Law Board (CLB) for prevention of mismanagement. Later on, half of the members (signatories) withdrew their consent after filing the petition. Examine whether the remaining applicants (petitioners/signatories) to the petition would be successful in their complaint to CLB. (4 tnarks)(June, 2014)

A3. The requisite number of members required for filing of application is determined on the date of making an application.
Accordingly, subsequent withdrawal of the name does not affect the validity of application.

Conditions to seek relief against Oppression or Mismanagement under section 241

Following conditions to be satisfied for seeking a relief under Section 241:

1. That the affairs of the company are being conducted:

(a) In a manner prejudicial to public interest; or

(b) Oppressive to any members.

2. That the fact justified the compulsory winding-up order on the ground that it is just and equitable that the company should be wound-up.

3. That to wind-up the company would unfairly prejudice the petitioners.

Oppression must be of a Continuous Nature:

Oppression must be a continuous process.

Hence isolated acts of oppression or mismanagement will not give rise to an action under Sections 241 to 246 of the Companies Act, 2013.

Q4. A company was in need of further capital. The majority representing 98% of the shares were willing to provide the capital if they could buy-up the 2% minority shares. The majority passed a resolution altering the articles and enabling them to purchase the minority shares. The minority shareholders refused to surrender their shares and challenged the validity of the majority resolution. Decide (5 marks)(June, 2007)

A4. The majority resolution is void as it is neither just nor equitable for the benefit of the company as a whole to purchase the shares of minority compulsorily.

When will Tribunal Issue Order (Section 242 of Companies Act, 2013)

The Tribunal has power to issue order on receiving application if it has following opinion:

(a) Prejudicial and oppressive to the members or public: The affairs of the company have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(b) Winding-up of the Company: If winding-up would be justified at the circumstance but would unfairly prejudice such member or members.

Then the Tribunal would avoid the extreme step of winding up and instead pass an order under this section.

Submit certified copy of Order to be filed with Registrar

A certified copy of the order of the Tribunal shall be filed by the company with the ROC within 30 days of the order of the Tribunal.

Contents of Order/Power of Tribunal through Order

The Tribunal can pass order related to following matters:

1. Affairs of the Company: It can pass an order to regulate the affairs of the Company.
2. Purchase of shares by other member(s): It can pass an order for purchase of shares or interests of any members of the company by other members of the company.
3. Purchase of shares by the Company: It can pass an order for purchase of shares by the Company, thereby resulting into reduction of share capital.
4. Modification of Agreement with MD, Director, and Manager: The Tribunal may set aside, terminate or modify, any agreement between the company and the managing director, any other director or manager.

Special Note:

No Claim against the Company by any person for damages or for compensation for loss of office or in any other respect either due to modification of Agreement.

No MD or other director or manager whose agreement is so terminated or set aside shall, for a period of 5 years from the date of the order terminating or setting aside the agreement be appointed, or act, as the managing director or other director or manager of the company:

5. Modification of Agreement with any other person: The Tribunal may set aside, terminate or modify, any agreement between the company and any other person.

Special Note: No Claim against the Company by any person for damages or for compensation for loss of office or in any other respect either due to modification of Agreement.

Note: No such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned.

6. Setting aside or cancelling fraudulent preferences: The Tribunal can set aside, any fraudulent preference within 3 months before the date of the application.

7. Removal of MD/Manager/ Director: The Tribunal can pass an order for removal of the managing director, manager or any of the directors of the company.
8. Appointment of Director: The Tribunal can pass an order for appointment of new directors if required.
9. Recovery of Undue Gains: The Tribunal may pass an order to recover any undue gains made by any managing director, manager or director during the period of his appointment.
10. Manner of appointment of MD/Manager: The Tribunal can pass an order stating the manner in which the managing director or manager of the company may be appointed after removal of the existing managing director or manager of the company.
11. Imposing Cost: The Tribunal can pass order of imposition of costs.
12. Other Matters: Any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

Other Power of Tribunal

1. Interim Order by Tribunal: The Tribunal may make any interim order which it thinks fit for regulating the conduct of the company's affairs.
2. Order for change of MOA/AOA: Where an order of the Tribunal makes any alteration in the MOA or AOA of a company, then, the company shall not have power to make any alteration without the order of Tribunal.

   Note: If a company contravenes the orders of Tribunal or the altered MOA or AOA, the company shall be punishable with fine which shall not be less than Rs.1 lakh but which may extend to Rs.25 lakh and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs.25,000/- but which may extend to Rs.1 lakh, or with both.

CLASS ACTION (Section 245):

A class action, class suit, or representative action is a type of law suit where one of the parties is a group of people who are represented collectively by a member of that group.

In short, a lawsuit filed or defended by an individual acting on behalf of a group.

Need of Class Action Suit:

The need to introduce this provision was felt in Satyam scam occurred in 2009.

The shareholders in Satyam Computers Services Limited were unsuccessful in claiming damages due to the absence of the provision for filing a class action suit under the Companies Act, 1956.

While in India, the Indian shareholders suffered a loss, the American investors at America were able to claim their part of damages in the US courts through a class action suit against Satyam Computers Services Limited.

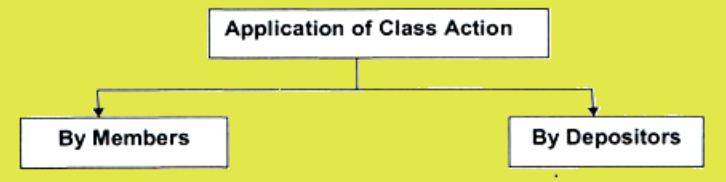
Why a separate provision was introduced inspite there being Relief under Oppression and Mismanagement?

The remedies available under the Oppression & Mismanagement (Sections 241-244) are different from remedy under section 245.

While oppression and management have a greater range of remedies, all of them were focused on controlling the affairs and management of the Company and were of restraining nature.

There was a need of compensatory remedy available to the sufferers, which was met by introduction of Class Action Suit in the Companies Act, 2013.

Who may file application for Class Action?



<table>
<tr><th colspan="2">By Members</th></tr>
<tr><td>In the case of a company having a share capital

(Minimum Members)

Lowest of

- 100 members

- Prescribed number of the total number of members

- Members holding prescribed percentage of the Issued Share Capital</td><td>In the case of a company NOT having a share

capital (Minimum Members)

1/5th of the total number of members</td></tr>
<tr><td colspan="2">By Depositor (Minimum Depositor)

Lowest of

- 100 members

- Prescribed number of the total number of depositors

- Depositors holding prescribed percentage of the Total Deposit</td></tr>
</table>

Relief under a class action:

The applicant may ask for the following relief from the Tribunal:

(a) to restrain the company from committing an act which is ultra vires to AOA or MOA of the company;

(b) to restrain the company from committing breach of any provision of the company's MOA or AOA;

(c) to declare a resolution altering the MOA or AOA of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed;

(g) to claim damages or compensation or demand any other suitable action from or against:

- the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
- the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
- any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

Case Law: **Hindustan Co-operative Insurance Society Ltd.**

Facts: The life Insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among shareholders, rather they passed a special resolution changing the objects of the company to utilize the compensation money for the new objects.

Judgment: The court observed: "The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful.

They attempted to force the minority shareholders to invest their money in different kind of business against their will.

The minority had invested their money in a life insurance business with all its safeguards and statutory protections.

But they were being forced to invest where there would be no such protections or safeguards".

This was held to be an "Oppression".

Case Law: **Rajahmundry Electric Supply Corporation v. A. Nageswara Rao**

Facts: In this case, a petition was brought against a company by certain shareholders on the ground of mismanagement by directors. The court found that the vice-chairman grossly mismanaged the affairs of the company and had drawn considerable amounts for his personal purpose, that large amounts were owing to the Government for charges for supply of electricity, that machinery was in a state of disrepair, that the directorate had become greatly attenuated and "a powerful local junta (Military) was ruling the roost", and that the shareholders outside the group of the chairman were powerless to set matters right.

Judgment: The Court accordingly appointed two administrators for the management of the company for a period of six months vesting in the mall the powers of the directorate.

This was held to be sufficient evidence of mismanagement.

PART III - WINDING UP

Winding up of a company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors.

An Administrator, called a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members.

WINDING-UP [maut ka intezar]

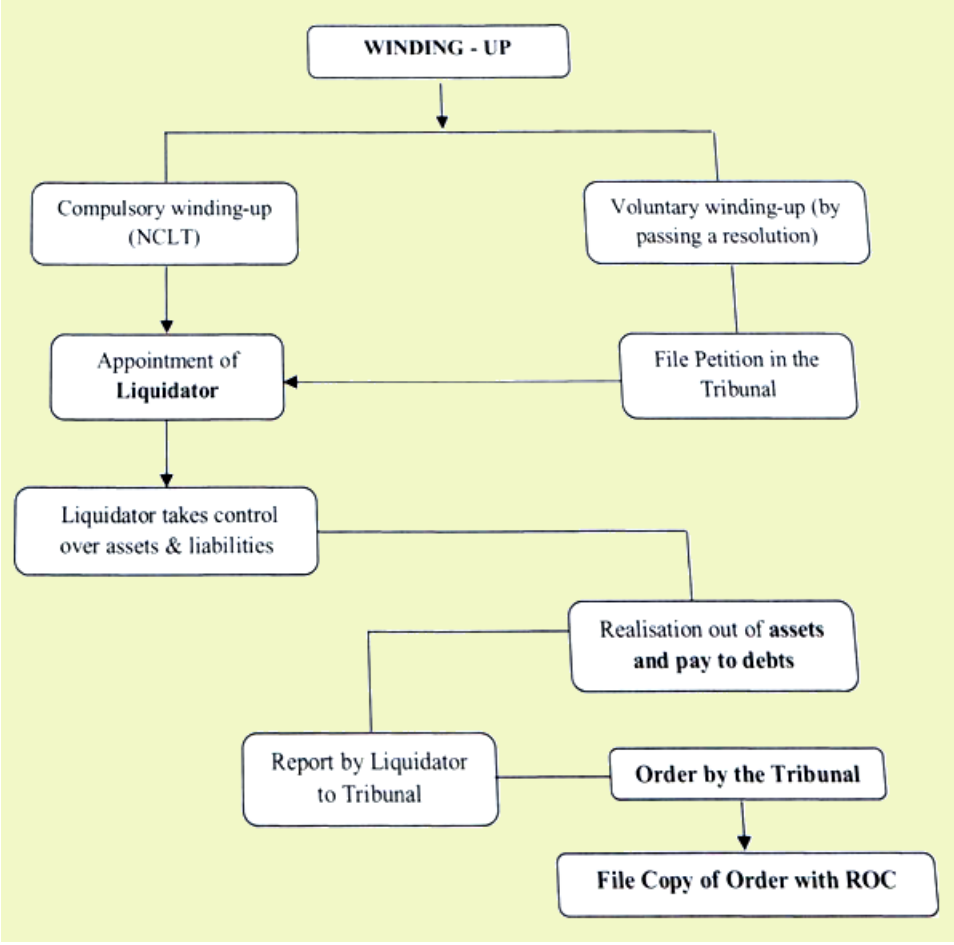
Winding-up is the process by which management of a company's affairs is taken out of its directors hands, its assets are realized by a liquidator and its debts are discharged out of proceeds of realization.

Any surplus of assets which remains after such discharge is returned to its members or shareholders.

In simple words, it is a process whereby the life of a company is ended and its property administered for the benefits of its creditors and members.

An administrator duly appointed by Tribunal is called a liquidator and he takes control of Company, realises its assets, pays debts and finally distributes surplus, if any, among members.

Process of winding-up



METHODS OF WINDING-UP (Section - 270 of the Companies Act, 2013)

(a) By the order of Tribunal i.e. compulsory winding-up

(b) By passing of an appropriate resolution for Voluntary winding-up at the General Meeting of members i.e. voluntary winding-up.

COMPULSORY WINDING-UP BY THE TRIBUNAL (Section - 271 of the Companies Act, 2013)

A winding-up process which is initiated by the order of the Tribunal is called Compulsory winding-up.

Grounds for Compulsory winding-up

A company may be wound-up by the Tribunal (i.e. NCLT) on the following grounds:

(a) Inability to pay Debt: If the company is unable to pay debts;

(b) Special resolution: If the company has passed a special resolution;

(c) Acted against Public Policy and Country: If the company has acted against the interest of the sovereignty and integrity of India, the security of the State, friendly relation with the foreign state, public order, decency or morality;

(d) Order by Tribunal: If the Tribunal has ordered the winding up of the company under Chapter XIX;

(e) Application by authorities regarding fraudulent/unlawful purpose: If on an application made by the ROC or any other person authorised by the CG, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been found guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(f) Default in filing: If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding 5 consecutive financial years;

(g) Just & Equitable Ground: If the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Who may file Petition for Compulsory Winding-up?

As per section 272 of the Companies Act, 2013, an application for the winding-up may be filed by any of the following persons:

- The company; or
- Any creditor or creditors, including any contingent or prospective creditor or creditors; or
- Any contributory or contributories; or
- All of the parties specified in clauses (a), (b), (c) can also file application jointly or separately; or
- The Registrar; or
- Any person authorised by the Central Government; or
- By the Central Govt. or State Govt.

Note: A trade union cannot file winding-up petition for unpaid wages of workmen/employees.

Power of the Tribunal

On presentation of the petition Tribunal can pass any of the following orders, namely: Dismiss it, with or without costs;

- Make any interim order as it thinks fit;
- Appoint a provisional liquidator of the company till the making of a winding up order
- Make an order for the winding up of the company with or without costs; or
- Any other order as it thinks fit.

Special Note: The Tribunal shall make an order on receipt of the petition within 90 days from the date of presentation of the petition

Appointment of Company Liquidator and Provisional Liquidator

The Tribunal shall at the time of passing winding up order shall appoint a liquidator from amongst the insolvency

professionals registered under the Insolvency and Bankruptcy Code, 2016, who shall act as Company Liquidator.

The Tribunal if it deems fit can appoint a provisional liquidator before the order of winding up is passed.

The Tribunal shall give notice to the company and give reasonable opportunity to make representations before such appointment.

Commencement of Compulsory winding-up: A Compulsory winding-up commences from the date of filing petition with the Tribunal.

VOLUNTARY WINDING-UP (Section - 304 of the Companies Act, 2013) [SUICIDE..!!!]

Grounds for Voluntary Winding Up

A company may be wound up voluntarily subject to the fulfilment of the below mentioned conditions:

- Company incorporated for fixed duration: When duration fixed in its articles of association has expired or any event as mentioned in the articles of association;
- Special Resolution: If the company passes a special resolution that the company be wound-up voluntarily.

Note: A company may be wound-up voluntarily on the expiry of the term fixed period or on the occurrence of the event as provided in its articles. In these two cases, only an ordinary resolution is required to be passed in the general meeting of the company.

Special Note: Apart from these two cases, a company may also go for voluntary winding-up for any other reason for which a company has to pass a special resolution

APPOINTMENT OF LIQUIDATOR

Appointment by Members: One or more liquidators are to be appointed by the company in general meeting for the purpose of winding-up the affairs and distributing the assets of the company.

The remuneration of the liquidators is also required to be fixed by the company in general meeting.

Appointment by Creditors: Where the creditors have passed a resolution for winding up the company, the appointment of the Company Liquidator shall be effective only after it is approved by the majority of creditors in value of the company.

Note: If creditors do not approve the appointment of such Company Liquidator, creditors shall appoint another Company Liquidator.

Commencement of Voluntary winding-up: A voluntary winding-up commences from the date of the passing of the resolution for voluntary winding-up.

Types of Voluntary Winding Up

Member's Voluntary Winding Up:

Where a declaration of solvency is made by majority of directors that in their opinion either the Company has no debt or that it will be able to pay its debts in full within stipulated time not later than 3 years, the winding up will become Member's Voluntary Winding Up.

Creditor's Voluntary Winding-Up:

Where a declaration of solvency of the company is not made and delivered to the Registrar in a voluntary winding-up it is a case of creditor's voluntary winding-up.

DISTINGUISH BETWEEN MEMBERS' AND CREDITORS' VOLUNTARY WINDING-UP

Basis	Member's winding-up	Creditor's winding-up
Basic distinction	A member's voluntary winding-up results where, before convening the general meeting of the company at which the resolution of winding-up is to be passed, the majority of the directors file with the Registrar a statutory declaration of solvency.	A creditors' voluntary winding up is one where no such declaration is filed.
Participation in liquidation	In a member's voluntary winding-up, the creditors do not participate directly in the control of the liquidation, as the company is deemed to be solvent.	In a creditor's voluntary winding-up, the company is deemed to be insolvent and, therefore, the control of liquidation remains in the hands of the creditors.
Appointment of Liquidator	There is no meeting of creditors in a member's voluntary winding-up and the liquidator is appointed by the company.	In a creditor's voluntary winding-up, meetings of creditors have to be called at the beginning and subsequently the liquidator is appointed by the creditors.
Power of liquidator	In a member's voluntary winding-up the liquidator can exercise some of his powers with the sanction of a special resolution of the company;	In a creditor's voluntary winding-up, creditors can do so with the sanction of the Tribunal.

WINDING-UP AND DISSOLUTION

The entire procedure for bringing about a lawful end to the life of a company is divided into two stages:

(a) Winding-up: Winding-up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are discharged out of proceeds of realization. Any surplus of assets which remains after such discharge is returned to its members or shareholders.

(b) Dissolution: Dissolution is the last stage of liquidation, the process by which a company (or part of a company) is brought to an end, and the assets and property of the company redistributed.

Distinguish between winding-up and dissolution

Basis	Winding-up	Dissolution – [Death]
Basic distinction	Winding-up is the 1st stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members.	Dissolution is the final stage whereby the existence of the company is withdrawn by the law.
Appointment of liquidator	The liquidator appointed by the company or the Tribunal carries out the winding- up proceedings.	The order for dissolution can be passed by the Tribunal only.
Representation by the Liquidator	The liquidator can represent the company in the process of winding-up. This can be done till the order of dissolution is passed by the Tribunal.	Once the Tribunal passes dissolution orders the liquidator can no longer represent the company.
Debts to be proven by the creditors	Creditors can prove their debts in the winding-up of a Company.	Creditors cannot prove their claim on the dissolution of the company.

CHAPTER 13
An Introduction to MCA 21
& filling in XBRL

AN INTRODUCTION TO MCA 21

MCA-21 has been designed virtually to eliminate the physical interface between the companies and the offices of ROCs, RDs and even MCA.

It has not only saved time and energy of the company representatives but also enabled them to focus on other creative tasks.

BENEFITS

The MCA21 application offers the following:

1. Enables the business community to register a company and file statutory documents quickly and easily.
2. Provides easy access of public documents
3. Helps faster and effective resolution of public grievances
4. Helps registration and verification of charges easily
5. Ensures proactive and effective compliance with relevant laws and corporate governance
6. Enables the MCA employees to deliver best of breed services

SERVICES OFFERED

- **Obtain Digital Signature Certificate –**
  The Information Technology Act, 2000 has provisions for use of Digital Signatures on the documents submitted in electronic form in order to ensure the security and authenticity of the documents filed electronically.
  This is secure and authentic way to submit a document electronically.

- **LLP Services for Business User –**
  A business user can enter or update partner details of an LLP, enter Form 3 or Form 3 & 4 details for LLP filing and verify partner details for filing Annual Return.

- **E-Filing –**
  User can download LLP Forms or Company Forms from the Portal, submit application for PAN and TAN, upload e-forms, download Submitted Form for resubmission, check annual filing status of the company, upload details of security holders or debenture holders or depositors.

- **Complaints –**
  A user can raise service related complaints, track the complaints created, create investor/serious complaint, track the status of complaints created as 'investor/serious complaint, give feedback or suggestions to MCA-21 and raise employee grievances.

- **Fee and Payment Services –**
  A user can avail services through Enquire Fees, pay later, link NEFT payment, pay miscellaneous fee, pay stamp duty and track the payment status.

- **Investor Services –**
  A user can search amount unclaimed/unpaid amount due to be transferred to the Investor Education and Protection Fund (IEPF), upload investor details, and confirm uploaded files.

CENTRAL REGISTRATION CENTRE (CRC)

The Central Registration Centre (CRC) is an initiative of Ministry of Corporate Affairs (MCA) in Government Process Re-engineering (GPR) with the specific objective of providing speedy incorporation related services in line with global best practices.

CRC is presently tasked to process applications for RUN service for reserving a name and forms related to new companies incorporations (SPICe/ SPICe MOA/ SPICe AOA /INC-22 andDIR-12).

CORPORATE IDENTITY NUMBER (CIN)

- Every company is allocated a Corporate Identity Number (CIN).
- CIN can be found from the MCA-21 portal through search based on:
  - ROC Registration No.
  - Existing Company Name
  - Old Name of Company (in case of change of name, user is required to enter old name and the system displays corresponding current name).
  - Inactive CIN [In case of change of CIN, the user is required to enter previous (inactive) CIN Number].
- Each Indian company (Listed or Unlisted) has a unique 21 Digit CIN.
- This is required to be quoted on all e-forms.
- Once this number is filled, company details are automatically filled in E-Forms issued by MCA by using pre-fill function.
- As stated above, CIN is a 21 digit number assigned to every company incorporated on or after November 1, 2000.
- The Corporate Identity Number allotted to a company indicates listing status, economic activity (industry), and state, year of incorporation, ownership and sequential number assigned by ROC (Registration Number).
- 1st Digit Listing Status Next 5 digits Economic Activity (industry) Next 2 digits State Next 4 digits Year of Incorporation Next 3 digits Ownership.
- Status of the company Private (PTC)/ public (PLC) / government companies (GOI) etc….. Last 6 digits Sequential number assigned by ROC (Registration Number).

Foreign Company Registration Number (FCRN)

Every Foreign Company has been allotted a Foreign Company Registration Number (FCRN).

Corporate Identity Number (CIN), work as a unique identifier of an Indian company.

Foreign Company Registration Number (FCRN) is a unique identifier in the case of a Foreign Company.

Director Identification Number (DIN)

DIN is an identification number which the Central Government may allot to any individual, intending to be appointed as director or to any existing directors of a company, for the purpose of his identification All existing and any person intending to be appointed as a director are required to obtain the Director Identification Number (DIN).

DIN is also mandatory for directors of Indian Companies who are not citizens of India.

However, DIN is not mandatory for directors of foreign company having branch offices in India.

Every individual, who is intending to be appointed as Director of a company or designated partner of a limited liability partnership is required to make an application electronically in Form DIR -3 to Central Government for obtaining Director Identification Number (DIN) or in case the company is being incorporated through Form SPICe, a maximum of three directors can apply for DIN.

DIN is a unique identification number and once obtained is valid for life time of a director.

A single DIN is required to be obtained irrespective of the number of directorships.

RUN FACILITY

The MCA Affairs has simplified the Company Name Approval Process from 26th January 2017 by introducing a new simple web-based application called RUN (Reserve Unique Name) for Company Registration.

RUN (Reserve Unique Name) is a simple and easy process for reserving a name for a new company or for change of name of an existing Company.

This facility can be availed only by a registered user of MCA portal.

The complete name of proposed company, including suffix like (OPC) Private Limited / Private Limited / Limited, should be submitted at the time of application for approval.

Also, the object of the proposed Company is also to be submitted through RUN application.

In case of change of name of an existing Company the Corporate Identification Number (CIN) of the existing company should be submitted at the time of application through RUN Process to reserve a new name.

INTEGRATED PROCESS OF NAME RESERVATION, COMPANY INCORPORATION, DIN ALLOTMENT AND ISSUANCE OF PAN &TAN THROUGH SPICe (FORM INC-32) BY MCA-21

An integrated process through which reservation of name, incorporation of a new company, application for allotment of DIN and/or application for PAN and TAN can be applied simultaneously through a single application e-Form i.e. Form INC-32 (SPICe).

After filing the SPICe Form and making payment the user is required to visit the MCA portal and access the service 'Submit application for PAN and TAN'.

He has to download Form 49A (PAN) and 49B (TAN) and upload them on the same screen after attaching his DSC.

He has to upload these forms (PAN & TAN) within 2 days of filing the SPICe form failing which the entire SPICe form would be marked as 'Invalid and Not to be taken on record'.

Once the e-Form is processed and found complete, company would be registered and CIN would be allocated.

DIN gets issued to the proposed Directors who do not have a valid DIN.

Maximum three proposed Directors are allowed using this integrated form for filing application of allotment of DIN while incorporating a company.

Also PAN and TAN would get issued to the Company.

On approval of SPIC e forms, the Certificate of Incorporation (COI) is issued with PAN as allotted by the Income Tax Department.

An electronic mail with Certificate of Incorporation (COI) as an attachment along with PAN and TAN is also sent to the user.

Further PAN card shall be issued by the Income Tax Department.

After receipt of Certificate of Incorporation (with PAN indicated there in as allotted by the Income Tax Department), in case of non-receipt of PAN card, stakeholders shall check the status at www.TINNSDL.com

DIGITAL SIGNATURE CERTIFICATE (DSC)

The e-forms are required to be authenticated by the authorized signatories using digital signatures as defined under the Information Technology Act, 2000.

A digital signature is the electronic signature duly issued by a certifying authority that shows the authority of the person signing the same.

It is an electronic equivalent of a written signature.

Every user who is required to sign an e-form for submission with MCA is required to obtain a Digital Signature Certificate.

For MCA-21, the following four types of users are identified as users of Digital Signatures and are required to obtain digital signature certificate:

1. MCA (Government) Employees.
2. Professionals (Company Secretaries, Chartered Accountants, Cost Accountants and Lawyers) who interact with MCA and companies in the context of Companies Act.
3. Authorized signatories of the Company including Managing Director, Directors, Manager or Secretary.
4. Representatives of Banks and Financial Institutions.

A person requiring a Digital Signature Certificate can approach any of the Certifying authorities identified by the MCA, with original supporting documents and self-attested copies, for issuance of Digital Signature Certificate.

DSCs can also be obtained, wherever offered by CA, using Aadhare KYC based authentication, and herein supporting documents are not required.

Such Certifying Authorities are authorized to issue a Digital Signature Certificate with a validity of one or two years. Registration of DSC is a onetime activity on the MCA portal.

For registration of DSC, steps are given on the MCA Portal.

All companies (Public Company, Private Company, Company not having share capital, Company limited by share or guarantee, Unlimited Company) must comply with this requirement of registration of DSC by the director, manager and secretary.

Foreign directors are required to obtain Digital Signature Certificate from an Indian Certifying Authority (List of Certifying Authorities is available on the MCA portal).

The process of registration of DSC is same as applicable to others.

IMPORTANT TERMS USED IN E-FILING

- **PRE-FILL**
  - Pre-fill is functionality in an e-Form that is used for filling automatically, the requisite data from the system without repeatedly entering the same.
  - For example, by entering the CIN of the company, the name and registered office address of the company shall automatically be pre-filled by the system without any fresh entry.

- **ATTACHMENT**
  - An attachment refers to a document that is sent as an enclosure with an e-Form by means of an attached file.
  - The objective of the attachment is to provide details relevant to the e-Form for processing.
  - While some attachments are optional, some are mandatory in nature.
  - The attachments to an e-Form have to be in Adobe PDF format only and My MCA portal has a facility to convert any document format to PDF format.
  - My MCA portal does not accept big attachments and the users are advised to keep the attachment size to minimum (Not exceeding 2.6 MB of the total size of the Form including attachments).

- **MODIFY**
  - Once the user has done "Check Form" the form gets locked and it cannot be edited.
  - If the user wishes to make any alteration, the form can be overwritten by clicking the "Modify" button.
  - If the user wants to modify the form after pre-scrutiny failure, the user can get the e-form and whichever fields have to be changed only those may be modified by using the "Modify" button.

- **RADIO BUTTON**
  - Frequent use of radio buttons has been done in the e-Form.
  - While filling the e-Form one is required to select applicable option out of two or more radio buttons given against each point.

- **CHECK BOX**
  - Applicable Check box is required to tick out of the two or more boxes wherever it appears in the e-Form.

- **DROP**
  - Down Box Drop down box is a box wherein at the end, a downward arrow is provided.
  - On clicking the arrow various applicable choices appear.

- One is required to highlight the applicable choice and that will be filled in the box.

- **TEXT BOX**
  - Text box is meant to provide details on the relevant point by the person filling the e-form.
  - Space provided is generally adequate for the text to be written.
  - However, if the space is not sufficient for a particular matter, information can be given in the annexure to the form indicating the same in the box.

- **COUNTRY CODE**
  - Sometimes the applicant is required to fill up the country code in the e-Form.
  - This is available in the instruction kit.

- **STOCK EXCHANGE CODE**
  - All the stock exchanges of the country have been divided into two categories A and B.
  - Listed companies are required to mention the stock exchange where the shares are listed with the help of the code.

- **CHECK FORM**
  - By clicking "Check Form", the user will be in a position to find out whether the mandatory fields in an e-Form are duly filled-in.
  - For example, if the user enters alphabets in "Date of Appointment of Director" field, he/she will be asked to correct the entered information.
  - If the size of e-Form including attachment is of bigger size then the attachment may be filed through an addendum.

- **PRE-SCRUTINY**
  - Pre-scrutiny is a functionality that is used for checking whether certain core aspects are properly filled in the e- Form. The user has to make the necessary attachments in PDF format before submitting the eForm for pre scrutiny.
  - After this affix digital signature.

- **SUBMIT**
  - An e-Form can be submitted after it has been digitally signed.
  - The process of submission of an e-Form in case of off-line filling is presented below:
  - User logs in to MCA21 portal and uses e-Form upload service
  - User browses the e-Form and clicks on "Submit¨ button
  - User will be shown errors, if any
  - If e-Form is successfully submitted, user will get confirmation message and will be lead to the fee payment screen.
  - The digital certificate is validated to ensure that the certificate has not expired and the current status of the same is valid and that the certificate has not been revoked or suspended.

- **SERVICE REQUEST NUMBER (SRN)**
  - Each transaction under e-filing is uniquely identified by a Service Request Number (SRN).

- On filing of an e-form, the system generates and provides an in e character alpha numeric string starting with an alphabet (A-Z), called a Service Request Number (SRN).
- A user can check the status of the document/transaction, by entering the SRN.

XBRL

XBRL stands for eXtensible Business Reporting Language.

XBRL is a language for the electronic communication of business and financial data which has revolutionized business reporting around the world.

It provides major benefits in the preparation, analysis and communication of business information.

It offers cost savings, greater efficiency and improved accuracy and reliability to all those involved in supplying or using financial data.

XBRL is a data-rich dialect of XML (Extensible Markup Language), the universally preferred language for transmitting information via the Internet.

It was developed specifically to communicate information between businesses and other users of financial information, such as analysts, investors and regulators.

XBRL provides a common, electronic format for business reporting.

It does not change what is being reported, It only changes how it is reported.

XBRL is a world-wide standard, developed by an international, non-profit-making consortium - XBRL International Inc. (XII).

XII is made up of many hundred members, including government agencies, accounting firms, software companies, large and small corporations, academics and business reporting experts.

XII has agreed the basic specifications which define how XBRL works.

BENEFITS OF XBRL

- XBRL offers major benefits at all stages of business reporting and analysis.
- The benefits are seen in automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision-making.
- All types of organisations can use XBRL to save costs and improve efficiency in handling business and financial information.
- Because XBRL is extensible and flexible, it can be adapted to a wide variety of different requirements.
- All participants in the financial information supply chain can benefit, whether they are preparers, transmitters or users of business data.
- XBRL enables producers and consumers of financial data to switch resources away from costly manual processes, typically involving time-consuming comparison, assembly and re-entry of data.
- They are able to concentrate effort on analysis, aided by software which can validate and manipulate XBRL information.

- However, big the size of balance sheet is, .XML will be in a capsule form to project such details, thus consuming lesser file size in comparison to normal pdf attachments.

CHAPTER 14
BOARD CONSTITUTION & ITS POWER

The company is a creation of law and treated as artificial person which is managed by the humans.

The humans who run the Company are known Directors of the Company.

When the Directors act collectively, they are known as Board and individually treated as Directors.

The directors play a very important role to manage the day to day affairs of the company.

In short, the Directors are responsible to attain the objectives as prescribed in Memorandum of Association of the company.

The position of board of directors is that of trust as the board is entrusted with the responsibility to act in the best interests of the company.

Acting collectively as a Board of Directors, they can exercise all the powers of the company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

DIRECTOR & BOARD [Karta darta of the company]

Director is a person who is appointed by the shareholders for the purpose to manage the day to day affairs of a company.

The Board of Directors of every company shall consist of individual only.

Thus, no body corporate, association or firm shall be appointed as director.

BOARD COMPOSITION

Minimum/Maximum Number of Directors (Section 149(1) of the Companies Act, 2013)

Minimum Directors: Every public company must have a minimum number of 3 directors.

In case of private company, there must be 2 directors and

Whereas 1 director is required in One Person Company.

Maximum Directors: Any company can appoint maximum 15 directors.

Any company can appoint more than 15 directors subject to the approval of shareholders via a special resolution.

Note: The restriction of maximum number of directors shall not apply to section 8 companies.

Residential Status of Director (Section 149(3) of the Companies Act, 2013)

Every company shall have at least 1 director who has stayed in India for a period of not less than 182 days in the previous Financial Year (April to March).

The days will be calculated proportionately, in case newly incorporated company.

Woman Director (Section 149 of the Companies Act, 2013)

The following class of companies must appoint at least 1 woman director on its Board:

- Every listed company;
- Every other public company having: —
  (a) Paid-up share capital of Rs.100 crores or more; or

CS SHUBHAM ABAD
8149221250

(b) Turnover of Rs.300 crores rupees or more.

However, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy, whichever is later.

Special Note: The paid-up share capital or turnover as on the last date of latest audited financial statements shall be taken into account.

Number of Directorship (Section 165 of the Companies Act, 2013)

An individual cannot hold more than 20 directorships in companies.

Maximum number of directorships include alternate directorship.

Out of the total directorship, the maximum number of public companies in which a person can be appointed as a director is 10.

Public company shall also include private companies which are holding or subsidiary of public companies.

In simple words, out of 20 companies maximum 10 can be public companies or private companies which are holding or subsidiary of public companies.

Section 8 company will not be counted for the purpose of maximum number of Directorship.

Note: The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as director.

Fine for default: Not less than Rs.5,000/- but not more than Rs.25,000/- for every day after the first day during which the contravention continues.

Special Note: For the purpose of counting the limit directorship in dormant company to be ignored.

POWER OF THE BOARD (Section 179 of the Companies Act, 2013)

The Board of Directors can exercise all the powers vested in the Company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

The powers of the Board of Directors shall be exercised only by means of resolutions passed at Board Meeting, i.e. Circular Resolution will not be sufficient in the following matters and the consent of the Board should be taken only in a Board Meeting.

1. To make calls on shareholders in respect of money unpaid on their shares.
2. To authorise buy-back of securities under section 68;
3. To issue securities, including debentures, whether in or outside India;
4. To borrow monies; (Section 8 Companies exempted, See note below)
5. To invest the funds of the company; (Section 8 Companies exempted, See note below)
6. To grant loans or give guarantee or provide security in respect of loans; (Section 8 Companies exempted, See note below)
7. To approve financial statement and the Board's report;
8. To diversify the business of the company;
9. To approve amalgamation, merger or reconstruction;
10. To take over a company or acquire a controlling or substantial stake in another company;
11. To make political contributions;
12. To appoint or remove key managerial personnel (KMP);
13. To appoint internal auditors and secretarial auditor;

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal

CS SHUBHAM ABAD
8149221250

officer of the branch office, the powers specified in (4) to (6) above on such conditions as it may specify.

The banking company is not covered under the purview of this section. The company may impose restriction and conditions on the powers of the Board.

Note: in case of Section 8 companies resolutions related to clauses (d), (e) and (f) of sub-section (3)of Section 179 of the Act i.e. borrow monies, to invest funds of the company and to grant loans or give guarantee or provide security in respect of loans by section 8 companies may be decided by the Board by circulation.

RESTRICTION ON POWER OF THE BOARD (Section 180 of the Companies ACT, 2013)

Type of Restriction placed [karne k pehle shareholders se pucho]

The Board can exercise the specified powers herein mentioned only with the approval via Special Resolution (SR) passed by the shareholders.

Powers which require Special Resolution

1. Sale, lease, etc. of Undertaking [Section 180(l)(a)]

Approval via SR be required by the Board to sell, lease or otherwise dispose of

> the whole or undertaking(s) of the company

> substantially the whole of the undertaking(s) of the company

Undertaking means: A unit is termed as undertaking under this section if it satisfies any of the following conditions:

- If investment in such unit exceeds 20% of net worth of the Company as per audited balance sheet of preceding FY.
- If it generated 20% or more of the Total Income during the preceding FY.

Substantially the whole of the undertaking means 20% or more of the value of the undertaking.

In simple words, an undertaking will be treated as substantially sold out if 20% or more of its value is old out.

Note: If the undertaking is sold or leased in contravention of Section 180(l)(a) the right of the buyer or lessee will not be affected if he acted in good faith.

2. Investment of compensation received on Merger/Amalgamation [Section 180(l)(b)]

Approval via SR be required by the Board to invest compensation received due to Merger/ Amalgamation.

Note: SR is not required if the funds are invested in specified securities of Indian Trust Act.

3. Borrowing Power [Section 180(l)(c)]

Approval via SR be required by the Board to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and Securities Premium Account, apart from temporary loans obtained from the company's bankers in the ordinary course of business.

Money already borrowed	+	Money proposed to be borrwoed	>	Paid Up Capital + Free Reserves + Securities

Special Note: Temporary Loans will not be considered for calculating the limit u/s 180(l)(c).

Temporary loans means a loan which is payable on demand or within 6 months, but it does not include a loan by whatever name called raised for financing capital expenditure.

CS SHUBHAM ABAD
8149221250

Note: If the borrowing is made in contravention of Section 180(l)(c) the right of the lender will not be affected if he acted in good faith and he has no knowledge that the limit u/s 180(l)(c) has exceeded.

4. Rescheduling of Repayment of any debt due from a director [Section 180(l)(d)]

Approval via SR be required by the Board to remit, or give time for the repayment of, any debt due from a director.

Private Companies are exempted from the ambit of Section 180.

Q1. Gomez, the chairman of a company, borrowed Rs.5 lakh from the State Bank of India, Patna under a promissory note. A suit was filed for the recovery of debts on the basis of the pro note executed by the chairman. The company refused to accept the liability on the plea that the chairman had borrowed funds without authorisation from the company. Will the company succeed? Explain. (5 marks)

A1. Case Law: Krishnan Kumar Bohatgi and others v. State Bank of India and others

Facts: An amount of Rs.5 lakh had been borrowed by the company under a promissory note guaranteeing the repayment by executing a guarantee in favour of the company. The Chairman of the Company executed such promissory notes in favour of Bank. In the suit for recovery, the company explained that the promissory note was executed by the Chairman without proper authorization from the Board.

Judgment: The Patna High Court held that the company shall be liable for the repayment of borrowed fund which was utilized for benefit of the company whether the borrowed fund admitted raise with or without proper authorization from the company.

Therefore, in given question, the company shall be liable to pay the borrowed fund to the Bank because the Company had utilised for its benefits.

CONTRIBUTIONS TO CHARITABLE FUNDS (Section 181 of the Companies Act, 2013)

[kuch donation ho jaye. Samajseva]

The power of making contribution to 'bona fide' charitable and other funds is available to the board, but it must be authorised by board by passing Board Resolution in Board Meeting only.

The permission of company in general meeting is required if such contribution exceeds 5% of its average net profits for the 3 immediately preceding previous years.

PROHIBITION & RESTRICTIONS REGARDING POLITICAL CONTRIBUTION (Section 182 of the Companies Act, 2013)

According to Section 182 of the Act, a company, other than a government company which has been in existence for less than three financial years, may contribute any amount directly to any political party.

Further the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

Further, the limit of contribution to political parties is 7.5% of the average net profits during the three immediately preceding financial years.

The Finance Act, 2017 amended section 182 of the Companies Act, 2013, accordingly the limit on the maximum amount that can be contributed by a company to a political party has been removed.

Hence a company now can contribute any percentage without any limit.

CS SHUBHAM ABAD
8149221250

Q1. A Company incorporated 1 year back contributed 5% in political parties. Discuss the validity of transaction.

A1. A company which has not completed 2 years of incorporation cannot contribute fund to political parties.

CONTRIBUTION TO NATIONAL DEFENCE FUND

(Section 182 of the Companies Act, 2013)

The Board can contribute such amount as it thinks fit to the National Defence Fund or any other fund approved by the Government for the purpose of national defence. It can also authorise other person to do so.

The company is required to disclose in its profit and loss account the total amount or amounts contributed by it during the financial year.

BOARD COMMITTEES

A board committee is a small working group identified by the board, consisting of directors.

Committees are usually formed as a means of improving board effectiveness and efficiency, in areas where more focused, specialized and technical discussions are required.

The Companies Act, 2013 also recognizes the formation of Board Committees Including Audit Committees. The Committees may be formed by the Board of Directors for following reasons:

(a) Audit
(b) Compensation
(c) Executive
(d) Governance and nomination
(e) Other types of committees

Committees are usually formed as a means of improving board effectiveness and efficiency in areas where more focused, specialized and technical discussions are required.

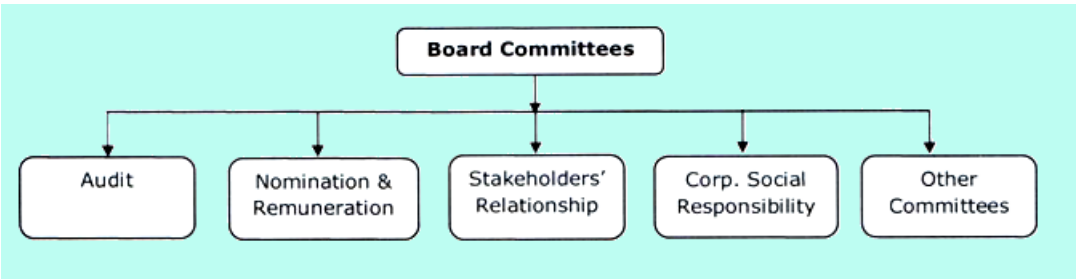
These committees prepare the groundwork for decision-making and report at the subsequent board meeting.

Any board should regularly review its own structure and performance and whether it has the right committee structure and an appropriate scheme of delegation from the board.

Classification of Board Committees

Mandatory Committees under the Companies Act, 2013

- Audit Committee
- Nomination and Remuneration Committee
- Stakeholders Relationship Committee
- Corporate Social Responsibility Committee



CS SHUBHAM ABAD
8149221250

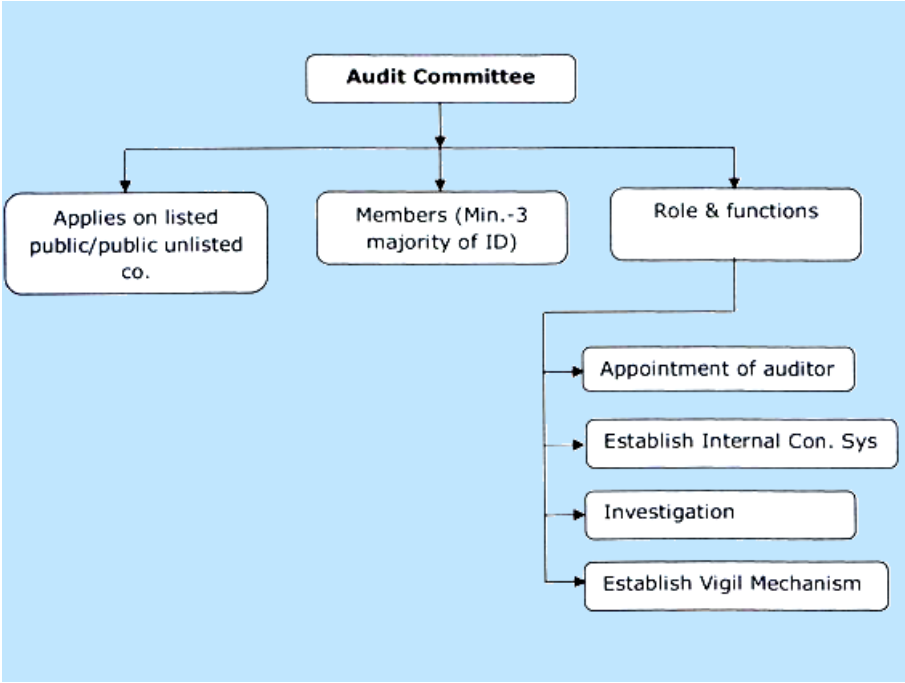
AUDIT COMMITTEE [FINANCE KO SAMBHALO]

Audit Committee is one of the main pillars of the corporate governance mechanism in any company.

The Committee is charged with the principal oversight of financial reporting and disclosure.

The constitution of Audit Committee is mandated under the Companies Act, 2013 and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Audit Committee Provisions in Companies Act (Section 177 of the Companies Act, 2013)



Constitution of Audit Committee:

As per the provisions of the Companies Act, 2013, the following companies are required to constitute an Audit Committee:

1. Every Listed Public Companies or
2. Unlisted public companies having:
   (a) Paid-up capital of Rs.10 crore or more;
   (b) Turnover of Rs.100 crore or more;
   (c) Aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 crore or more.

Note: The calculation of above paid-up share capital or turnover or outstanding loans etc. shall be based on the last audited Financial Statements. The Companies Act, 2013 provides 1 year from the date of its enforcement for reconstitution of the Audit Committee.

Members:

The Audit Committee shall comprise of minimum 3 directors with majority of the directors being Independent Directors.

The majority of members of audit committee should be financial literate.

Chairman:

The Chairman of the Audit Committee should be financially literate.

CS SHUBHAM ABAD
8149221250

Special Note: The requirement of Independent directors forming a majority is not applicable to Section 8 companies

Role of Audit Committee:

(a) The recommendation for appointment, remuneration and terms of appointment of auditors;
(b) Review and monitor the auditors' independence and performance, and effectiveness of audit process;
(c) Examination of the financial statement and the auditors' report thereon;
(d) Approval or any subsequent modification of transactions of the company with related parties;
(e) Scrutiny of inter-corporate loans and investments;
(f) Valuation of undertakings or assets of the company, wherever it is necessary;
(g) Evaluation of internal financial controls and risk management systems;
(h) Monitoring the end use of funds raised through public offers and related matters.

Establishment of Internal Control Systems:

The Audit Committee recommends the establishments of Internal Control Systems (relating to financial) and may also call the auditors for comments relating to internal control systems, the scope of audit etc.

Investigation:

The audit committee can start investigation in the matter or referred by the Board and also have the authority to obtain advice from external sources and have full access to records of the company.

Disclosure in Board's Report:

Section 177(8) of the Act provides that the board's report shall disclose

- Composition of an Audit Committee
- Where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in the report along with the reasons therefore.

Establishments of vigil Mechanism:

Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report genuine concerns or grievances:

(1) The companies which accept deposits from the public;
(2) The companies which have borrowed money from banks and public financial institutions in excess of Rs.50 crores.

Note: In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

Audit Committee Provisions in SEBI (Listing Obligation Disclosure Requirements), 2015

Every listed entity shall constitute a qualified and independent audit committee Members:

The audit committee shall have minimum three directors as members.

- Two-thirds of the members of audit committee shall be independent directors;
- All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise;

Chairman: The Chairman of the Audit Committee shall be an Independent director and shall be present at Annual General Meeting to answer Shareholder's queries;

Secretary: The Company Secretary shall act as the secretary to the committee.

CS SHUBHAM ABAD
8149221250

Invitees: The audit committee may invite such of the executives, as it considers appropriate to be present at the meetings of the committee.

The finance director, head of internal audit and a representative of the statutory auditor may be present as invitees for the meetings of the audit committee.

Note: Financially literate means the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows. A person will be treated to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience.

Number of Meetings: [jine k hai chaar din]

The audit committee should meet at least 4 times in a year and the maximum gap between two meetings shall not exceed 120 days.

Quorum: [kitne aadmi the??? Sarkar 2]

The quorum shall be either 2 members or 1/3 of the members of audit committee whichever is greater subject to minimum of 2 independent members present in the meeting.

Additional Role of Audit Committee in LODR:

The role of the audit committee includes the following:

- Oversight of company's financial reporting process & disclosure of financial information.
- Recommending to the Board appointment, re-appointment and the replacement or removal of the statutory auditor and the fixation of audit fees.
- Approval of payment to statutory auditors for any other services rendered.
- Reviewing, with the management, the annual or quarterly financial statements before submission to the board for approval.
- Reviewing, with the management, performance of statutory and internal auditors, and adequacy of the internal control systems.
- Reviewing the adequacy of internal audit function.
- Scrutiny of inter-corporate loans and investments;
- Valuation of undertakings or assets of the listed entity, wherever it is necessary;
- Evaluation of internal financial controls and risk management systems;
- Discussion with internal auditors of any significant findings and follow up;
- Discussion with statutory auditors before the audit commences, about the nature and scope of audit.

Compliance:

A listed entity is required to comply both with the Companies Act, 2013 as well as SEBI (LODR) Regulations, 2015.

Whereas, other entities who need to constitute Audit Committee will comply with Companies Act, 2013.

Comparison of Audit Committee under Companies Act. 2013 and SEBI (LODR) Regulations, 2015

1. LODR requires that all members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise whereas the Companies Act, 2013 provides for majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.
2. The Regulations require 2/3rd of members of the Audit Committee to be independent whereas Companies Act,

CS SHUBHAM ABAD
8149221250

2013 requires majority of members to Audit Committee to be Independent.

3. The role of Audit Committee under the Regulations is wider.
4. The Companies Act, 2013 does not prescribe that the chairman shall be an independent Director.
5. The Companies Act, 2013 does not provide for frequency of meeting of the audit Committee.
6. The Companies Act, 2013 does not provide for quorum for Audit committee meeting.

NOMINATION AND REMUNERATION COMMITTEE [KON HOGA AUR KISKO KITNA PAISA DENA PADEGA]

The Nomination and Remuneration Committee helps the Board relating to the appointment of the members of the Board.

This Committee finalizes the conditions of employment and remuneration of senior management, and to management's and personnel's remuneration and incentive schemes.

NRC Provisions in Companies Act (Section 178 of the Companies Act, 2013)

Constitution of Nomination Committee:

The following companies are required to constitute a nomination Committee:

1. Every listed Public Companies or
2. Unlisted public companies having:
   (a) Paid-up capital of Rs.10 crores or more;
   (b) Turnover of Rs.100 crores or more;
   (c) Aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 crores or more.

Special Note: Dormant and Section 8 Companies not required to constitute NRC.

Note: The calculation of above paid-up share capital or turnover or outstanding loans etc. shall be based on the last audited Financial Statements.

Members:

This committee shall consist of 3 or more non-executive directors out of which not less than one-half shall be independent directors.

Formulation of Policy:

The Nomination and Remuneration Committee shall consider the following while formulating the policy:

(a) The level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;
(b) Relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and
(c) Remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

Role & Responsibilities of Nomination and Remuneration Committee

(a) Identifying the persons who are qualified to become Directors and who may be appointed in senior management;
(b) Recommend to the Board the appointment and removal of any director;
(c) Specify the manner for effective Evaluation of Board, Director's Committees performance;
(d) Formulation of the parameters for determining qualifications, positive attributes and independence of a Director; and

CS SHUBHAM ABAD
8149221250

(e) Recommend a policy relating to the remuneration for the Directors, KMP and other employees.

NRC Provisions in SEBI (Listing Obligation Disclosure Requirements) Regulation, 2015

Members:

The Company shall set up a nomination and remuneration committee which shall comprise at least 3 directors, all of whom shall be non-executive directors and at least 1/2 shall be independent.

Chairman:

The Chairman of the committee shall be an independent director.

The Chairman of the nomination and remuneration committee shall be present at the AGM and answer the shareholders' queries in this regard.

Additional Role under LODR:

- Formulation of criteria for evolution of performance of Independent director and the Board of Directors
- Devising a policy on diversity of Board of Directors
- To extent or continue the terms of appointment of Independent Director

Compliance:

A listed entity is required to comply both with the Companies Act, 2013 as well as SEBI (LODR) Regulations, 2015.

Whereas, other entities who need to constitute Nomination Remuneration Committee will comply with Companies Act, 2013.

Comparison of Nomination Remuneration Committee under Companies Act. 2013 and SEBI (LODR) Regulations, 2015

1. The regulation prescribes that the chairperson of the committee shall be an Independent Director.
2. The regulation requires all the members of the committee to be non-executive directors.
3. The regulation prescribes that the chairperson of committee may be present at the Annual General Meeting.
4. The regulation prescribes the following key additions to the role of the committee:
    - Formulation of criteria for evolution of performance of Independent director and the Board of Directors
    - Devising a policy on diversity of Board of Directors
    - To extent or continue the terms of appointment of Independent Director

STAKEHOLDERS RELATIONSHIP COMMITTEE (SRC) [maintain relationship with stakeholders]

SRC Provisions under Companies Act. 2013 (Section 178(5) of the Companies Act, 2013)

Constitution:

A company has to constitute a "Stakeholders Relationship Committee" where such company has more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year.

Note: The provisions of this section are not at all clear regarding the constitution of Stakeholders Relationship Committee.

Chairperson:

The Chairperson of a Stakeholders Relationship Committee shall be a non-executive director or other member of the Board.

This Committee considers and resolves the grievances of security holders of the company.

CS SHUBHAM ABAD
8149221250

Note: The chairperson of each of the committees or in his absence, any other member of the committee duly authorised by him, shall attend the general meetings of the company.

SRC Provisions under SEBI (Listing Obligation Disclosure Requirements Regulations, 2015

The listed entity shall constitute a Stakeholders Relationship Committee to specifically look into the mechanism of redressal of grievances of shareholders, debenture holders and other security holders.

- The chairperson of this committee shall be a non-executive director.
- The board of directors shall decide other members of this committee.

Compliance: A listed entity is required to comply both with the Companies Act, 2013 as well as SEBI (LODR) Regulations, 2015.

Whereas, other entities who need to constitute Stake Holders Relationship Committee will comply with Companies Act, 2013.

Comparison of Stake Holders Relationship Committee under Companies Act, 2013 and SEBI (LODR) Regulations, 2015

1. The Regulations specifically prescribe role of the committee in Schedule II, Part D of the Regulations.
2. Further a listed entity even if having less than 1000 debenture holders/security holders is required to constitute a stakeholder relationship committee.

Penalty for Contravention of Sections 177 and 178 of the Companies Act, 2013

For Company: Minimum Fine - Rs.1,00,000/- Maximum Fine - Rs.5,00,000/-.

For Every officer who is in default: Imprisonment - upto one year or Minimum Fine - Rs.25,000/-, Maximum Fine - Rs.1,00,000/- or both.

RISK MANAGEMENT COMMITTEE [Required only under SEBI (LODR) Regulations]

As per regulation-21 of the listing regulation, the top 100 listed entities, determined on the basis of market capitalization, shall lay down the procedures about the risk assessment and minimization procedures:

(a) The Board is responsible for framing, implementing and monitoring the risk management plan.

(b) The company shall also constitute a Risk Management Committee. The Board shall define the roles and responsibilities of the Risk Management Committee.

CORPORATE SOCIAL RESPONSIBILITY COMMITTEE (Section 135 of the Companies Act, 2013)

As per section 135 of the Companies Act, 2013, certain class of companies must constitute a CSR Committee for formulation and implementation of CSR policy.

Constitution of CSR Committee: Every company has to constitute a CSR Committee which is having:

(a) Net worth of Rs.500 crores or more or

(b) Turnover of Rs.1000/- crores or more or

(c) Net profit of Rs.5 crores or more

Note: If a company crosses the above limits in respect of net worth or turnover or net profit during any financial year, such company has to constitute a CSR committee.

Members:

The CSR Committee shall consist of 3 or more Directors, out of which at least one Director shall be an Independent Director.

CS SHUBHAM ABAD
8149221250

(**Note**: For more details refer Chapter 7 (Corporate Social Responsibility)

OTHER COMMITTEES

In addition to the Committees of the Board mandated by the Companies Act, 2013 viz, Audit Committee, Nomination and Remuneration Committee, Stakeholders Relationship Committee and the CSR Committee, Board of Directors may also constitute other Committees to oversee a specific objective or project.

The nomenclature, composition and role of such Committees will vary, depending upon the specific objectives of the company.

A few examples of such Committees prevalent in the corporate sector in India and abroad are given below:

1. Corporate Governance Committee
2. Science, Technology & Sustainability Committee
3. Regulatory, Compliance & Government Affairs Committee
4. Investment Committee
5. Ethics Committee.

Requirement of Constitution of Committees (ROUND UP)

Particulars	**Listed Company**	**Public Companies**			**Other Companies**
		Paid up capital 10 Crores or more	Turnover 100 Crores or more	Loans or borrowings Exceeding 50 Crores	No. of Shareholders or debenture holders 1000 or more
Audit Committee	**YES**	**YES**	**YES**	**YES**	**NO**
Nomination and Remuneration Committee	**YES**	**YES**	**YES**	**YES**	**NO**
Stake Holders Relationship	**NO**	**NO**	**NO**	**NO**	**YES**

CHAPTER 15
DIRECTORS

INTRODUCTION

A company being an artificial person created by law does not have any physical existence. It can act only through natural persons. The person, acting on its behalf, is called Director.

The Directors are appointed due to following reasons:

The shareholders of the Company are scattered throughout the Country and sometimes even outside the country and therefore their participation in the day to day management is nearly impossible.

The shareholders lack expertise to manage the business.

It is mandatory to appoint Directors under the Act

DIRECTOR (Section 2(34) & Section 2(10) of the Companies Act, 2013) [Karta Datra]

The definition of the Director or the Board of Directors is not exhaustive.

The Companies Act, 2013 does not explain in real terms who is a director.

Section 2(34) of the Companies Act, 2013: "Director means a director appointed to the Board of a company".

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

Directors to be Individual only: As per Section 149 of the Companies Act, 2013, the Board of Directors of every company shall consist of individual only.

Thus, no body corporate, association or firm shall be appointed as director.

Office of Director cannot be assigned

Again Section 166(6) of Companies Act, 2013, prohibits assignment of office of director to any other person.

Any assignment of office made by a director shall be void.

DIRECTOR IDENTIFICATION NUMBER (DIN) [Director ki Pahchan]

Procedure for allotment of DIN

Application for DIN:

Every individual, who is to be appointed as director shall make an application electronically in Form DIR-3 to the Central Government for the allotment of a DIN.

Special Note: If a person is proposed to become a Director in existing Company he has to obtain it by filing DIR-3.

The Board resolution of the Company where he is proposed to be appointed shall also be attached along with the application.

If a person is proposed to be appointed in a new Company he may file the application through INC-32(SPICe) Form.

File an application:

The applicant should file an application in DIR-3 for the allotment of DIN on the website of the Ministry of Corporate Affairs (i.e. www.mca.aov.in).

Submission of documents:

The applicant shall attach the following documents along with DIR-3:

(a) Photograph;

(b) Proof of identity;

(c) Proof of residence; and verification by the applicant in Form DIR-4.

Note: The specimen signature of the applicant should be duly verified and sign the form digitally.

Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own DSC and shall also be verified digitally by—

(i) A chartered accountant in practice or a company secretary in practice or a cost accountant in practice; or

(ii) A company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed a director.

Allotment of DIN:

The Central Government shall within 1 month from the receipt of the application for allotment of a Director Identification Number to an applicant.

Removal of defects from application:

If the Central Government, on examination, finds such application to be defective or incomplete it shall give intimation of such defect or incompleteness to the applicant directing him to rectify such defects or incompleteness by resubmitting the application within a period of 15 days of intimation.

Rejection of Application:

If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application, directing the applicant to rectify such defects or incompleteness by resubmitting the application within a period of fifteen days of such placing on the website and email.

Special Note:

(a) The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

(b) No individual shall apply for/obtain/ possess another DIN who has already been allotted a Director Identification Number under section 154.

(c) If any person furnishes any return, information or particulars which are required to be furnished under the Act and are related to a director shall mention DIN in that document.

(d) DIN issued under Companies Act, 1956 to be treated as DIN issued under Companies Act, 2013.

Cancellation of DIN [pahchan le lenge wapis]

The Regional Director (North) may cancel or deactivate the DIN in the following cases:

(a) The DIN is found to be duplicated in respect of the same person;

(b) The DIN was obtained in a wrongful manner or by fraudulent means;

(c) In case of the death of the concerned individual;

(d) The concerned individual has been declared as a lunatic or unsound mind;

(e) If the concerned individual has been adjudicated an insolvent.

Penalty for Contravention

If a person fails to possess DIN, or fails to inform DIN to the Company, or possess more than 1 DIN, he shall be punishable with imprisonment upto 6 months or Fine upto Rs. 50000.

In case of continuing default fine will be Rs. 500 per day.

CONCEPT OF EXECUTIVE AND NON EXECUTIVE DIRECTOR

Before understanding this concept, let us be informed that a director holds the position of officer of the Company, irrespective of the type of Director he is.

Non-Executive Director [Part time]

A non-executive director is a director who is only a director of the Company and is not an employee.

He does not derive remuneration in the form of salary from the Company.

Therefore, a non-executive director will only be an officer of the Company.

Executive Director [full time director]

An executive director is a director who is also in employment with the Company.

A managing director and whole time director are executive director of the Company.

They are generally responsible for overseeing the administration, programs and strategic plan of the organization.

Since they are employees also, they can derive salary.

An executive director will be Officer as well as employee of the Company.

QUALIFICATION AND DISQUALIFICATIONS OF DIRECTOR

Appointment of Directors to be voted individually Section 162 of the Companies Act, 2013

A single resolution shall not be moved for the appointment of 2 or more persons as directors in a general meeting unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

A resolution moved in contravention of aforesaid provision shall be void, whether or not any objection was taken when it was moved.

A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Non-Applicability:

Section 162 will not apply to

- Private Company
- Government Company in which entire paid up capital is held by CG, SG or both.
- Wholly owned subsidiary of such Government Company

Special Note: This section prohibits appointment of more than 1 director through single resolution at GM only. Therefore directors can be appointed by passing a single resolution at BM.

Qualifications of a Director

The Companies Act, 2013 does not prescribe any qualification for holding the position of directorship by any individually.

It means any individual can be appointed as director in any company subject to fulfilment of the following conditions:

1. He must have obtained Director Identification Number (DIN) before his appointment from MCA.

   Central Government may prescribe any identification number which shall be treated as DIN for the purpose of the Act, and holding that number will be considered sufficient.

2. He has not been disqualified under section 164.

Q1. A foreign national was intended to be appointed to the Board of an MNC in India. He contends that, director identification number (DIN) is not required for him as he is a foreign nationA1. Whether his contention is valid?

Dec., 2013 (4 marks)

A1. The contention of foreign national is not correct. If anyone wants to become a director of a company registered in India, must have DIN before his appointment as a Director.

Further under Companies (Amendment) Act, 2017, Central Government may prescribe any identification number which shall be treated as DIN for the purpose of the Act, and holding that number will be considered sufficient.

Therefore, if the foreign national must have obtained this prescribed number then he can become Director without obtaining DIN as that would be sufficient.

Disqualifications of a Director (Section 164 of the Companies Act, 2013) [Tum se na ho payega]

Basic disqualifications (Section 164(1) :

A person shall not be eligible for appointment as a director of a company, if:

(a) He is of unsound mind and stands so declared by a competent court;

(b) He is an undischarged insolvent;

(c) He has applied to be adjudicated as an insolvent and his application is pending;

(d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence.

Note: If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, he shall never be eligible to be appointed as a director in any company.

(e) An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call;

(g) He has been convicted of the offence dealing with related party transactions at any time during the last preceding 5 years; or

(h) He has not got the DIN.

The above disqualifications mentioned in clauses (d), (e) and (g) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

Additional disqualification based on Non-Compliances (Section 164(2) :

A director shall also be treated as disqualified in case of following non-compliances:

What are the Non-Compliances?

(a) Non-filing of financial statement and annual return for continuous 3 financial years; or

(b) Defaulted in payment of debentures/deposit/dividend in any year.

Impact of the above Disqualifications:

Such director shall

– Not be eligible for appointment as director in any company for 5 years from the date of default,

– Not be eligible for re-appointment in the same company for 5 years from the date of default.

Note: A private company may prescribe additional disqualifications for appointment of a director in its Articles in addition to the above disqualifications of a Director.

"Provided that where a person is appointed as a director of a company which is in default of Section 164(2) he shall not incur the disqualification for a period of six months from the date of his appointment."

Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014

Every director who is disqualified as above, shall inform to the company before his appointment or re-appointment (in Form DIR-8).

The company shall immediately file Form DIR-9 to the ROC relating to such directors of the company within 30 days from the date of failure.

Upon receipt of the Form DIR-9, the Registrar shall immediately register the document and place it in the document file for public inspection.

VACATION OF OFFICE OF DIRECTOR (Section 167 of the Companies Act, 2013)

[Maine chodh diya]

The office of a director shall become vacant in case:

(a) He disqualifies as per section 164.

"Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section"

(b) He absents himself from all the Board meetings during a period of 12 months with or without leave of absence from the Board;

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

(d) He fails to disclose his interest (direct or indirect) in any contract or arrangement.

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

(f) He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect to imprisonment for not less than 6 months:

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

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

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

Imprisonment & Fine: In case of failure to vacate the position of directorship, the person shall be liable for punishment for a term which may extend to 1 year or with fine not less than Rs.1,00,000/- but not more than Rs.5,00,000/- or with both.

Special Note: Section 167(3) of the Act provides that if due to any happening vacation of office arises in case of all the directors.

Then required number of directors be appointed by Promoter and in absence of promoter by Central Government.

The directors appointed will hold the position until regular directors are appointed in General Meeting.

Note: A private company may prescribe additional grounds of vacation of a director in its Articles in addition to the above disqualifications of a Director.

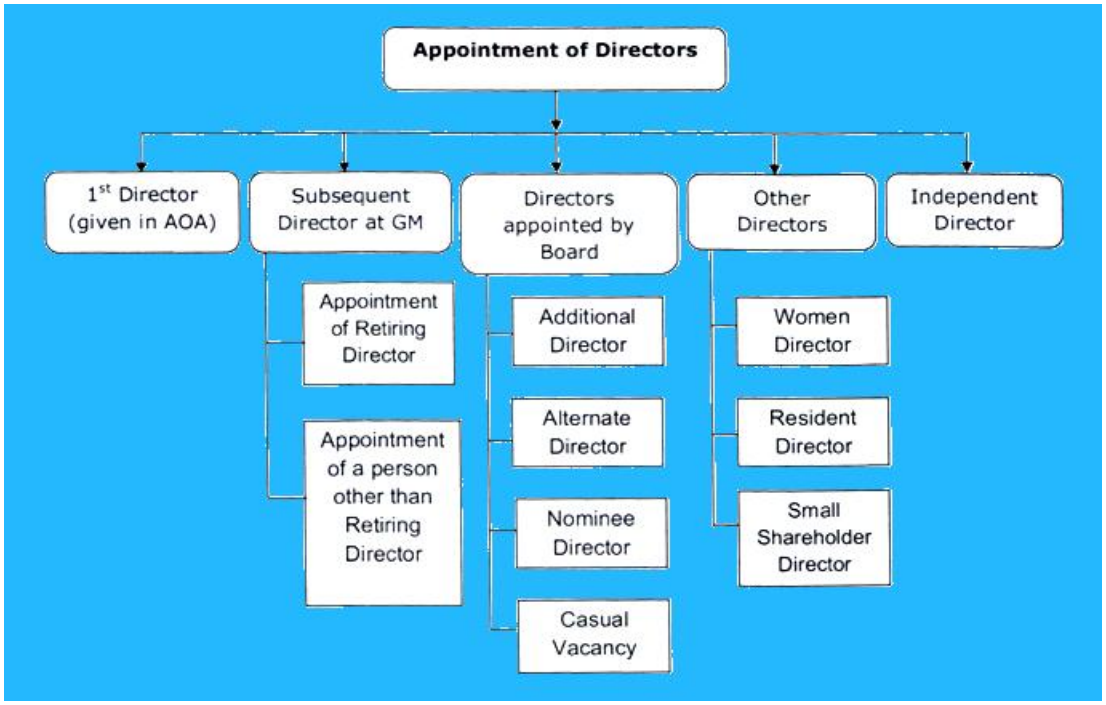
Q2. Manish, a director of PQR Ltd., defaulted in filing annual accounts and annual return with the Registrar of Companies for a continuous period of three financial years ended 31st March, 2012. Based on the provisions of the Companies Act, 2013, validate the following:

Whether Manish can continue to be a director of PQR Ltd. when he is also a director in UV Ltd.? Also narrate whether he can be reappointed in PQR Ltd as well as in UV Ltd. (4 marks) (Dec, 2013)

A2. As per section 164(2) read with section 167(l)(a) and clarifications of MCA Manish can continue in defaulting Co. for a period of 6 months, but his vacation will arise in UV Ltd.

He cannot be re-appointed as director in PQR Ltd. as well as UV Ltd.

APPOINTMENT OF DIRECTORS



FIRST DIRECTOR

Generally, the first directors of the companies are named in AOA of the Company.

If the names of the 1st Director are not given in the AOA of a company, then subscribers to the MOA who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

In case of OPC, an individual being a member shall be deemed to be its first director until the director(s) are duly appointed by the member.

APPOINTMENT OF DIRECTORS/ SUBSEQUENT DIRECTORS

1. **Appointment of directors in the General Meeting:**

   Every director shall be appointed by the company in general meeting except otherwise provided.

2. **DIN:**

   Director Identification Number or any other number prescribed by the CG which sgall be treated as DIN is compulsory for appointment of director of a company. Every person proposed to be appointed as a director shall furnish his DIN and a declaration that he is not disqualified to be appointed as director.

3. **Consent to act as Director:**

   A person appointed as a director shall on or before the appointment give his consent to hold the office of director in physical Form DIR-2 i.e. Consent to act as a director of a company.

4. **Filing of Form DIR-2 & DIR-12:**

   The Company has to file Form DIR-12 (particulars of appointment of directors and KMP along with the Form DIR-2) within 30 days of the appointment of a director.

RETIREMENT BY ROTATION [AB AARAM KA TIME HAI]

Applicability:

The provisions relating to retire by rotation only applies to the Public Companies.

Non-Applicability:

The provisions relating to retire by rotation will not apply to -

1. Private Company
2. Unlisted Government Company
3. Subsidiary of unlisted Government Company

Rotational & Non-Rotational Directors [ghumne wale aur fixed director]

Rotational Director	Non-Rotational Director
Meaning	
Rotational Directors are directors who are 'eligible to retire' at an AGM.	Directors other than Rotational Directors are Non Rotational Director
Number	
Atleast 2/3rd of the 'Total Number of Directors' should be Rotational Director. Note: 1. The AOA of Public Company can specify higher number of Rotational Directors, or All directors be Rotational 2. Total Number of Directors means total directors	Other than rotational director will be non- rotational. (Maximum l/3rd of the 'Total Number of Directors' will be Non-Rotational Director)

on roll of the board currently. 3. Independent Director shall be excluded while calculating 'Total Number of Director' 4. Rounded off to next 1	

Retirement of Rotational Director: [Inko jane do]

At every Annual General Meeting of a public company l/3rd of the Rotational Director shall retire.

Note:

1. If their number is neither 3 nor a multiple of 3, then, the number nearest to 1/3, shall retire from office (the number will be rounded off to nearest to l/3rd)
2. The independent directors shall not be included for the computation of total number of directors retire by rotation.

Example - I: Company having provisions in the AOA for retirement of all directors by rotation

Questions: ABC Ltd. is a public limited company and having 15 directors on its Board. The article of association of the Company is having provision regarding retire by rotation for all directors. The company is convening its 1st AGM on 30th September, 2014. Decide (a) how many directors are Rotational? (b) How many directors will be liable to retire by rotation in 1st AGM (i.e. on 30th September, 2014)?

Answer:

Total No. of Rotational Directors	15 Directors (As AOA mentions all directors to be rotational)
Total No. of Directors Retire by rotation on 1st AGM :	1/3 of 15 directors = 5 directors [retire by rotation on 1st AGM]

Example - II: Company having no provisions in the AOA for retire by rotation

Questions: ABC Ltd. is a public limited company and having 15 directors on its Board. The article of association of the Company is not having provision regarding retire by rotation for all directors. The company is convening its 1st AGM on 30th September, 2014. Decide (a) How many rotational directors are there? (b) How many directors will be liable to retire by rotation in 1st AGM (i.e. on 30th September, 2014)?

Answer:

Total No. of Rotational Directors	: 2/3 of 15 Directors = 10 directors [10 directors are rotational]
Total No. of Directors Retire by rotation on 1st AGM :	1/3 of 10 directors = 3 directors [retire by rotation on 1st AGM]

Who shall retire 1st?

Longest in the office (Method 1):

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

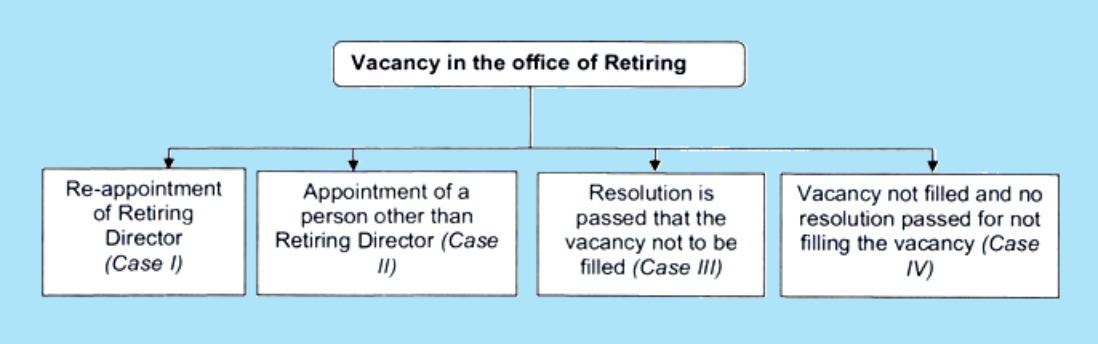
Agreement (Method 2):

If 2 or more directors were appointed on the same day and 1st method fails, then as agreed by them.

Bv Draw of Lots (Method 3):

If 2 or more directors were appointed on the same day and there is no agreement between them, then lot will be drawn.

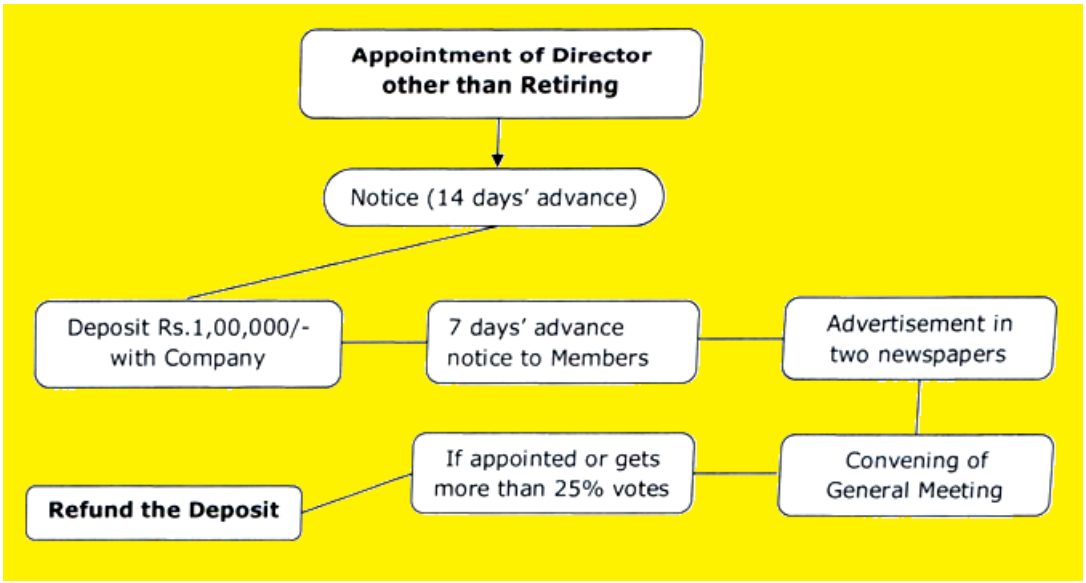
How to deal with Vacancy in the Office of Retiring Director? [joh gaye unki jagah ka kuch karo]



Case I: Re- Appointment of Retiring Director [Tum hi chaiye]

At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director.

Case II: Appointment: of a person other than Retiring Directors (Section 160) Appointment of a person as Director other than retiring directors [teri jagah koi aur aayega]



Notice:

A person who is not a retiring director shall be eligible for appointment as director shall give notice not less than 14 days before the general meeting at the registered office of the company.

Deposits:

The notice must be in writing under his hand signifying his candidature along with a deposit of Rs.1,00,000/- which shall be refunded to such person if the person proposed gets elected as a director or gets more than 25% of the valid votes casted.

The deposit is not required in the following cases:

> Appointment of Independent Director

> A person who is recommended to be appointed as director by NRC or Board (if NRC constitution is not required by the Company)

7 days' advance Notice:

The Company shall inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office, at least 7 days before the general meeting by serving individual notices to members through e-mail and by post.

Advertisement:

If a company advertises such candidature in a vernacular newspaper in the principal vernacular language of the registered office's district and also in English language not less than 7 days before the General Meeting then there is no requirement for serving individual notices to the members.

Non-Applicability:

The provisions of section 160 will not apply to:

1. Private Company
2. Government Company in which entire capital is held by CG/SG/ both
3. Wholly Owned Subsidiary of such Government Company.
4. Section 8 Company (if it's AOA provides for election of directors by ballot)

Case III: Resolution is passed that the vacancy need not be filled [na tu nahi koi aur mangta]

At the annual general meeting at which a director retires as aforesaid, the company may pass a resolution that the vacancy need not be filled up.

Case IV: Neither vacancy filled nor resolution is passed for not filling the vacancy [hamse kuch nahi huwa toh?]

If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy then the following procedure be followed:

Step 1: The meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Step 2: If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless:

(a) A resolution for the re-appointment of such director has been put to the meeting and lost;

(b) The retiring director has expressed his unwillingness to be so re-appointed;

(c) He is not qualified or is disqualified for appointment;

(d) A resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or

(e) Appointment of directors to be voted individually.

DIRECTORS APPOINTED BY BOARD ADDITIONAL DIRECTOR [Section 161(1)]

[kaam jyada hai]

The Board can appoint additional directors provided they are authorised by the Articles of Association of the Company.

The additional director shall hold office only upto the date of next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

In case, the AGM gets postponed due to any reason, the additional director has to vacate his office on the date of AGM.

Note: A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director.

ALTERNATE DIRECTOR [Section 161(2)]

Authorisation for appointment:

The Board of Directors may appoint 0 they are

Authorised by AOA of the Company or

By a resolution passed in GM for appointment of alternate director.

Conditions for appointment of alternate director:

(a) **Outside India for at least 3 months:** The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.

(b) **Who cannot be appointed as Alternate Director:** Following persons cannot be appointed as the Alternate Director

- Person holding any alternate directorship for any other Director in the Company.
- Person holding directorship in the same company.

A Director cannot be appointed as Alternate Director in the same Company.

(c) **Alternate to an Independent Director:** If it is proposed to appoint an Alternate Director to an Independent Director, it must satisfy the criteria for appointment of an Independent Director.

(d) **Vacation of Alternate Director Office:** An alternate director shall vacate the office when the original director comes to India or as permitted by the original director.

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

NOMINEE DIRECTOR [Section 161(3)] [represent karega]

The Board of Directors may appoint any person as a director nominated by any financial institution/ Bank or also by private equity partners.

The t appointment of Nominee Director is based on the agreement between the financial institution/Bank for providing loan to the Company.

The Company and the Board of Directors have no option except to appoint such nominated person as nominated by the Bank/Financial Institution.

Nominee directors are appointed only for the purpose to take care of interest of the Bank/Financial Institution.

Special Note: The Board is bound to follow instruction or suggestion of Financial Institution/ Bank etc.

CASUAL VACANCY [Section 161(4)]

The Board of Directors can appoint any person as a director in place of casual vacancy caused by death or resignation before expiry of the term of a director appointed at General Meeting.

The appointed director shall hold office only up to the term of the director in whose place he is appointed.

This section applies to every Company whether Private or Public.

COMPARITIVE SUMMARY OF SECTION 161

Basis	Additional Director	Alternate Director	Casual Vacancy Director
Applicability	Every Company	Every Company	Every Company
Meaning	A person appointed on the Board by Directors	The BOD may appoint a person in place of a director who is out of India for 3 months or more. A person alternate to independent Director should be independent	Where office of a director who was originally appointed in GM comes to an end otherwise than normal course
Who cannot be appointed	A person who fails to get appointment in GM cannot be appointed as additional director	A person who holds alternate directorship for another person in the Co. v A person holding directorship in the Co.	—
Specific Authority	Specific Authority in AOA needed	Specific Authority in AOA needed, OR „ A resolution at GM needed for allowing BOD to appoint alternate director	No specific authority needed
Manner of appointment	Either by Passing BR at BM, or Circular Resolution	Either by Passing BR at BM, or Circular Resolution	Only at BM
Term of office	Earlier of the following: V Date of AGM, or s Last date at which AGM ought to be held	Earlier of the following: Max tenure of original director, or When original director returns to India	Term of Director of the director, in whose place Casual Vacancy director is appointed.
Nature	Non-Rotational Director	Non-Rotational Director	Non-Rotational Director
Compliance of Section 160 needed?	Needed	Needed	Needed
Compliance of Section 162 needed?	Not Applicable as section 162 applies to the directors appointed at GM	Not Applicable as section 162 applies to the directors appointed at GM	Not Applicable as section 162 applies to the directors appointed at GM

Q3. Vinay was appointed as an additional director by the Board of Directors of Prudent Ltd. in its meeting held on 20th July, 2005. Further, Vinay was appointed as a director by members of the company in its annual general meeting held on 2nd September, 2005. Comment whether Vinay is again required to file consent to act as a director.

(4 marks) (June, 2006)

A3. Section 161(1) of the Companies Act, 2013:

A person appointed as a director or reappointed as an additional or alternate director must sign and file with the Registrar his consent in writing to act as such director immediately on the expiry of his term of office within 30 days.

Therefore, Mr. Vinay has to file his fresh consent on his re-appointment as a director.

SMALL SHAREHOLDER DIRECTOR (Section 151 of the Companies Act, 2013)

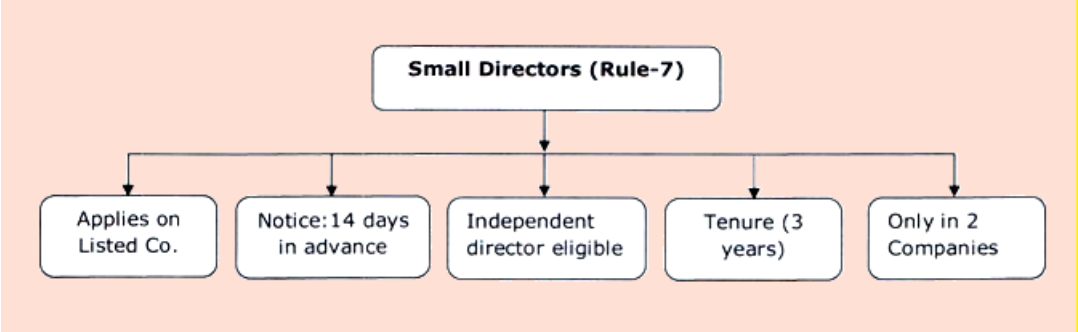
[Garibo ka masiha]

Every listed company may have one director elected by such small shareholders.

Here, "Small shareholder" means a shareholder holding shares of nominal value of not more than Rs.20,000/- or such other sum as may be prescribed.

Rule 7 of Companies (Appointment and Qualifications of Directors) Rules, 2014

Terms and Conditions for appointment of small shareholder's director:



(i) **Applicability on Companies:**

A listed company, May upon notice of not less than 1000 or 1/10 of the total number of small shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders. A listed company may also suo moto opt to have a director representing small shareholders.

(ii) **Notice:**

The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall give a signed notice to the company at least 14 days before the meeting.

(iii) **Attachment of the Notice:**

The notice shall be accompanied by a statement signed by the proposed director for the post of small shareholders' director stating

(a) His Director Identification Number;

(b) That he is not disqualified to become a director under the Act; and

(c) His consent to act as a director of the company.

(iv) **Eligible as Independent Director:**

If proposed director is qualified for appointment as an independent director and has given declaration for his independence then such director shall be considered as an independent director.

(v) **Tenure:**

The director's tenure as small shareholders' director shall not exceed a period of 3 consecutive years and he shall not be liable to retire by rotation. Further, he shall not be eligible for reappointment after the expiry of his tenure.

(vi) **Appointment only in two Companies:**

A small director shall not hold the office of small shareholders' director in more than two companies. If second company is in competitive business or is in conflict with business of the 1st company then he shall not be appointed in second company.

(vii) **No Appointments for 3 years:**

A small director shall directly or indirectly not be appointed or associated in any other capacity with the company for a period of 3 years from the date of cessation as a small shareholder's director.

INDEPENDENT DIRECTOR

Which companies are required to have independent directors?

The Companies Act, 2013 provides that every listed company to have at least 1/3 of the total number of directors as independent directors and further states that the Central Government may prescribe the minimum number of independent directors for a class of companies.

The Rule 8 prescribes at least two directors as independent directors for the following classes of public limited companies having:

(a) Paid-up share capital of Rs.10 crores or more; or

(b) Turnover of Rs.100 crores or more; or

(c) In aggregate, outstanding loans, debentures and deposits, exceeding Rs.50 crore.

However it is **not applicable** to

(a) Joint venture;

(b) Wholly owned subsidiary; and

(c) Dormant company as defined under section 455 of the Act.

Note: In case a company covered under this rule is required to appoint higher number of independents directors due to composition of its audit committee and then they shall appoint such higher number of independent directors.

Special Note: If a Company to which these condition applied, ceases to fulfil any of three conditions for three consecutive years then it shall not be required to appoint independent director.

Independent Director (Section 149(6) of the Companies Act, 2013)

Independent Director, in relation to a company, means a director other than a managing director or a whole time director or a nominee director—

(a) Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

In case of Government company, instead of Board, the Ministry or Department of the Central Government which is administrative incharge of the company.

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

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

(c) who has or had no "pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent, of his total income or such amount as may be prescribed," with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. In Government companies, the criteria is not required to be followed.

Special Note: **Pecuniary Relationship** in respect of Independent Director does not include following:

- **Remuneration**
- **Transaction not exceeding 10% of his total income** Inserted by Companies.

(d) none of whose relatives—

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

PROVIDED that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent, of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

(ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;

(iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or

(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent, or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii)

(e) who, neither himself nor any of his relatives—

(i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed for his employment during preceding three financial years.

(ii) is or has been an employee or proprietor or a partner, in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, of:

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm;

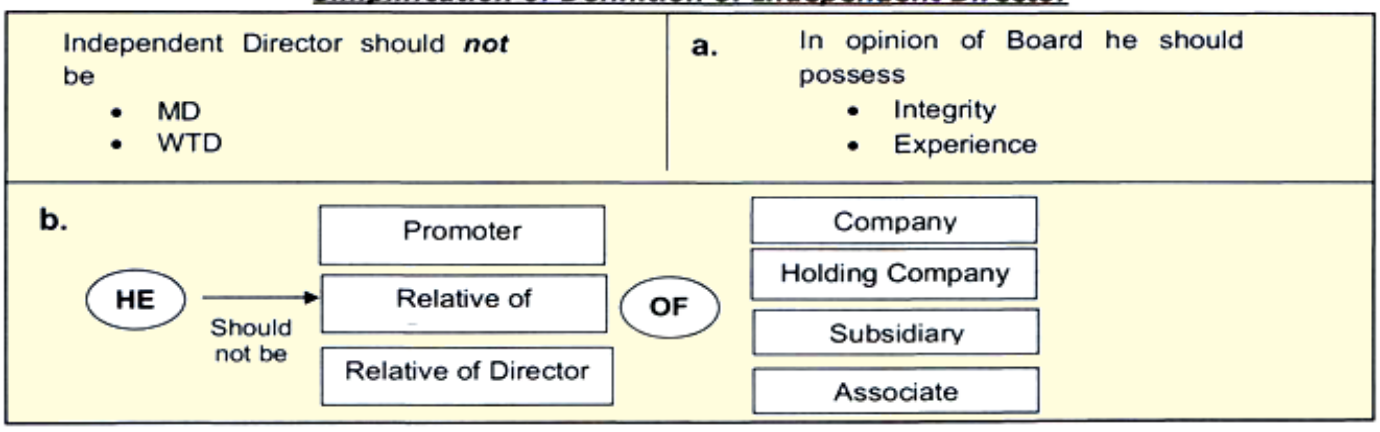
(iii) holds together with his relatives 2% or more of the total voting power of the company; or

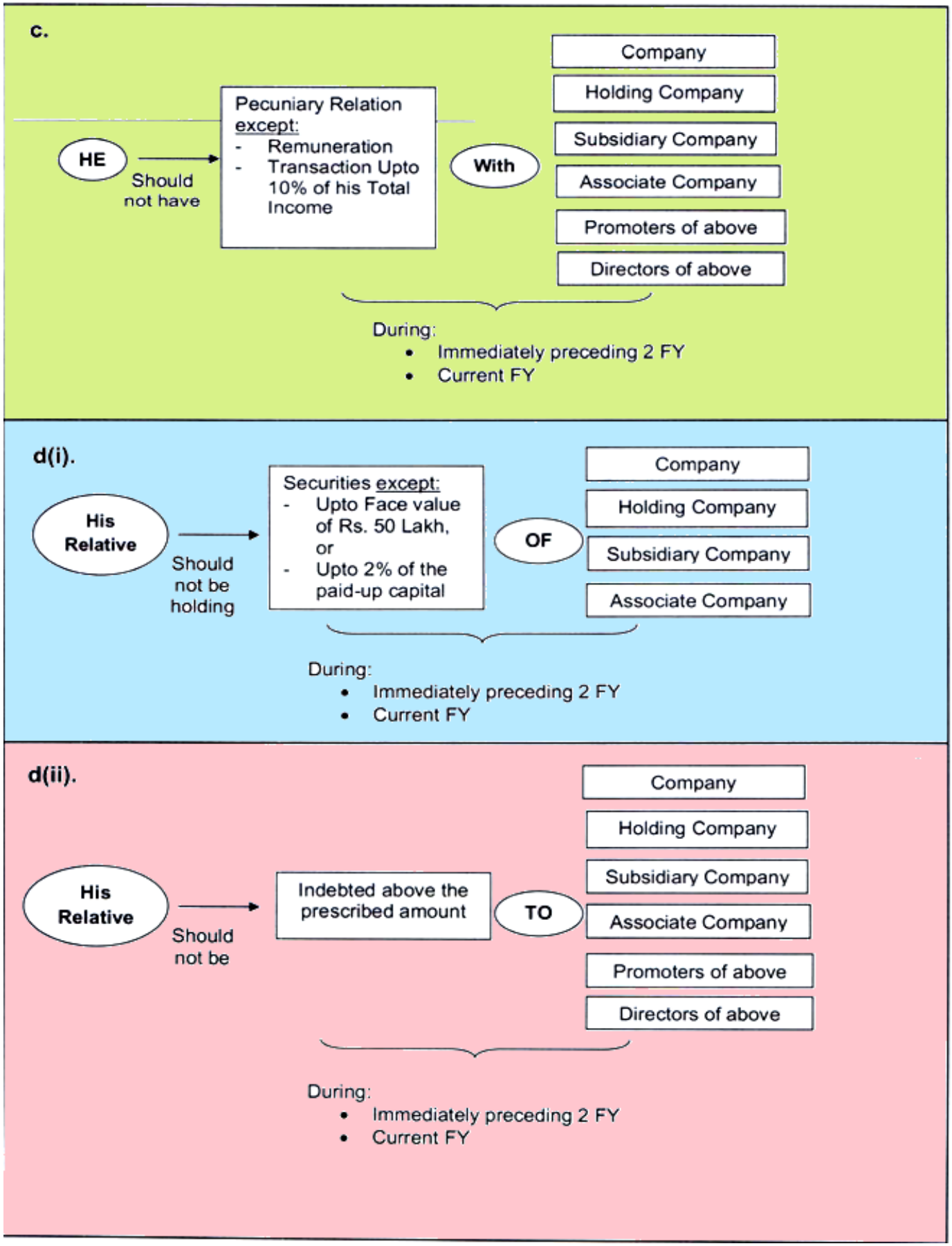
(iv) is a Chief Executive or director, by whatever name called, of any non-profit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or

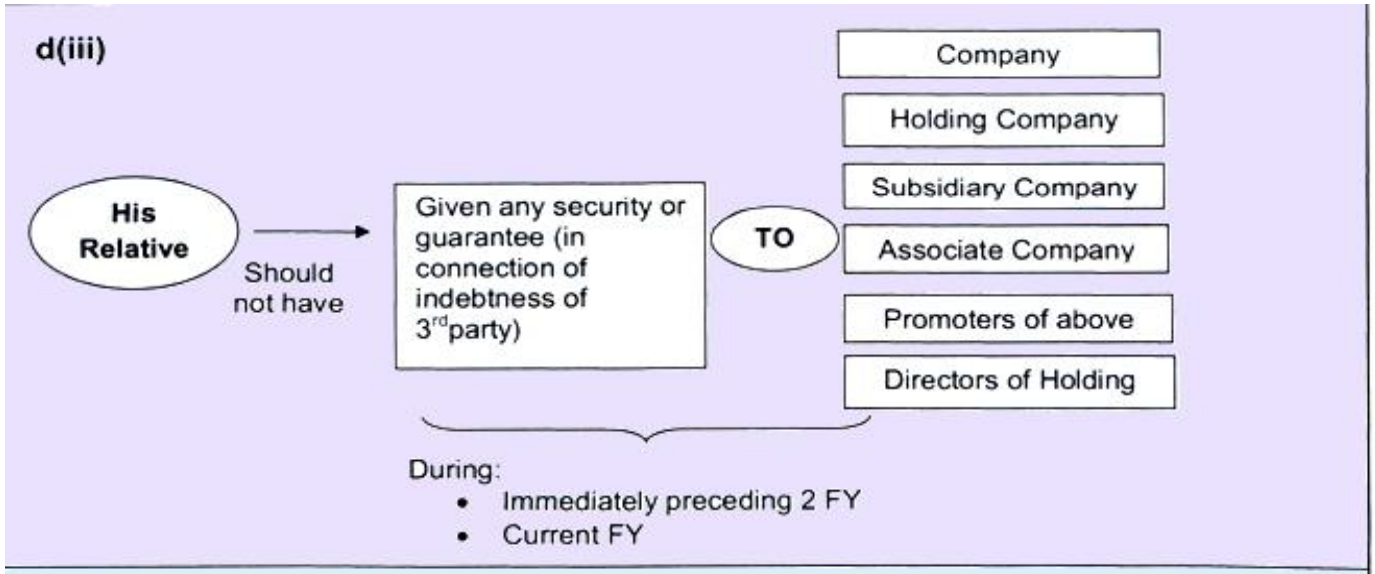
(f) who possesses such other qualifications as may be prescribed.

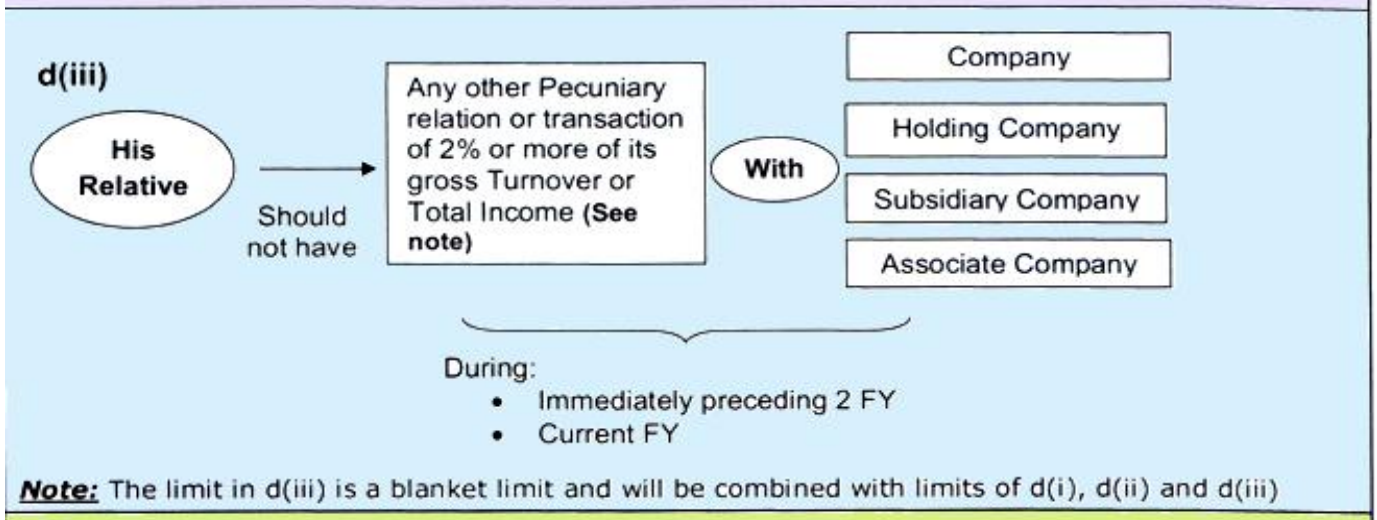
Since the definition given above is difficult to understand and remember, an attempt is made by the author to simplify it as follows:

Simplification of Definition of Independent Director

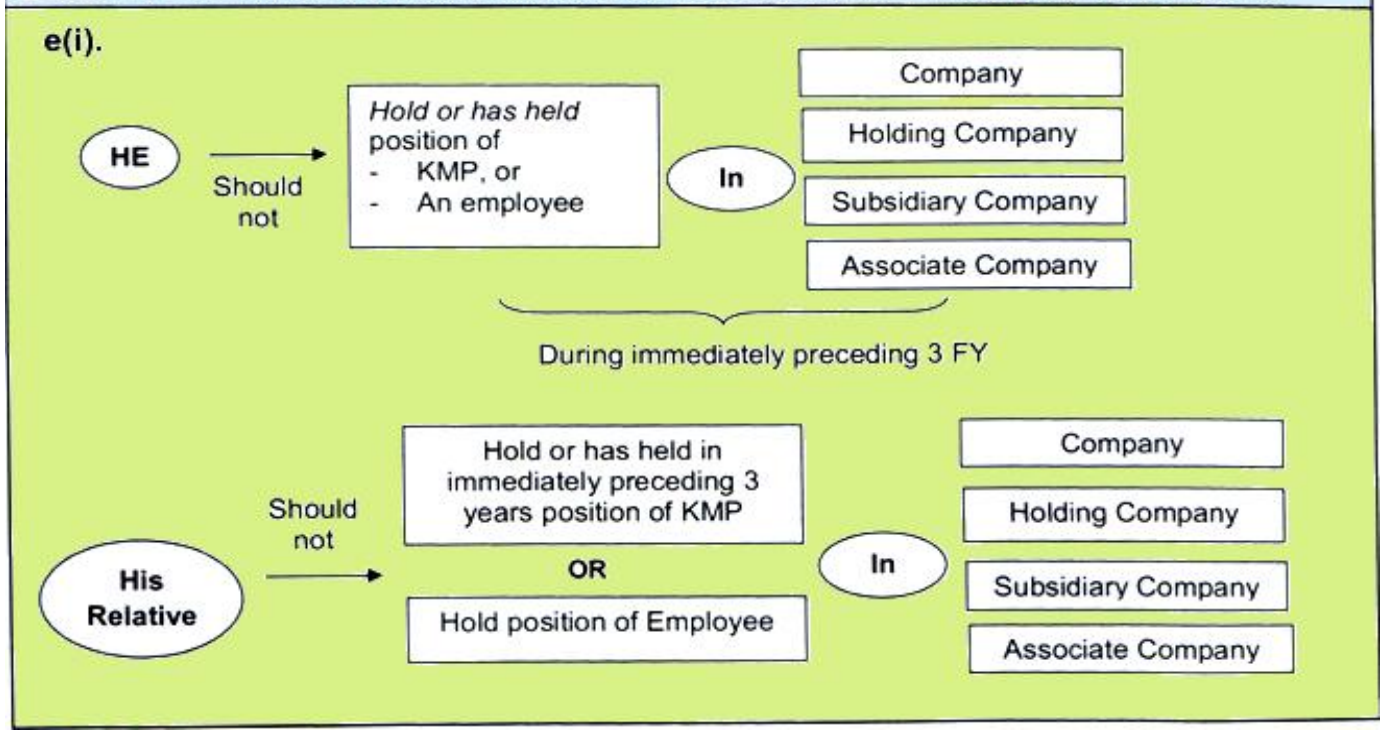


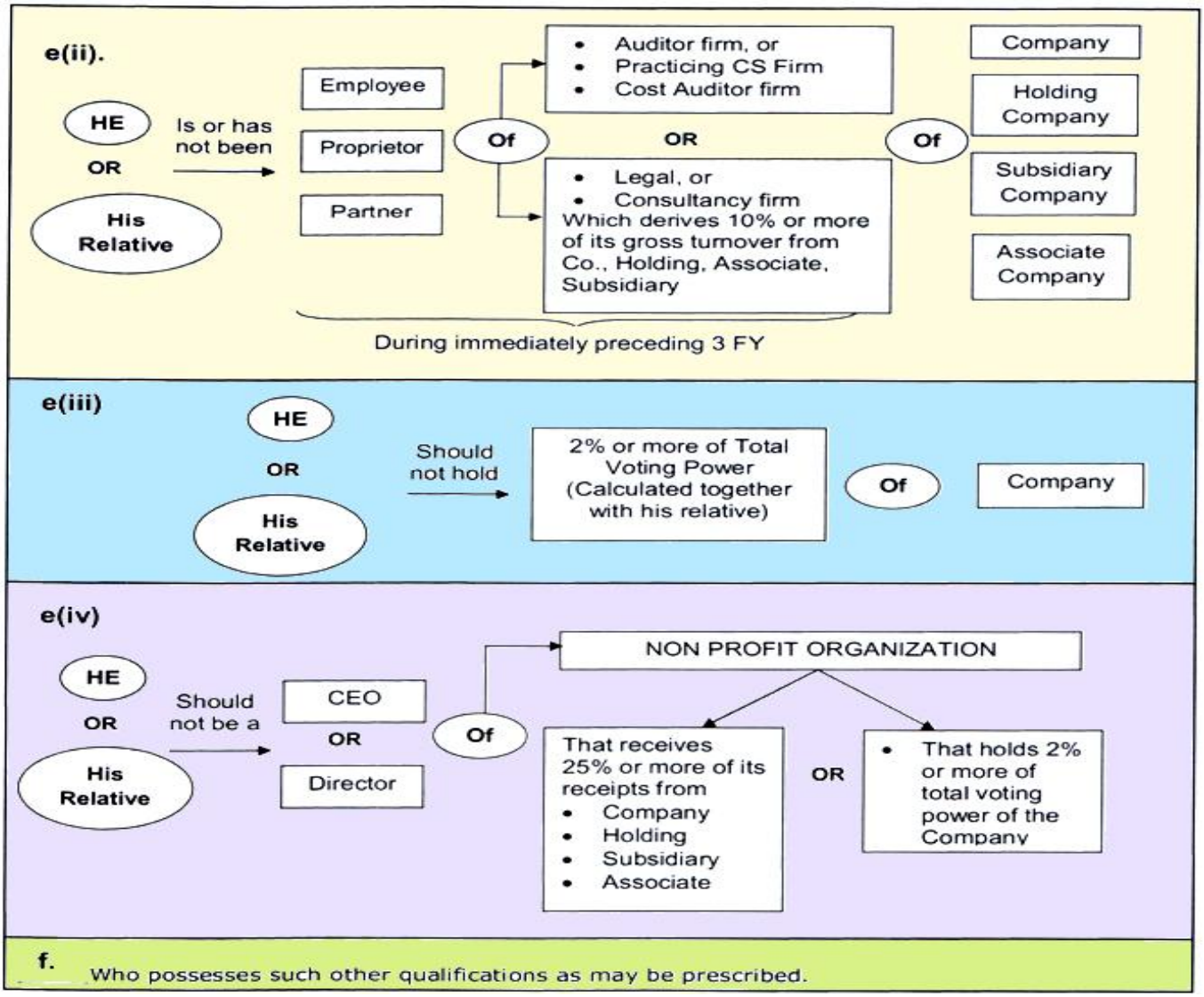

c.
HE
Should not have
Pecuniary Relation except:
- Remuneration
- Transaction Upto 10% of his Total Income
With
Company
Holding Company
Subsidiary Company
Associate Company
Promoters of above
Directors of above
During:
• Immediately preceding 2 FY
• Current FY
d(i).
His Relative
Should not be holding
Securities except:
- Upto Face value of Rs. 50 Lakh, or
- Upto 2% of the paid-up capital
OF
Company
Holding Company
Subsidiary Company
Associate Company
During:
• Immediately preceding 2 FY
• Current FY
d(ii).
His Relative
Should not be
Indebted above the prescribed amount
TO
Company
Holding Company
Subsidiary Company
Associate Company
Promoters of above
Directors of above
During:
• Immediately preceding 2 FY
• Current FY





Note: The limit in d(iii) is a blanket limit and will be combined with limits of d(i), d(ii) and d(iii)





QUALIFICATION OF INDEPENDENT DIRECTORS

Rule 5 of Companies (Appointment and Qualification of Directors) Rules, 2014

An independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research, corporate governance, technical operations or other disciplines related to the company's business.

Manner of selection of an Independent Director

(a) **Selection from Data Bank:** Independent directors may be selected from a data bank of eligible and willing persons maintained by the agency (Anybody, institute or association as may be authorised by Central Government like ICSI).

(b) **Approval from Shareholders:** The appointment of independent directors has to be approved by members in a General meeting and the explanatory statement annexed to the notice must indicate justification for such appointment.

(c) **Application for adding the name in the databank:** Any person who desires to get his name included in the data bank of independent directors shall make an application to the agency in Form DIR-1 Application for inclusion of name in the databank of Independent Directors which includes the personal, educational, professional, work experience, other Board details of the applicant.

The agency may charge a reasonable fee from the applicant for inclusion of his name in the data bank of independent directors.

An existing or applicant of such data bank of independent directors shall intimate any changes in his Particulars within 15 days of such change to the agency.

Declaration by independent director

Every independent director shall give a declaration that he meets the criteria of independence in following events:

1. At the first meeting of the Board in which he participates as a director
2. At the first meeting of the Board in every financial year
3. Whenever there is any change in the circumstances which may affect his status as an independent director.

Code for Independent Directors

The company and independent directors shall follow code of conduct for independent directors.

It is a guide to professional conduct for independent directors.

Adherence to these standards by independent directors and fulfilment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

Note: Code of Conduct includes guidelines of professional conduct, role and functions, duties, manner of appointment, reappointment, resignation or removal, separate meetings, evaluation mechanism.

Guidelines of professional conduct of an independent director shall:

(a) Uphold ethical standards of integrity and probity;

(b) Act objectively and constructively while exercising his duties;

(c) Exercise his responsibilities in a bona fide manner in the interest of the company;

(d) Devote sufficient time and attention to his professional obligations for informed and balanced decision making;

(e) Not allow any extraneous (unrelated) considerations that will vitiate his exercise of objective independent judgment in the paramount interest of the company as a whole, while concurring in or dissenting from the collective judgment of the Board in its decision making;

(f) Not abuse his position to the detriment of the company or its shareholders or for the purpose of gaining direct or indirect personal advantage or advantage for any associated person;

(g) Refrain from any action that would lead to loss of his independence;

(h) Where circumstances arise which make an independent director lose his independence, the independent director must immediately inform the Board accordingly;

(i) Assist the company in implementing the best corporate governance practices.

Tenure of Independent Director (Section 149 of the Companies Act, 2013)

An independent director shall hold office for 5 years in a row, but shall be eligible for reappointment on passing of a special resolution and other conditions.

No independent director shall hold office for more than 2 consecutive terms.

It means no independent director shall hold office for more than 10 years in a row.

Note: An Independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director.

The above appointment is only possible when an independent director has not been associated with the company in any other capacity either directly or indirectly.

Special Note: It has been clarified that as such while appointment of an ID for a term of less than 5 years would be permissible, appointment for any term (whether for 5 years or less) is to be treated as a one term.

Re-appointment of Independent Director:

The re-appointment of independent director shall be on the basis of report of performance evaluation for another tenure of 5 years.

Role and functions of an Independent Director:

To help in taking independent decisions	The independent director helps the Board of Directors to take independent decisions relating to the strategy, performance, risk management, resources, key appointments and standards of conduct of the Company.
Evaluation of the performance	The independent director evaluates the performance of board and management.
To Scrutinize the performance	The independent director scrutinizes the performance of management in the Board meeting agreed goals and objectives and monitor the reporting of performance.
To safeguard the interests of all stakeholders	The independent director has to take all measure to safeguard the interests of all stakeholders, particularly the minority shareholders of the Company.
To determine remuneration of KMP	The independent directors are to determine the remuneration of executive directors, key managerial personnel and senior management according to their role.

Manner of Appointment

Selection of Independent Director:

The Board shall select a person for the position of Independent director who has appropriate skills, experience and knowledge to discharge its functions and duties effectively.

Approval from shareholders:

The appointment of independent director(s) of the company shall be approved at the meeting of the shareholders.

Note: The explanatory statement attached to the notice of the meeting shall include the opinion of the Board for the proposed appointment of the independent director.

The opinion of the Board shall explain fulfilment of the conditions as specified in Companies Act, 2013 and its rules.

Finalization of the terms of appointment:

The appointment of independent directors shall be finalized through a letter of appointment, which shall cover:

(a) The term (period) of appointment;

(b) The expectation of the Board from the Independent director;

(c) The fiduciary duties that come with such an appointment along with accompanying liabilities;

(d) Provision for providing insurance to the Independent Directors;

(e) The Code of Business Ethics of the company;

(f) List of actions that a director should not do while functioning as such in the company; and

(g) Other details like remuneration, sitting fees, reimbursement of expenses for Board Meeting and other meetings etc.

Open to the General Public for Inspection:

The terms and conditions of appointment of independent directors shall be open for inspection at the registered office by any member during normal business hours.

Terms & Conditions of Appointment on the Company's website:

The terms and conditions of appointment of independent directors shall also be posted on the company's website.

Resignation or removal of Independent Director:

An independent director shall be resigned or removed subject to the fulfilment of the following conditions:

1. Notice in writing: An Independent director may resign from his office by giving a notice in writing to the company and the Board.

   The receipt of such notice shall be taken into account and shall also be informed to ROC by the company.

   Note: The resignation of a director shall take effect from the date on which the notice is received by the company or the date as specified by the director, whichever is later.

2. Replacement of Independent Director: An independent director who resigns or is removed shall be replaced by a independent director within 180 days from the date of such resignation or removal.

3. No Replacement till resignation or removal: Where the company fulfils the requirement of independent directors even without filling the vacancy created by resignation or removal, the requirement of Replacement by a new independent director shall not apply.

Separate meetings of Independent Directors:

The independent directors shall hold at least 1 meeting in a year without the presence of non- independent directors (i.e. MD/WTD) and members of management (i.e. Employee).

All independent directors of the Company shall make every effort to be present at the meeting of Independent Directors.

The meeting of Independent Directors shall:

(a) Review the performance of non-independent directors and the Board as a whole;

(b) Review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

(c) Assess the quality, quantity and timeliness of flow of information between the company management.

Liability of Independent Director:

An independent director or a non-executive director not being promoter or key managerial personnel shall be held liable only to those acts of omission which had occurred with their knowledge and with his consent or connivance or where they had not acted diligently.

Retirement of independent directors:

The provisions in respect of retirement of directors by rotation shall not apply to the independent directors.

Remuneration of Independent Director:

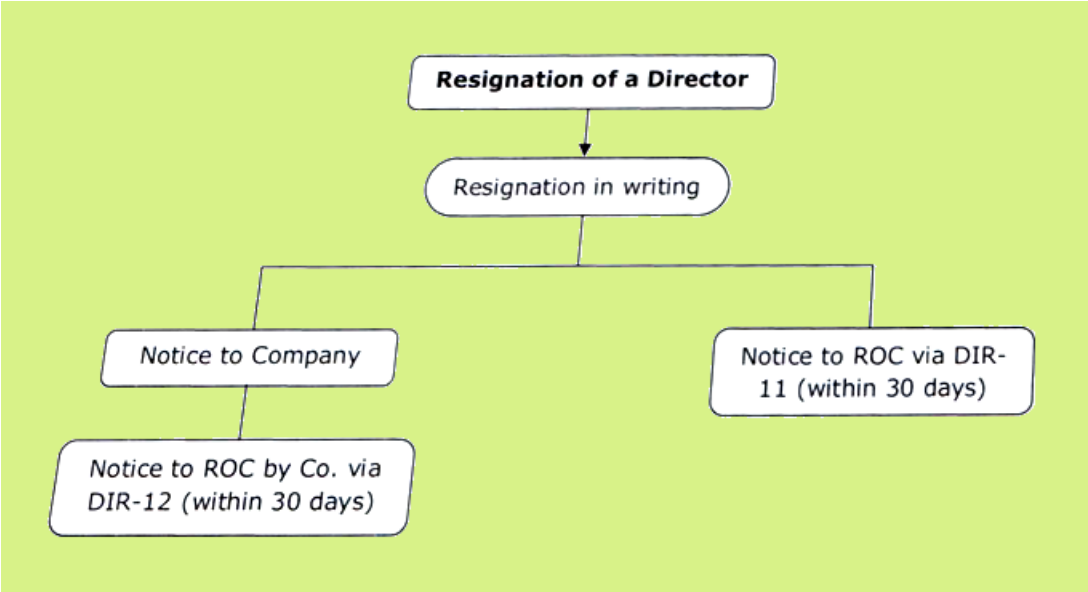
An independent director shall not be entitled to any stock option scheme (i.e. ESOP & Sweat equity) but shall receive remuneration by way of sitting fee, reimbursement of expenses for participation in the Board Meetings and other meetings and profit related commission as approved by the members.

LODR Requirement:

A person shall not serve as an independent director in more than seven listed entities. Provided that any person who is serving as a whole time director in any listed entity shall serve as an independent director in not more than three listed entities.

RESIGNATION OF DIRECTOR (Section 168 of the Companies Act, 2013)

[muje nahi karna kaam]



Resignation Process for making it effective

(a) **Resignation in writing:**

A director may resign from his office by giving notice in writing or another mode of communication like e-mail.

(b) **Notice to ROC by the Company:**

The Board of Directors of the Company shall send notice to the ROC in Form DIR-12 within 30 days from the date of receipt of resignation notice.

(c) **Recording of the Resignation:**

The resignation of a director should be in the Directors' Report of subsequent general meeting and also post such information on website of the Company.

(d) **Notice to ROC by the Director:**

The director shall also forward a copy of resignation along with detailed reasons for the resignation to the ROC in Form DIR-11 within 30 days from the date of resignation.

Note: The notice of resignation of the Director shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. The director who has resigned shall be liable for all offences occurred during his tenure even after.

RESPONSIBILITY OF DIRECTOR AFTER RESIGNATION:

No director shall be liable for any liabilities if arise after the date of his resignation whether the company has filed DIR-12 or not but he shall be responsible for all activities done during his tenure even after his resignation.

Case Law: **Dushyant D. Anjaria v. Wall Street Finance Ltd.**

Facts: In this case, a director intimated resignation to the company and the company failed to communicate the same to ROC.

Judgment: In this case, the Bombay High Court held that the resignation of a Director would be effective from the date it was submitted because the letter brings out clearly his intentions to resign. However, the delayed intimation to the ROC was delayed on the part of the company about the date of the resignation; the resigning Director could not be burdened with responsibility and liability for such delay.

Q4. The Chairman and Managing Director of Progressive Ltd. resigned on 6th May, 2009 as such, but the company filed Form No. DIR -12 with the Registrar of Companies stating the date of resignation as 15th March, 2010. The company issued various cheques to its investors in repayment of their deposits after 6th May, 2009 which were bounced. The investors filed a complaint against the former chairman and managing director. The articles of association of the company provided that the resignation would be effective from the date it was tendered. Will the chairman and managing director be liable in the instant case? Dec., 2011

A4. The Chairman and Managing Director of Progressive Limited could not be held responsible under sections 138 & 141 of the Negotiable Instruments Act, 1881.

REMOVAL OF DIRECTORS (Section 169 of the Companies Act, 2013)

A company may remove a director except the director appointed by NCLT, before the expiry of the period of his office after giving him a reasonable opportunity of being heard and passing the ordinary resolution.

Conditions

(a) **Special Notice:**

A special notice of the meeting shall be required of such resolution, to remove a director or to appoint somebody in place of a director so removed.

(b) **Send Special Notice to Director:**

On receipt of notice of a resolution regarding removal of a director, the company shall forthwith send a copy thereof to the director concerned.

(c) **Send Special Notice to proposed Director:**

A vacancy created by the removal of a director may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given.

(d) **Tenure for Appointment:**

A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.

(e) If the vacancy is not filled, it may be filled as a casual vacancy by the Board of Directors.

RIGHTS AND DUTIES OF DIRECTORS

The **duties of directors** as contained in section 166 of the Companies Act, 2013 are described as follows

1. **Duty to act as per the articles of the company-**

   The director of a company shall act in accordance with the articles of the company.

2. **Duty to act in good faith-**

   A director of a company shall act in good faith in order to promote the company, its employees, the shareholders, and the community and for the protection of environment.

3. **Duty to exercise due care-**

   A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

4. **Duty to avoid conflict of interest-**

   A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

5. **Duty not to make any undue gain-**

   A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable

to pay an amount equal to that gain to the company.

6. Duty not to assign his office-

A director of a company shall not assign his office and any assignment so made shall be void.

Punishment for contravention

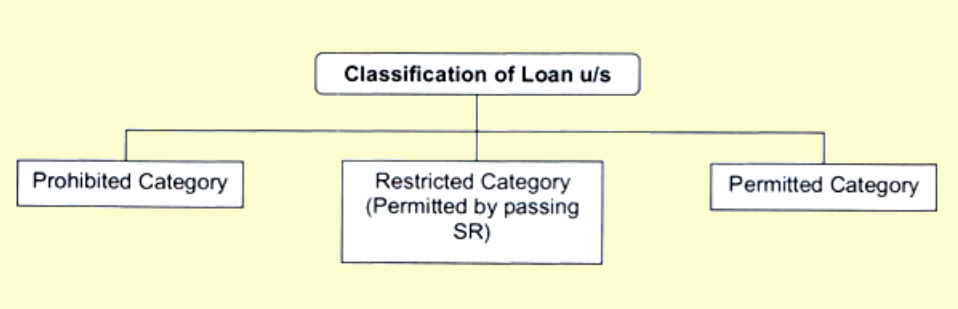
If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

LOANS TO DIRECTOR (Section 185 of the Companies Act, 2013)

This section puts restriction on company in connection with giving loan or guarantee or provides any securities to its directors or to any person in whom director is interested.

The content is as per Amendment and Substitution by Companies (Amendment) Act, 2017

To understand this section let us divide the loans to directors or any other person in whom director is interested in three parts:



I. PROHIBITED CATEGORY:

Any Company shall not (directly or indirectly)

- Advance any loan (including book debt) to
- Any director of Company or its Holding Company; or
- Any partner or relative of any such director; or
- Any firm in which any such director or relative is partner
- Given any guarantee or provide any security in connection with any loan taken by any director of Company or its Holding Company; or Any partner or relative of any such director; or Any firm in which any such director or relative is partner

II. RESTRICTED CATEGORY

A company may subject to the conditions mentioned below

- Advance any loan (including book debt) to any person in whom any of the director is interested, or
- Given any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested

Meaning of Any person in whom any of the director of the company is interested means—

(a) Any private company of which any such director is a director or member;

(b) Any body corporate at a general meeting of which 25% or more of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c) Any body corporate, the Board of Directors, managing director or manager, whereof is accustomed to act in

accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

Condition to grant above loans and guarantee/securities-

1. Special Resolution-

   SR needs to be passed by the company in general meeting.

   The explanatory statement to the notice of GM shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security.

2. The loans are utilised by the borrowing company for its principal business activities.

III. PERMITTED CATEGORY

The section does not apply to loans granted under following 4 categories and therefore these loans/securities/guarantees can be provided by the Company:

1. **Loan to MD, WTD:**

   The section will not apply to loan given to Managing Director, Whole Time Director, therefore loan can be provided if any of the following 2 conditions are satisfied:

   Conditions:

   • The loan is given as a part of the conditions of service extended by the company to all its employees; or

   • The loan is granted pursuant to any scheme approved by the members by a special resolution.

2. **Loan/Guarantee/Security in Ordinary Course of Business:**

   A company which in the ordinary course of its business provides loans or gives guarantees or securities can grant such loans if it satisfies the following condition:

   Condition:

   Interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan.

3. **Loan/Guarantee/Security to Wholly Owned Subsidiary:**

   Any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company.

   Condition: The loans are utilised by the wholly owned subsidiary company for its principal business activities.

4. **Guarantee/Security in case of Subsidiary Company:**

   Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company.

   Condition: The loans are utilised by the subsidiary company for its principal business activities

   Case Law: **Dr. Fredie Ardesir Mehta v. Union of India:**

   In this case, the Bombay High Court held that where company sells flat to one of its directors on receipt of 50% cash and 50% agrees to receive by instalments does not amount to loan. It is like a sale credit and shall not be treated loan to directors, therefore section 185 does not attract.

Note: A company may give loan to managing or whole-time director as part of the conditions of service extended by the company to all its employees or pursuant to any scheme approved by the members by a special resolution.

PUNISHMENT OF CONTRAVENTION:

- To the Company: Fine Minimum Rs.5 lakh to Maximum Rs.25 lakh
- To the Office in Default:

  Imprisonment upto 6 months or
  Fine of Minimum Rs.5 lakh to Maximum Rs.25 lakh or
  Both
- To the person to whom Loan/Guarantee/Security is given:

  Imprisonment upto 6 months or
  Fine: Minimum Rs.5 lakh to Maximum Rs.25 lakh or
  Both

MEMBERS RIGHT TO INSPECT (SECTION 171)

(i) The register of directors and Key Managerial Personnel kept under section 170(1) shall be open for inspection during business hours and the members shall have the right to take extracts there from and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(1)(a)]

(ii) Such register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Section 171(1)(b)]

(iii) If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an application made to him order immediate inspection and supply of copies required there under. [Section 171(2)]

(iv) In case of Government Company - Section 171 shall not apply to Government Company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Governments.

CHAPTER 16

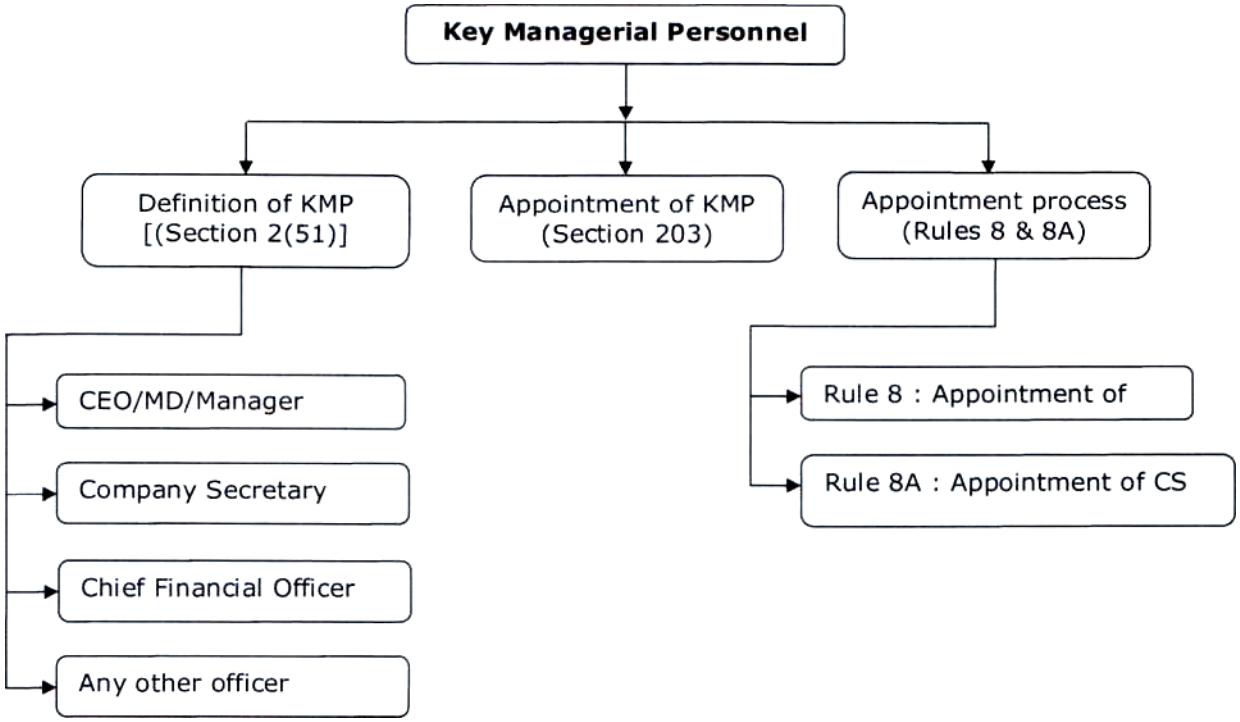
KEY MANAGERIAL PERSONNEL

The Companies Act, 2013 recognises the appointment of the Key Managerial Personnel (KMP) on top level of the organizational structure for managing entire business of a Company.

KMP is also responsible for all regulatory compliances not only as per the Companies Act, 2013 but also for other laws applicable on Companies.

It means KMP is the executive management of a company and responsible for the day to day management of a company.

PROVISIONS RELATING TO KMP



KEY MANAGERIAL PERSONNEL (Section 2(51) of the Companies Act, 2013)

Key Managerial Personnel, in relation to a company, means:

(a) The Chief Executive Officer or the managing director or the manager;

(b) The Company Secretary;

(c) The Whole-Time Director;

(d) The Chief Financial Officer;

(e) Such other officer, not more than one level below the directors who is in whole time employment, designated as Key Managerial Personnel by the Board, and

(f) Such other officer as may be prescribed.

CS SHUBHAM ABAD
8149221250

Elements of Definition of Kev Managerial Personnel

Chief Executive Officer [(Section 2(18)]: "Chief Executive Officer" mean an officer of a company, who has been designated as such by it.

Chief Financial Officer [(Section 2(19)]: "Chief Financial Officer" means a person appointed as the Chief Financial Officer of a company.

Managing Director [(Section 2(54)]: "Managing Director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Whole Time Director [Section 2 (94)]: Whole-Time Director means a director who is in the wholetime employment of the company.

Manager [(Section 2(53)]: "Manager" means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not.

Company Secretary [(Section 2(24)]: "Company Secretary or Secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act.

APPOINTMENT OF KEY MANAGERIAL PERSONNEL

Section 203 of the Companies Act, 2013 & Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

Every listed company and every unlisted public company having a paid-up share capital of Rs.10 crores or more shall appoint following whole time key managerial personnel:

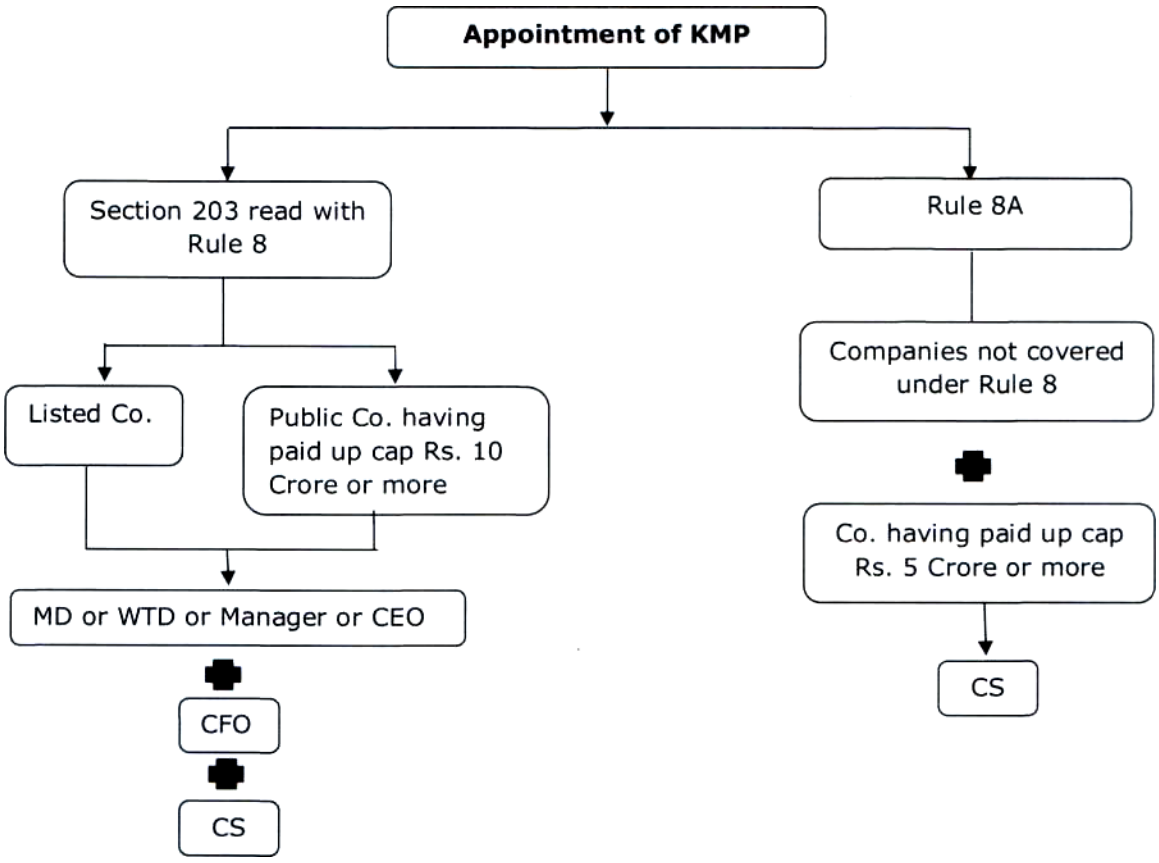
(a) Managing Director, or Chief Executive Officer or Manager and in their absence, a whole-time director;

(b) Company Secretary; and

(c) Chief Financial Officer:

Later on Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, which laid down that a company other than a company covered under rule 8 which has a paid-up share capital of five crores rupees or more shall have a whole-time company secretary other than the KMP as given in Rule 8.

CS SHUBHAM ABAD
8149221250



Appointment of KMP by the Board

Every whole-time key managerial personnel of a company shall be appointed by passing a Board Resolution containing the terms and conditions of the appointment including the remuneration.

Note:

1. No KMP shall become the Chairperson unless the articles of such a company provide otherwise.
2. Whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, he can hold directorship in other companies with the permission of the Board.
3. A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company if the following conditions are satisfied:
   In addition to the current employment, he can be appointed as MD or manager in only 1 more company.
   Such appointment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting.
   Specific notice has been given to all the directors then in India.

Re-appointment of KMP by the Board

If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board within 6 months from the date of such vacancy.

Note: A whole-time key managerial personnel holding office in more than one company at the same time has to choose one company within 6 months from the date of commencement of this Act.

Procedure for appointment of KMP

Hold BM and pass BR
↓
Make sure the whole time KMP is not a KMP in any other company except in subsidiary.
↓
MD can be appointed even if he is MD or Manager of one more Company, provided conditions are fulfilled
↓
File MGT-14 within 30 days of appointment.
↓
File DIR-12 within 30 days
↓
File MR-1 within 60 days of appointment.
↓
If vacancy arises, fill it up within 6 months at BM

APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER

Tenure for MD/WTD/Manager (Section 196 of the Companies Act, 2013)

A company shall not appoint or re-appoint any person as its MD, WTD or Manager for a term exceeding 5 years at a time and no reappointment shall be made earlier than one year before the expiry of his term.

Note: No company shall appoint or employ at the same time a Managing Director or a Manager.

Schedule V complied- Board can appoint KMP	Schedule V not complied- Approval of CG & Shareholders required

CS SHUBHAM ABAD
8149221250

Appointment by Board Resolution: A MD, WTD or manager shall be appointed and the terms and conditions of such appointment and remuneration payable should also be approved by the Board Meeting.

Approval by Shareholders & CG: The approval from shareholders and the Central Govt, is required in case any variances in the terms & conditions as specified in Schedule V.

Note: Approval of the CG is not necessary if the appointment of MD, WTD or Manager, is made in accordance with the terms & conditions as specified in Schedule V.

In short, the appointment of a MD, WTD or manager and the terms and conditions of such appointment and remuneration payable thereon must be first approved by the Board and then by an ordinary resolution passed at a general meeting of the company.

Filing of return for the appointment of KMP

Rule 3 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014

A company shall file a return of appointment of a MD, WTD or Manager, CEO, CS and CFO within 60 days of their appointment, with the ROC in Form No. MR-1.

Note: Where an appointment of a MD, WTD or manager is not approved by the company at a general meeting, any act done by him before such approval shall be treated as valid.

No company shall appoint at the same time a Managing Director or a Manager.

PROCEDURE FOR APPROVAL OF CENTRAL GOVERNMENT

An application seeking approval to the appointment of a MD, WTD or Manager shall be made to the Central Government in e-Form No. MR-2.

The Central Government shall consider the following with regard to the appointment of a MD, WTD or Manager:

(a) the financial position of the company;

(b) the remuneration or commission drawn by the individual concerned in any other capacity;

(c) the remuneration or commission drawn by him from any other company;

(d) professional qualifications and experience of the individual concerned;

(e) such other matters as may be prescribed.

DISQUALIFICATIONS OF KMPS

No company shall appoint or continue the employment of any person as its MD, WTD or manager who:

(a) Is less than 21 years or has attained the age of 70 years.

Note: A person, who has attained 70 years, may be appointed by passing a special resolution.

Where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

(b) Is an undischarged insolvent or has at any time been adjudged as an insolvent or

(c) Has suspended the payments to his creditors

(d) Has convicted by a court of an offence and sentenced for a period of more than 6 months.

Apart from the above conditions, a person to be eligible for appointment as MD, WTD, or manager without the approval of the Central Government.

These conditions are as below:

Part - I of schedule - V

(a) He had not been sentenced to imprisonment for any period, or to a fine exceeding Rs.1000/-, for the conviction of an offence under any of the following Acts, namely:-

1. The Indian Stamp Act, 1899,
2. The Central Excise Act, 1944,
3. The Industries (Development and Regulation) Act, 1951,
4. The Prevention of Food Adulteration Act, 1954 ,
5. The Essential Commodities Act, 1955,
6. The Companies Act, 2013,
7. The Securities Contracts (Regulation) Act, 1956,
8. The Wealth-tax Act, 1957,
9. The Income-tax Act, 1961,
10. The Customs Act, 1962,
11. The Competition Act, 2002,
12. The Foreign Exchange Management Act, 1999,
13. The Sick Industrial Companies (Special Provisions) Act, 1985,
14. The Securities and Exchange Board of India Act, 1992,
15. The Foreign Trade (Development and Regulation) Act, 1992;
16. The Prevention of Money Laundering Act, 2002;

(b) He had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;

(c) Where he is a managerial person in more than one company, he draws remuneration from one or more companies.

(d) He is resident in India.

Note: Resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India:

(i) For taking up employment in India, or

(ii) For carrying on a business or vocation in India.

Special Note: The person must have obtained the proper Employment Visa from the concerned Indian Mission abroad.

Exemption to Specified Companies:

1. Private Companies:
   Private Companies are exempted from Section 196(4) which deals with appointment of Managing Director/Whole time director/manager/approval of Central Government.

   Section 196(5) deals with validating actions of Managing/Whole time Director/manager, if the appointment is not approved by a company in general meeting.

2. Government Companies:
   Government Companies are exempted from Section 196(4) which deals with appointment of Managing Director/Whole time director/manager/approval of Central Government.

   Section 196(5) deals with validating actions of Managing/Whole time Director/manager, if the appointment is not approved by a company in general meeting.

   Section 196(2) relates to term of managing director not to exceed five years.

3. IFSC Public Companies:
   International Financial Services Centers are exempted from Section 196(4) which deals with appointment of Managing Director/Whole time director/manager/approval of Central Government.

Procedure for appointment of MD

Hold BM and pass BR
↓
Hold GM and pass resolution
↓
File MR-2 (application to seek approval of CG)
↓
File MGT-14 within 30 days of appointment.
↓
File DIR-12 within 30 days
↓
File MR-1 within 60 days of appointment.

COMPANY SECRETARY

Who can be Company Secretary?

Definition as per Companies Act, 2013

Section 2(24) of the Companies Act, 2013 defines "company secretary" or "secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act.

Definition as per Company Secretaries Act, 1980

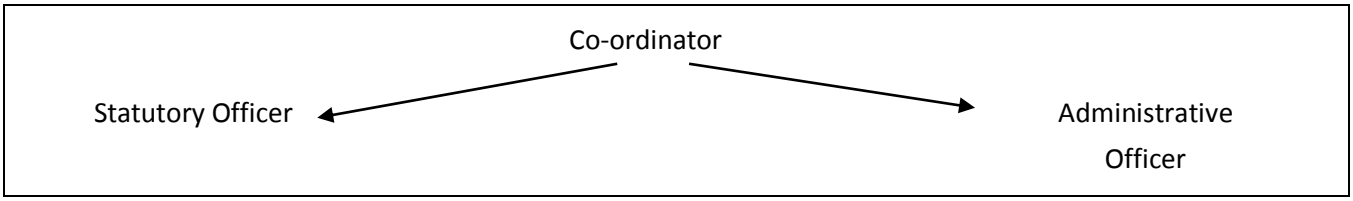
According to clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980, a company secretary means a person who is a member of the Institute of Company Secretaries of India.

Therefore, 'Company Secretary' means a person who is a member of the Institute of Company Secretaries of India (ICSI) and who is appointed by a company to perform the functions of a company secretary.

Appointment of Company Secretary

Rule 8 read with Rule 8A of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides for mandatory appointment of whole time company secretary in companies having a paid up share capital of five crores rupees or more.

Roles & Responsibilities of Company Secretary



1. Statutory Officer:

The company secretary is an officer responsible for compliance with numerous legal requirements under different Acts including the Companies Act, 2013 as applicable to companies. The responsibilities of company secretary have also increased as he has been included in the definition of Key Managerial Personnel.

Under the Companies Act, he has either to comply with the various provisions of the Act or is liable to be fined or imprisoned for non-compliance of his obligations.

The responsibility of a secretary as a statutory officer has been greatly expanded by enactment of various economic statutes, like Competition Act, Foreign Exchange Management Act, SEBI Act, Security Contracts (Regulation) Act, 1956 and Depositories Act, etc.

2. Co-ordinator:

The Company Secretary as a co-ordinator has an important role to play in administration of the company's business and affairs.

It is for the secretary to ensure effective execution and implementation of the management policies laid out by the Board.

The position that the company secretary occupies in the administrative set-up of the company makes his function as one of co-ordinator and link between the top management and other levels.

He is not only the communicating channel between the Board and the executives but he also co-ordinates the actions of other executives vis-a-vis the Board.

The ambit of his role as a co-ordinator also extends beyond the Company and he is the link between the Company and its shareholders, the society and the Government.

Thus, the role of a company secretary as a co-ordinator has two aspects, namely internal and external.

Relationship with other Functionaries:

1. Trade Union
2. Shareholders
3. Government
4. Auditor
5. Community
3. Administrative Officer: The role of a company secretary as an administrator can be sub-divided into following categories:

- Organizational Administration
- Financial Administration
- Tax Administration
- Office Administration
- Personnel Administration
- Administering Company's property

Statutory Duties & Liabilities of a Company Secretary

The duties of the Company Secretary stipulated under law include:

1. Regarding compliance with requirement of registration
2. Authentication of documents, proceedings and contracts
3. Signing of share certificates
4. Signing of Annual Return u/s 92
5. Signing of financial statements
6. Appear before NCLT to represent the Company
7. Company Secretary of a Listed Company will also be designated as Compliance Office as per SEBI (LODR) Regulations, 2015

Liabilities of Company Secretary-

The Company Secretary being an officer in default can be held liable for various provisions under the Act.

Procedure For Appointment Of Company Secretary

Conduct Interviews and select an Individual
↓
Hold BM and pass a Board Resolution for appointment
↓
File DIR-12 within 30 days of appointment.
↓
File MGT-14 within 30 days of appointment.
↓
Make entries in Directors and KMP Register
↓
Inform Stock Exchange in case of Listed Company.

REMOVAL OF COMPANY SECRETARY

A company secretary can be removed or dismissed like any other employees of the organization.

Since he is appointed by Board, the Board of Directors of a company has absolute discretion to remove a company secretary subject to terms of appointment and opportunity of being heard.

Procedure For Removal Of Company Secretary

Check out the terms and conditions of appointment
↓
Hold BM and pass a Board Resolution for removal
↓
File DIR-12 within 30 days of removal
↓
File MGT-14 within 30 days of appointment.
↓
Make entries in Directors and KMP Register
↓

Inform Stock Exchange in case of Listed Company.
↓
The vacancy should be filed within 6 months.

FUNCTIONS OF COMPANY SECRETARY (Section 205 of the Companies Act, 2013)

The functions of the company secretary shall include:

(a) To report to the Board about compliance of this Act and its rules and other laws applicable to the company;

(b) To ensure the compliance of the applicable secretarial standards as issued by ICSI;

(c) To discharge such other duties as may be prescribed by the Act.

Additional Functions

(a) To provide guidance to the directors of the company either collectively and individually as they may require, with regard to discharge their duties, responsibilities and powers;

(b) To convene the meetings and attend Board, committee and general meetings, and maintain the minutes of these meetings;

(c) To obtain approvals from the Board, general meetings, the Government and such other authorities as required under this Act;

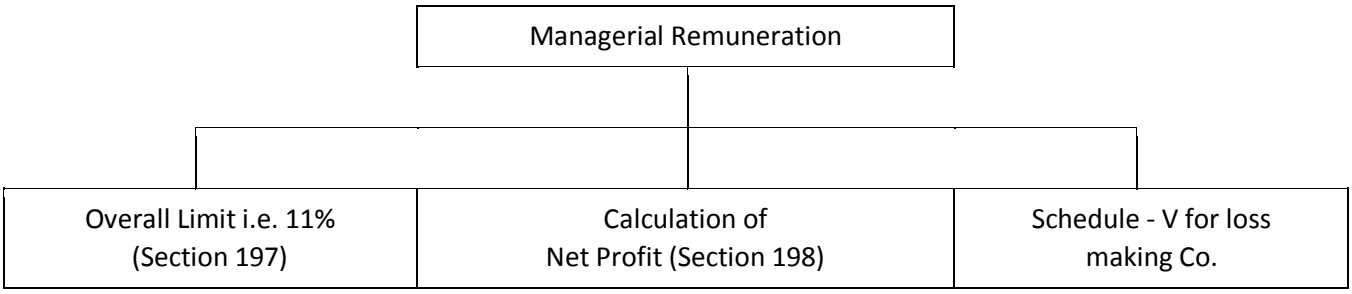
(d) To represent before various regulators, Tribunal and other authorities under this Act;

(e) To assist the Board in the conduct of the affairs of the company;

(f) To assist and advise the Board in ensuring good corporate governance; and

(g) To discharge such other duties as may be assigned by the Board from time to time or as prescribed in this Act.

MANAGERIAL REMUNERATION OF KMP



The provisions relating of the Managerial Personnel in the Companies Act, 2013 are as under:

(a) Section 197: Overall ceiling for Managerial Remuneration i.e. 11% of the Net Profit or Individual limit.

(b) Section 198: Calculation of Net Profit as required under section 197.

(c) Schedule V: Conditions for Appointments of KMPs and their remunerations in case of a Company having no profit or inadequate profits.

Overall Limit Of Managerial Remuneration (Applicable in case of Adequate Profits) Section 197 of the Companies Act, 2013

The maximum ceiling for payment of managerial remuneration by a public company to its MD, WTD and which shall not exceed 11% of the net profit of the company in a particular financial year.

Note: The calculation of net profit for the purpose of Managerial Remuneration shall be made in accordance with section 198.

Special Note: A company may pay more than 11% of the Net Profit with authority of shareholders. (Prior to Companies (Amendment) Act, 2017 approval of Central Government was also needed)

Non-Applicability: This section does not apply to

-A Private company.

-A Government Company

-IFSC (International Financial Services Centers) Public Company Individual limit of Managerial Remuneration to MD, WTD or Manager

The remuneration payable to any one MD or WTD or Manager shall not exceed 5% of the net profits and if there are more than one such directors and manager, remuneration shall not exceed 10% of the net profits.

Note: The Company may increase the above limit of Managerial Remuneration subject to the approval of shareholders by Special Resolution in general meeting.

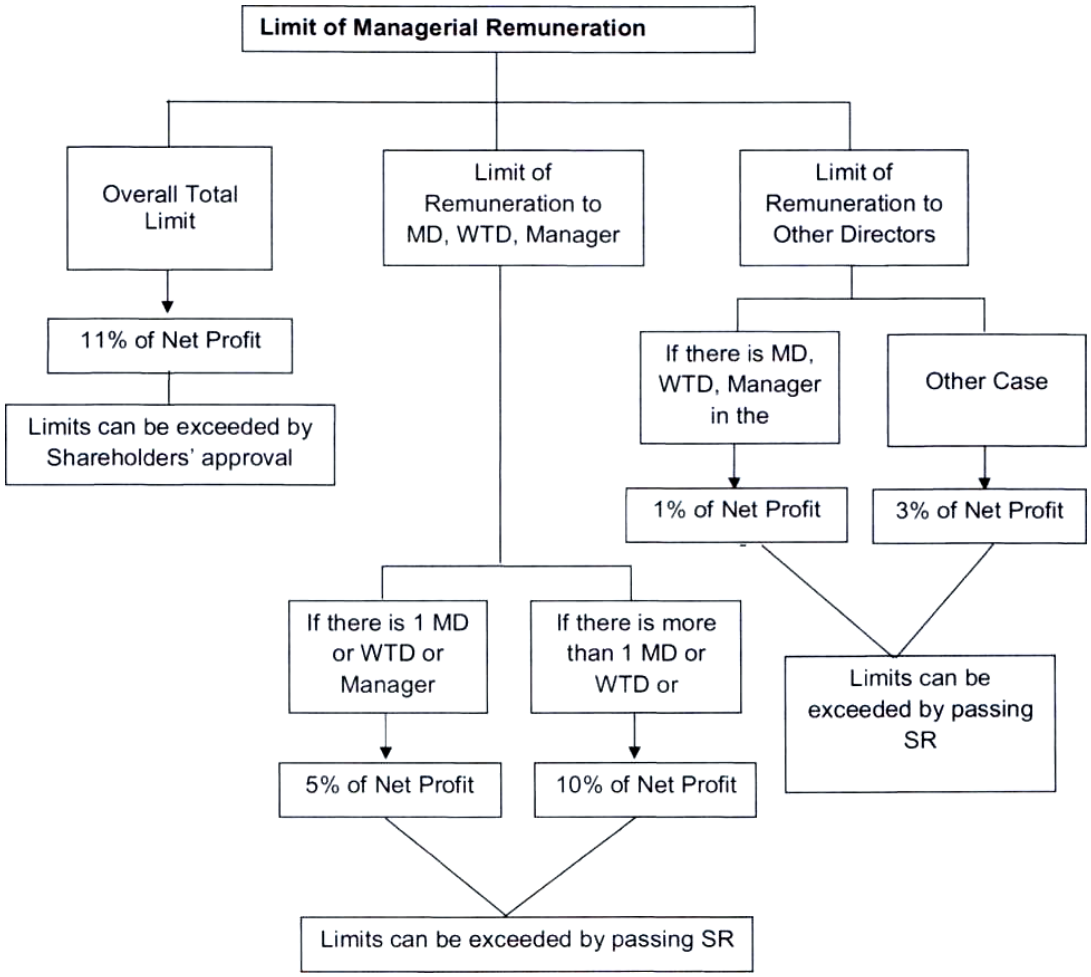
Individual Limit to Non-Executive directors other than MD & WTD or Manager

The remuneration payable to Non-Executive directors shall not exceed:

(a) 1% of the net profits, if there is a MD, WTD or Manager;

(b) 3% of the net profits in any other case.

Note: The Company may increase the above limit of Managerial Remuneration subject to the approval of shareholders by Special Resolution in general meeting.



Provisions relating to sitting fees

The above mentioned limit of managerial remuneration shall be exclusive of sitting fees payable to directors for attending the board meetings/committees meetings.

The maximum sitting fees payable to each director for attending the Board Meeting or any committee meeting shall not exceed Rs. 1 lakh per meeting.

Note: The Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors. Any director can take sitting fees including MD or WTD. The siting fee of women director cannot be less than other Directors)

Remuneration to Directors in other Capacity: The remuneration payable to the directors including MD, WTD or Manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the services of a professional nature and in the opinion of the Nomination and Remuneration Committee or the Board, the director possesses the requisite qualification for the services of the professional nature.

Q1.	Suresh, a solicitor, is appointed as director on the Board of Sam Organic Ltd. The company has obtained legal opinion from Suresh and paid a fee ofRs. 5 lakh during the financial year 2004-05. Auditor has raised an objection that fee payable to Suresh exceeds the limit prescribed under Section 197 and

	hence payment made to him is illegal, as the company has not obtained permission from the Central Government. Therefore, the company should take steps to recover the same from Suresh. Keeping in view the provisions of the Companies Act, 2013, give your opinion on the objection raised by the auditor. 2006 - June (5 marks)
A1.	Hint: If Nomination & Remuneration Committee and Boards has opinion that the director possesses the requisite qualification for the services of the professional nature, then any amount can be paid.

Other provisions relating to Remuneration to Director or Manager

(a) Permissible forms of Remuneration: A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

(b) Commission or remuneration from holding or subsidiary company: Any director who is in receipt of any commission from the company and who is a MD, WTD or Manager of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.

(c) Independent directors are not entitled to stock options: An independent director shall not be entitled to any stock option and may receive remuneration by way of fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

(d) Insurance Premium not part of Remuneration: Where any insurance is taken by a company on behalf of its MD, WTD, Manager, CEO, CFO or CS for indemnifying against any liability in respect of any negligence, default, or breach of trust for which they may be guilty in relation to the company, such insurance premium shall not be treated managerial remuneration.

Note: If such KMP is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

Section-198: Calculation of Profit for purpose to pay managerial remuneration under section 197

Remuneration in case of Inadequate or No Profits (Schedule V- Part II- Section II)

In case of no or inadequate profits a Company can pay remuneration to directors only by complying Schedule V.

Where in any financial year, if a company has no profits or inadequate profits, it may pay the remuneration to the managerial person not exceeding the limits as mentioned in Table A and Table B below:

Table - A

Effective Capital	Remuneration (Annually)
Negative or less than 5 crores	60 Lakhs
More than 5 crores but less than 100 crores	84 Lakhs

CS SHUBHAM ABAD
8149221250

More than 100 crores but less than 250 crores	84 Lakhs
250 crores and above	120 Lakh plus 0.01% of the effective capital in excess of Rs.250 crores

Note: The above limits shall be doubled if a special resolution is passed by the shareholders.

It is clarified that for a period less than one year, the limits shall be pro-rated.

Calculation of Effective capital:

Paid-up share capital : (Excluding Application money or advances against shares)	XXXX
Add: (a) credit of share premium account; :	XXXX
(b) reserves and surplus (excluding revaluation reserve); :	XXXX
(c) long-term loans and deposits repayable after one year : (Excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements)	XXXX
Less:	
(a) Aggregate of any investments (except in case of investment : by an investment company whose principal business is acquisition of shares, stock, debentures or other securities),	XXXX
(b) Accumulated Losses :	XXXX
(c) Preliminary Expenses not written off. : Effective Capital : XXXX	XXXX

Note: Date of Calculating Effective Capital

(a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment;

(b) In any other case the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Table - B

If the following conditions are satisfied then remuneration can be paid without any limits:

1. The managerial person functions in a professional capacity
2. He does not hold any share at any time in the Company, Holding or Subsidiary during 2 years preceding the appointment.

   - As on the date of appointment

   After the date of appointment

Note: However, holding shares upto 0.5% of paid up share capital allotted under ESOP is permitted.

3. He is not related to the Directors or promoters of the Company, Holding or Subsidiary during 2 years preceding the appointment.

As on the date of appointment after the date of appointment

4. He should possess graduate level qualification with expertise and specialised knowledge in the field in which the company operates.

Procedural Requirements under Schedule V

(a) Approval by the Board & Committee: Payment of remuneration is approved by a resolution passed by the Board & also approved by nomination and remuneration committee and while doing so record in writing clear reason and justification for payment of remuneration beyond the said limit;

(b) No default on repayments: The company has not made any default in repayment of any of its debts or debentures or interest payable thereon for a continuous period of 30 days in the preceding financial year before the date of appointment of such managerial person;

(c) Approval from shareholders: Prior approval of shareholders by following way to be taken:

Within limits specified under Table A- Ordinary Resolution Double the specified limit- Special resolution Payment to professional person- Special Resolution.

(d) Statement with Notice: Statement along with a notice calling the general meeting as referred above is given to the shareholders containing the following information, namely: —

General Information:

(a) Nature of industry

(b) Date or expected date of commencement of commercial production

(c) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus

(d) Financial performance based on given indicators

(e) Foreign investments or collaborations, if any.

Information about the appointee:

(a) Background details

(b) Past remuneration

(c) Recognition or awards

(d) Job profile and his suitability

(e) Remuneration proposed

(f) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)

(g) Pecuniary relationship directly or indirectly with the company, or

(h) Relationship with the managerial personnel, if any.

Other information:

(a) Reasons of loss or inadequate profits

(b) Steps taken or proposed to be taken for improvement

(c) Expected increase in productivity and profits in measurable terms.

Disclosures:

The following disclosures shall be mentioned in the Board of Directors' report under the heading "Corporate Governance", if any, attached to the financial statement: —

(a) All elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;

(b) Details of fixed component and performance linked incentives along with the performance criteria;

(c) Service contracts, notice period, severance fees;

(d) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Section III: Remuneration in Special Circumstances

Where the company is having no profit or inadequate profit can pay remuneration to its managerial personnel in excess of amount as mentioned in Section II above, without Central Government's approval. The following companies are covered in this section:

(a) Foreign Company

(b) New incorporated Company (for a period of 7 years from the date of Incorporation)

(c) Sick Company (as order passed by BIFR or NCLT for five years from date of sanction of scheme)

Remuneration payable to a managerial person in two companies:

A managerial person shall draw remuneration from one or more companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

Recovery of Managerial Remuneration (Section 197 of the Companies Act, 2013)

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.

Note: The Company shall not waive the recovery of any amount unless permitted by the Central Government.

Section 199 of the Companies Act, 2013: This section provides for recovery of remuneration including stock options received by the Managerial Personnel, where the benefits given to them are found to be in excess of what is reflected in the restated financial statements.

Compensation for Loss of Office Section 202 of the Companies Act, 2013

A company may make payment to a MD, WTD or Manager, but not to any other director, by way of compensation for loss of office, or as consideration for loss of office.

No payment shall be made in the following cases:

(a) In case of resignation by the directors due to reconstruction/amalgamation of the company and is appointed as the MD, WTD or Manager or other officer of the resulting company.

(b) Where the director resigns from his office otherwise than on the reconstruction/amalgamation of the company;

(c) Where the office of the director is vacated due to disqualification;

(d) Were the company is being wound up due to the negligence or default of the director;

(e) Where the director has been found guilty of fraud or breach of trust or gross negligence or mismanagement; and

Note: Any payment made to a MD, WTD or Manager shall not exceed the remuneration which he would have earned if he had been in office for his remaining term or three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period.

Q2. Prudent Ltd. is paying remuneration to its non-executive directors in the form of commission at the rate of 1% of the net profits of the company distributed equally among all the non-executive directors. The company is providing depreciation on straight line basis at the rates specified in Schedule II to the Companies Act, 2013. The company seeks your advice in respect of the following:

(i) Whether it is necessary to make adjustment in respect of depreciation for the purpose of arriving at the net profit of the company to determine the quantum of remuneration payable to its non-executive directors?

(ii) Is it possible to pay minimum remuneration to non-executive directors besides sitting fees in the event of loss in a financial year?

Advise the company explaining the relevant provisions of the Companies Act, 2013. 2004 - Dec (5 marks)

A2. The Company (if profit making) shall make payment of Managerial Remuneration to Non-executive Directors subject to two sections:

(a) Section 197 for maximum limit of Managerial Remuneration

(b) Section 198 for calculation of net profit

(i) According to Section 198 of the Companies Act, 2013 in computing the net profits of a company in any financial year for the purposes of determination of managerial remuneration, the sum of depreciation to the extent specified in Schedule—II of the Companies Act, 2013 shall be deducted from the gross profit. Accordingly, a company cannot calculate net profit without adjusting depreciation.

(ii) Section 197 of the Companies Act, 2013, fixes an overall limit of managerial remuneration payable by a public company and a private company which is a subsidiary of public company. A Company can pay sitting fees in addition to the managerial remuneration to the Non-executive directors.

CHAPTER 17
MEETING OF BOARD & ITS COMMITTEES

A company is a separate legal entity distinct from its shareholders and its directors.

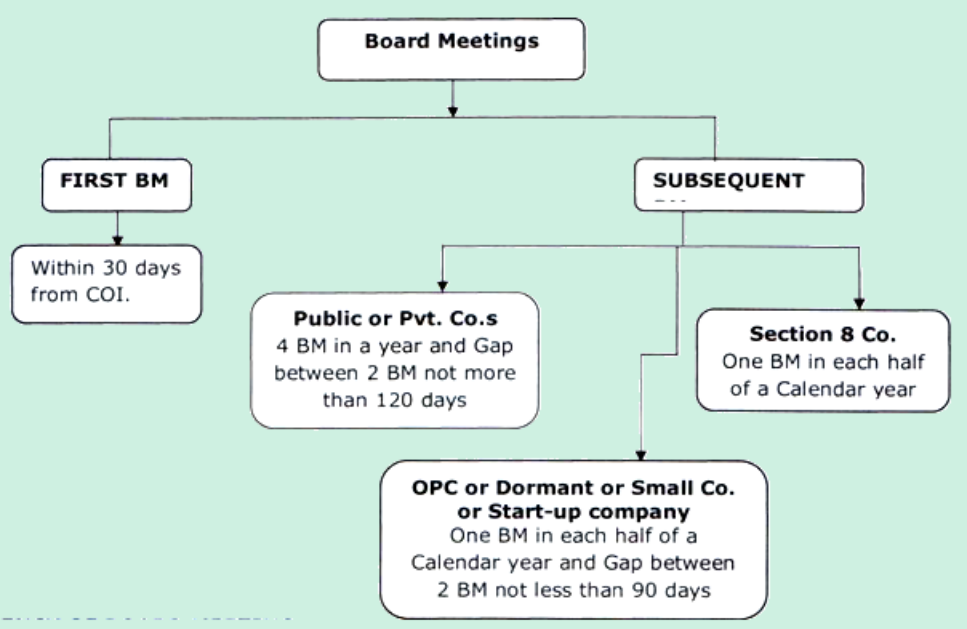
As per provisions of the Companies Act, 2013 & its rules, some of the powers are reserved for the shareholders and Board of Directors. The powers of management are vested in the directors. It means they alone can exercise these powers.

BOARD MEETING

The shareholders cannot usurp the powers of Board of Directors as given under the Act or in the Articles of Association of the Company.

BOARD MEETING

Section 173 of the Companies Act, 2013



FREQUENCY OF BOARD MEETING

For Private or Public Company

- 1st Board Meeting: The 1st Board meeting should be held within 30 days from the date of incorporation.
- 2nd & Subsequent Board Meeting: There must be at least 4 Board Meetings in a year.

The gap between two consecutive Board Meetings shall not be more than 120 days.

Note: A minimum number of four meetings of the Board of Directors (either in private or public co.) shall be held every year.

Secretarial Standard on BM

Secretarial Standard on Board Meetings (SS-1) issued by ICSI clarifies that the Board shall meet at least once in every calendar quarter, with a maximum interval of 120 days between any two consecutive Meetings.

SS-1 also states that it shall be sufficient that in the year of incorporation if a company, in addition to the first meeting to be held within thirty days of the date of incorporation, holds one meeting in every remaining calendar quarter in the year of incorporation.

In case of OPC, Dormant Company, Small Company and Private Company which is Start-up,

There must be at least one board meeting in each half of the calendar year and the gap between two meetings should not be less than 90 days.

Note: According to SS-1 (Secretarial Standard on Board Meetings) Committees shall meet as often as necessary subject to the minimum number and frequency prescribed by any law or any authority or as stipulated by the Board.

Q1. The Board of Directors of a company met thrice in the year 2012 and the 4th meeting was not held for want of quorum. As a company secretary, examine the provisions of the Companies Act, 2013 and decide whether the company has complied with the requirement of the minimum numbers of meeting to be held in a calendar year or violated the requirement thereof

A1. For Private or Public Company: 1st Board Meeting: The 1st Board meeting should be held within 30 days from the date of incorporation.

2nd & Subsequent Board Meeting: There must be at least 4 Board Meetings in a year. The gap between two consecutive Board Meetings shall not be more than 120 days.

Note: A minimum number of four meetings of the Board of Directors (either in private or public co.) shall be held every year.

For OPC, Dormant Company & Small Company: There must be at least one board meeting in each half of the calendar year and the gap between two meetings should not be less than 90 days.

NOTICE OF BOARD MEETINGS:

- **Notice of Original Meeting**

  Notice should be given to every directors of the Company not less than 7 days before the date of Board Meeting.

  The notice should be sent at the registered address of every director as available with the company.

- **Notice of an Adjourned Meeting**

  Notice of atleast 7 days before the date of Adjourned meeting shall be given to all Directors

  Including those who did not attend the Meeting on the originally convened date and unless the date of adjourned Meeting is decided at the Meeting.

- **Mode of Sending Notice:**

  The notice can be given by hand delivery or by post or by electronic means i.e. registered email id.

For Section 8 Company

The Board of Directors, of such companies shall hold at least one meeting within every six calendar months.

Note: Where a Director specifies a particular means of delivery of Notice, the Notice shall be given to him by such means.

- **Mode of Sending as per Secretarial Standard on BM (SS-1)**

  SS-1 provides that a notice in writing of every Meeting shall be given to every Director by hand or by speed post or by registered post or by facsimile or by e-mail or by any other electronic means.

  It will not be given by ordinary post.

In case the company sends the Notice by speed post or by registered post or by courier, an additional 2 days shall be added for the service of Notice. (i.e. exclude the day of serving the notice and date of meeting)

- **Shorter Notice**:

A meeting can be called at shorter notice if the following conditions are satisfied:

A. If the company is required to have independent director:

- Presence of at least one Independent director is required.
- In case of absence of independent director, decision taken at such meeting shall be circulated to all the directors, and shall be final only on ratification thereof by at least one Independent director.

B. If the company does not require appointing independent director, meeting can be called up at a shorter notice without any conditions to be complied with.

- **Shorter Notice as per Secretarial Standard on BM (SS-1)**

In case the company does not have an Independent Director, the decisions shall be final only on ratification thereof by a majority of the Directors of the company, unless such decisions were approved at the Meeting itself by a majority of Directors of the company.

The fact that the meeting is being held at a shorter notice shall be stated in the notice.

- **Miscellaneous points**

1. Proof of sending Notice and its delivery shall be maintained by the company for a minimum period of 3 years from the date of the Meeting.
2. Notice shall be issued by the Company Secretary or where there is no Company Secretary, any Director or any other person authorised by the Board for the purpose.
3. The Notice shall specify the serial number, day, date, time and full address of the venue of the Meeting.
4. The Notice shall inform the Directors about the option available to them to participate through Electronic Mode and provide them all the necessary information.
5. The Notice of a Meeting shall be given even if Meetings are held on pre-determined dates or at predetermined intervals.
6. If notice of meeting is not given to one of its directors, meeting of board of directors is invalid and resolutions passed at such meeting are inoperative.

AGENDA OF THE BOARD MEETING

The Act does not prescribe any requirement to circulate Agenda etc.

On the other hand Secretarial Standard on Board Meetings provide exhaustively about Agenda.

Agenda as per Secretarial Standard on BM (SS-1)

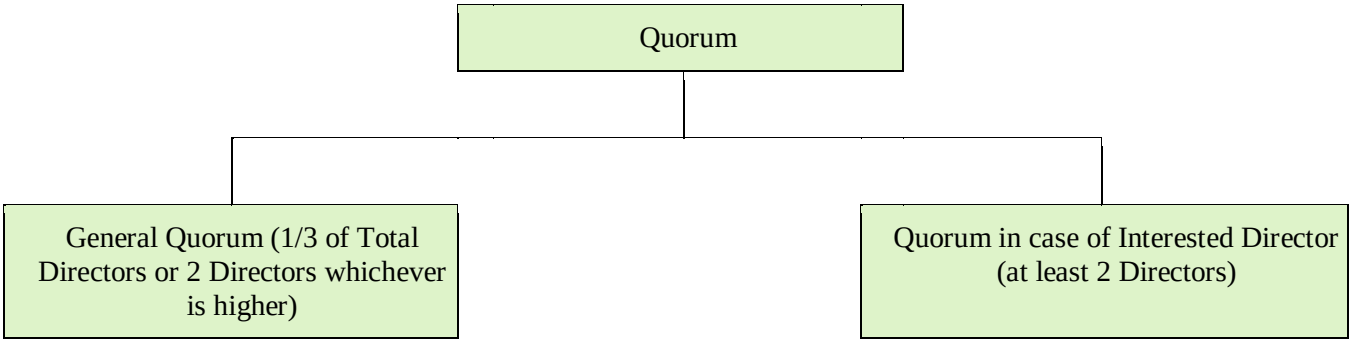
- The Agenda and Notes on Agenda shall be given to the Directors at least 7 days before the date of the Meeting, unless the Articles prescribe a longer period.
- Agenda and Notes on Agenda shall be sent to all Directors by hand or by speed post or by registered post or by e-mail or by any other electronic means.
- In case the company sends the Agenda and Notes on Agenda by speed post or by registered post, an additional 2 days shall be added for the service of Agenda and Notes on Agenda.
- Where a Director specifies a particular means of delivery of Agenda and Notes on Agenda, these papers shall be sent to him by such means.
- However, in case of a Meeting conducted at a shorter Notice, the company may choose an expedient mode of sending Agenda and Notes on Agenda.
- Proof of sending Agenda and Notes on Agenda and their delivery shall be maintained by the company for atleast 3 years from the date of the Meeting.
- Agenda Item shall be supported by a note setting out the details of the proposal, interested director, etc.
- Each item of business to be taken up at the Meeting shall be serially numbered.

- Any item not included in the Agenda may be taken up for consideration with the permission of the Chairman and with the consent of a majority of the Directors present in the Meeting.

QUORUM [kam se kam kitne log]

Quorum means the minimum number of directors which is required to validate meeting of the Board. Quorum should be present throughout the meeting of Board, it means at beginning of the meeting and also at conclusion of the Meeting.

If any decision (resolution) is taken without the presence of quorum, then such decision (resolution) shall be treated as null and void.



(a) General Quorum:

1/3 of total strength of Board or 2 directors, whichever is higher, shall be treated the quorum for a Board Meeting of a Company.

If due to resignations or removal of director(s), the number of directors of the company is reduced below the quorum as fixed by the Articles of Association of the company, then, the continuing Directors may act for the purpose of increasing the number of Directors to that required for the quorum or for summoning a general meeting of the Company.

It shall not act for any other purpose.

Special Note:

The participation by a director in the Board Meeting through Video Conferencing or other audio visual mode shall also be counted for the purpose of quorum, unless it is to be excluded for any item of business under any provisions of the Act or the rules.

Even if he cannot be counted for the purpose of quorum, does not impact his right to participate in the meeting.

Therefore generally a director participating trough video conferencing will be counted for the purpose of quorum.

But if due to any provision or rules they cannot be counted in quorum they can still participate in the meeting.

(b) Quorum in case of Interested Director:

If at any time the number of interested directors exceeds or is equal to 2/3 of the total strength of Board, the remaining directors shall be counted for quorum provided the number should not be less than 2.

Note: If a Board meeting has been adjourned due to want of quorum, unless the articles provide otherwise, the Board Meeting shall be held on the same day at the same time and same place in the next week or if the day is National Holiday, the next working day at the same time and place.

ATTENDANCE REGISTER

Every company shall maintain separate attendance registers for the meetings of the Board and meetings of the committee.

- **Loose Leaf & Serially numbered**

The pages of the respective attendance registers shall be serially numbered.

If an attendance register is maintained in loose leaf form, it shall be bound periodically depending on the size and volume.

- **Place of Keeping Attendance Register**

  The attendance register shall be maintained at the Registered Office of the company or such other place as may be approved by the Board.

  The attendance register may be taken to any place where a Meeting of the Board or Committee is held.

- **Inspection of Attendance Register**

  The attendance register is open for inspection by the Directors. Even after a person ceases to be a Director, he shall be entitled to inspect the attendance register of the Meetings held during the period of his Directorship.

- **Particulars of attendance register**

  Serial number and date of the Meeting;

  In case of a Committee Meeting name of the Committee;

  Place of the Meeting;

  Time of the Meeting;

  Names and signatures of the Directors,

  The Company Secretary and also of persons attending the Meeting by invitation and

  Their mode of presence, if participating through Electronic Mode.

- **Preservation of Attendance Register**

  The attendance register shall be preserved for a period of at least 8 financial years from the date of last entry made therein and may be destroyed thereafter with the approval of the Board.

  It shall be in the custody of the Company Secretary.

Chairman of the Meeting

The Chairman of the Company shall be the chairman of the Board.

If the company does not have a Chairman, the Directors may elect one of themselves to be the chairman of the Board.

If no Chairman has been so elected or if the elected chairman is unable to attend the meeting, the Board/ Committee shall elect one of its members present to chair and conduct the meeting of the Board unless otherwise provided in the articles.

RESOLUTION PASSED BY CIRCULATION (Section 175 of the Companies Act, 2013 read with SS-1)

Considering the urgency of matters there can be situations when calling of board /committee meeting is not possible.

At such times, the company may pass the resolutions through circulation.

The resolution in draft form together with the necessary papers may be circulated to all the directors or members of committee at their address registered with the company in India by hand or by speed post or by courier or through electronic means which may include e-mail or fax.

Salient points related to circular resolution

1. **Passing of Circular Resolution:** The said resolution must be passed by majority of directors or members entitled to vote.
2. **Request of Directors to consider the matter at Board Meeting only:** If more than one third of directors require that the resolution most be decided, at the meeting, the chairperson shall put the resolution to be decided at the meeting.
3. **Noting of the Circular Resolution:** The resolution passed through circulation be noted at a subsequent meeting and made part of the minutes of such meeting.

4. **Time Limit to respond to the Circular resolution:** Not more than seven days from the date of circulation of the draft of the resolution shall be given to the directors to respond.
5. **Effective date of passing of resolution:** The Resolution, if passed, shall be deemed to have been passed on the earlier of:
   - the last date specified for signifying assent or dissent by the Directors, or
   - the date on which assent has been received from the required majority.
6. **Recording in the Subsequent Board Meeting Minutes:** The Circular resolution so passed shall be recorded in the minutes of subsequent meeting.

MINUTES

Section 118 provides that every company shall prepare, sign and keep minutes of proceedings of meeting. Minutes are evidence of the proceedings at the meeting.

(a) **Circulation of draft minutes:** The draft minutes shall be circulated among all the directors within 15 days from the date of board meeting either in writing or in electronic mode.

(b) **Confirmation from Directors:** Every director who attended the board meeting (whether personally or through electronic mode) shall confirm or give his comments, about the accuracy of recording of the proceedings within 7 days after receipt of the draft minutes.

(c) **Entry in the Minute Books:** After completion of above confirmation procedure of the meeting, the minutes shall be entered in the minute book within 30 days of conclusion of BM. and signed by the Chairperson.

Note: Date of entry to be recorded by Company Secretary or any authorised person.

(d) **Signing of Minutes:** Minutes of the meeting of Board to be signed by Chairman of the meeting or Chairman of the next meeting.

All pages of the minutes are to be initialed and the last page of the minutes to be signed and dated.

(e) **Preservation of Minutes:** Minutes should be preserved permanently whether in physical or electronic form.

Special Note: The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual mode:

(a) the approval of the annual financial statements;

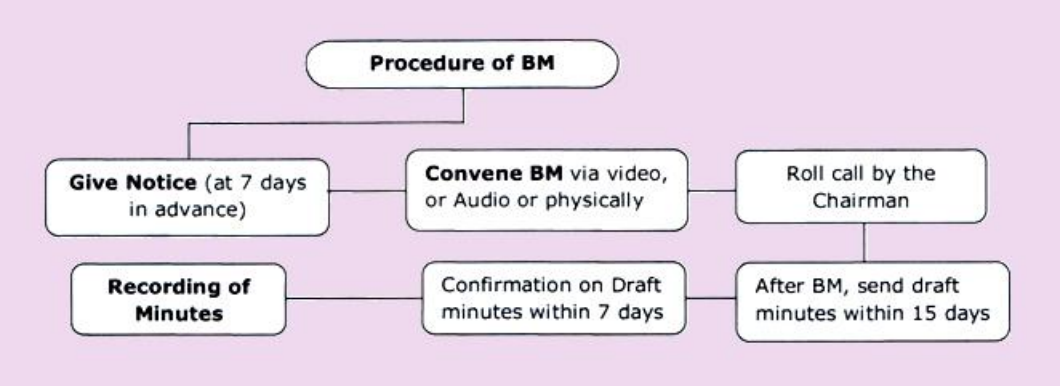
(b) the approval of the Board's report;

(c) the approval of the prospectus;

(d) the Audit Committee Meetings for consideration of accounts; and

(e) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

PROCEDURES & REQUIREMENT OF A BOARD MEETING



Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014

1. Convening of Board Meetings:

A Board Meeting may be conducted physically or also through video conferencing or other audio visual mode.

Note: Every Company shall make necessary arrangements to avoid failure of video or audio visual connection during the Board Meeting.

Safeguards during Board Meetings: The Chairperson and the company secretary shall take due and reasonable care:

(a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(b) to ensure the availability of proper video conferencing or other audio visual equipment or facilities for transmission of the communications for effective participation in the Board Meeting;

(c) to record the proceedings of the Board Meeting and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;

(e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means.

2. Notice to the Directors:

The notices of the meeting shall be sent to all the directors.

(a) The notice of the meeting shall inform about the other option available to participate in the Meeting through video conferencing mode or other electronic mode.

(b) A director intending to participate through video conferencing mode or audio visual means shall communicate his intention to the Chairman or the company secretary.

(c) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for 1 calendar year.

(d) In the absence of any such intimation from the director, it shall be assumed that the director will attend the meeting in person.

3. Roll call by Chairperson:

At the commencement of the meeting, the Chairperson shall check and ensure the participation of every director through video conferencing or other audio visual for the record and verify the following details:

(a) the name of the directors;

(b) the location from where a director is participating;

(c) ensure that the directors can completely and clearly see, hear and communicate with the other participants;

(d) ensure that the directors have received the agenda and all the relevant material for the meeting; and

(e) ensure that no one other than the concerned director is attending.

However, the roll call shall also be made at the conclusion of the board meeting and at the recommencement of the board meeting after every break to confirm the presence of a quorum throughout the meeting.

Note: After the roll call, the Chairperson or the Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairman.

> **Special Note:** A director participating in a meeting through video conferencing or other audio visual mode shall be counted for the purpose of quorum.

4. Place of Board Meetings:

In case of Board Meeting convened by video conferencing or other electronic mode, the place of recording of proceedings of the board meetings shall be deemed as place of Board Meeting.

5. No accessibility of the place of Board Meeting:
No person other than the Chairperson, directors, Secretary and any authorised person shall be allowed access to the place where the Board Meeting is going on without the permission of the Board.

6. Preparation of Minutes

Compliance with Secretarial Standards:

Section 118(10) "Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India (ICSI) constituted under section 3 of the Company Secretaries Act,1980, and approved as such by the Central Government".

CHAPTER 18
GENERAL MEETINGS

The decision making powers of a company are vested in the Members and the Directors and they exercise their respective powers through Resolutions passed by them.

General Meetings of the Members provide a forum to them to express their will in regard to the management of the affairs of the company.

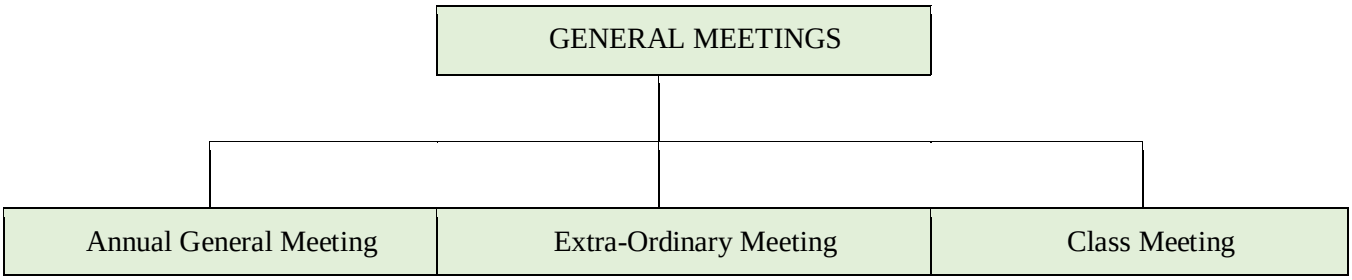
A meeting may be generally defined as a gathering or assembly or getting together of a number of persons for transacting any lawful business.

There must be at least two persons to constitute a meeting.

Secretarial Standard on General Meetings of companies: Secretarial Standard on General Meeting (SS-2) is issued by the Institute of Company Secretaries of India (ICSI) and approved by Central Government. Compliance of Secretarial Standards is a must as per the provision of Section 118(10) of Companies Act, 2013.

This Standard is applicable to all types of General Meetings of all companies incorporated under the Act except One Person Company (OPC) and class or classes of companies which are exempted by the Central Government through notification.

The revised version of Secretarial Standard is effective from 1st October, 2017.



Convening a Valid General Meeting

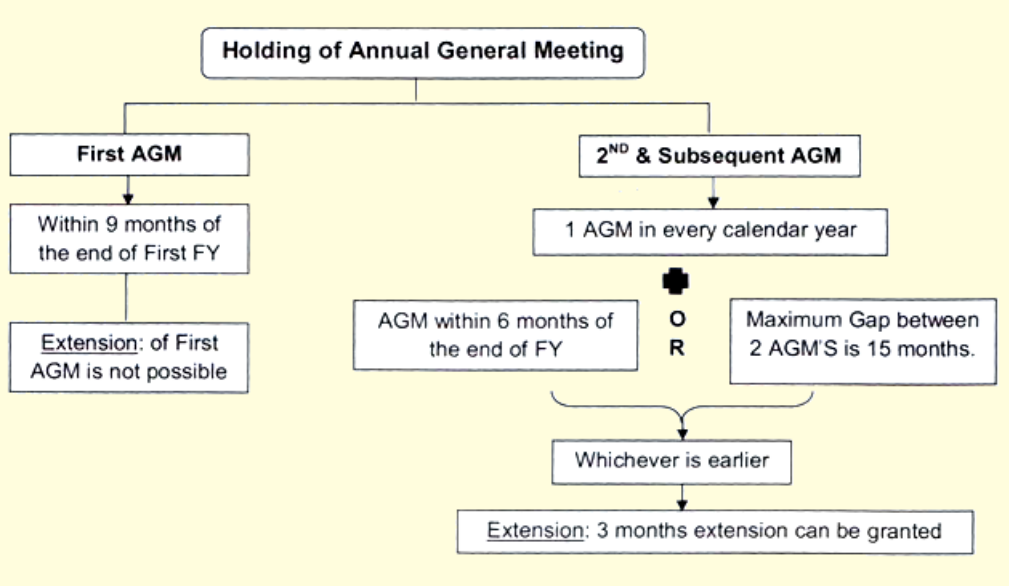
The essentials of a valid meeting are that the meeting should be:

Properly Convened	• The meeting must be **called by proper authority** • **Proper notice** must be served
Properly Constituted	• **Proper quorum** must be present in • **Proper chairman** must be present
Properly Conducted	• **Resolution properly** moved, passed • **Minutes recorded**

ANNUAL GENERAL MEETING (Section 96 of the Companies Act, 2013)

Every company (other than OPC) should hold an Annual General Meeting (AGM) every year for considering the ordinary business of the Company (i.e. approval of annual accounts, declaration of dividend, appointment of directors & auditors).

FREQUENCY FOR HOLDING OF ANNUAL GENERAL MEETING



1st AGM [pehli meeting 9 mahine me]

A Company should convene its first AGM within 9 months from the end of its 1st Financial Year.

2nd & Subsequent AGM

Every company must hold subsequent AGM within 6 months from the closing of the financial year or the gap between two annual general meetings should not exceed 15 months whichever is earlier.

Note: Financial Year means a year starts from 1st April and ends on 31st March of each year.

Extension of time of 2nd & Subsequent AGM:

In case, it is not possible to hold a 2nd & subsequent AGM within the prescribed time, the Registrar may grant extension of time.

Such extension can be for a period not exceeding 3 months.

Special Note: Extension can be granted only if the application for extension is served before the normal due date as calculated above.

Note: No such extension of time shall be granted by the ROC for the holding of the 1st AGM.

Q1. Calculate the last date when the AGM can he held for Patience Pays Ltd., if the date of last AGM is held on:

(a) 15th June, 2017

(b) 15th September, 2017

A1. Every Company shall have one AGM in 1 calendar year. The last date when the AGM can be held is the earliest of the following:

-Within 6 months of end of FY -Within 15 months of Last AGM.

(a) In case (a), the 2 dates will be 30th September, 2018 and 15th September, 2018, Therefore due date will be earliest of the 2 i.e. 15th September, 2018

(b) In case (b), the 2 dates will be 30th September 2018 and 15th December 2018. Therefore due date will be earliest of the 2 i.e. 30th September, 2018

Q2. Asia Pacific Co. Ltd., called its AGM on 30th September, 2001 and adjourned it to 31st December, 2001 due to delay in completion of audit of accounts for the year ended 31stMarch, 2001. At the adjourned meeting, the meeting was further-adjourned to 31st March, 2002. Subsequently, the AGM was held on 28th January, 2002. State whether the company has complied with the provisions of Section 96 and, if not, whether the company is liable to default and conviction. 2005 - June (8 marks)

A2. Refer Section 96 of the Companies Act, 2013.

There shall be a general meeting held at least once in every year.

Therefore, the provisions of section 96 have not been satisfied.

Meaning of First Financial Year

As per Section 2(41) of Companies Act, 2013 "Financial year" in relation to any company or body corporate means the period ending on 31st day of March every year, and where it has been incorporated on or after the 1st day of January of year, the period ending on the 31st day of the March of the following year, in respect whereof financial statement of company or body corporate is made up.

Date of Incorporation of Company	First Financial Year end date	Example
Between 1st April - 31st December	31st March upcoming	XYZ Private Limited Company is incorporated on 15th Nov, 2014. So the closing of First Financial Year would be 31st March, 2015
Between 1st January- 31st March	31st March next or following year	XYZ Private Limited Company is incorporated on 15th Feb, 2015. So the closing of First Financial Year would be 31st March, 2016

Q3. Ki and Ka Ltd. was incorporated on 15th January, 2016. The first AGM of the Company was held on 15th October, 2017. Some of the shareholders raised a concern that the due date of first AGM has already been lapsed and therefor the Company non complied with provisions of holding AGM. Please advice.

A3. As per section 96, the due date of holding the first AGM of the Company is within 9 months of the end of first financial year.

As per section 2(41), the first financial year of the company where it has been incorporated on or after the I5' day of January of year will be 31st day of the March of the following year.

In this case the Company was incorporated on 15th Jan, 2016 and therefore its first financial year will

end on 31st March, 2017.

The Company should hold its first AGM within 9 months of the end of 1st Financial year, i.e. by 31st December, 2017.

Therefore there is no non-compliance on behalf of the Company.

DATE AND TIME OF ANNUAL GENERAL MEETING DAY:

Date:

Every AGM should be held on any other day except on National Holiday as specified by the GOI.

(15th August, 26th Jan., 2nd Oct. or any other day as notified by the Central Govt.).

National Holiday means and includes a day declared as National Holiday by the Central Government.

Time:

Every AGM should be held during the business hours on any day excluding national holiday.

Here, business hour is between 9.00 A.M. and 6.00 P.M.

Place:

Type of Company	Place of AGM	Condition	Source of Provision
Unlisted Company	Any Place in India	If consent of all members is taken in advance	As per Companies (Amendment) Act, 2017
Government Company	Any Place	If approved by CG	As per SS-2
Other Companies	Either at Registered Office or any other place within city, town, or village where Registered Office is situated	No conditions	As per Section 96 of the Companies Act, 2013

BUSINESS TRANSACTED AT AN AGM (ADDA)

An AGM of a company must consider the following ordinary businesses:

(a) Annual Accounts; (A)

(b) Declaration of dividend; (D)

(c) Appointment of directors (D) (retire by rotation); and

(d) Appointment and fixing of remuneration of the auditors. (A)

Other than the above mentioned businesses every other item of AGM and every item of EGM will be treated as special business.

DEFAULT IN HOLDING ANNUAL GENERAL MEETING (Section 99 of the Companies Act, 2013)

[nahi le paye AGM]

If any default is made in holding the annual general meeting of a company, any member of the company may make an application to the NCLT to call or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient.

Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute quorum for the meeting.

Penalty:

The Company and every officer of the Company who is in default shall be punishable with fine which may extend to Rs.1,00,000/- and in case of continuous default with a further fine which may extend to Rs.5,000/- for every day during which such default continues.

In the case of **Smith v. Paringa Mines Ltd.,** the Board of Directors gave notice of a general meeting and later desired to adjourn by a subsequent notice. It was held that the Board of Directors does not have this power.

EXTRAORDINARY GENERAL MEETING (section 100 of the companies act, 2013)

[Special mulakat]

An extraordinary general meeting (EGM) is any general meeting of a company other than the annual general meeting.

Generally, a company convenes an EGM to transact all urgent matter for which it cannot wait till next annual general meeting.

An EGM may call to transact any business other than the ordinary business for fixed Annual General Meeting.

Every item of the EGM is considered as Special Business Item.

An extraordinary general meeting may be convened:

(a) by the Board of Directors on its own or

(b) by the Board of Directors on the requisition of members or

(c) by the requisitionists or

(d) by the Tribunal (NCLT)

Who may convene an EGM?

■ **By the Board of Directors**

An extraordinary general meeting may be convened by the directors if some business of special importance requires an approval from the members whenever required.

■ **By Board on requisition of members:**

The members of a company may ask for an extraordinary meeting to be held.

- Persons entitled to requisition:

  A requisition for convening an EGM may be made by members:

  (a) holding 10% of the paid-up share capital and having a right to vote of the Company or

  (b) holding 10% voting rights, if the company has no share capital, at the date of the deposit of requisition on the matter to be discussed.

- Compliance of requisition:

  The Board of Directors are under obligation to proceed within 21 days of the deposit of the requisition to convene an EGM which should be held within 45 days of such deposit of the requisition with the company.

  Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board to call a meeting duly shall be repaid to the requisitionists by the company.

  Any sum so repaid shall be recovered by the company from the Directors.

- Notice issued by the requisitionists:

  The Board may call an extra-ordinary general meeting (EGM) whenever they deem it fit. They may also call EGM on the requisition of shareholders carrying at least $1/10^{th}$ of paid-up share capital or $1/10^{th}$ of voting power.

  The requisition shall set out matters for which the meeting is called and be sent to the registered office. The Board has to call within 21 days of the receipt of the requisition an EGM not later than 45 days.

- **Meeting to be convened by the requisitionists:**

  If the Board does not within 21 days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition then the requisitionists may call an EGM themselves within 3 months from the date of requisition.

- **By the Tribunal (Section 98):**

  If for any reason it is impracticable to call a meeting of a company or to hold or conduct the meeting of the company, the Tribunal may, either suo motu or on the application of any director or member of the company who would be entitled to vote at the meeting:

  (a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

  (b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting. Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting. Meeting held pursuant to such order shall be deemed to be a meeting of the company duly called, held and conducted.

Day, Time & Place

- **Day:**

  An EGM can be held on any day including National Holiday as specified by the GOI.

  (15th August, 26th Jan., 2nd Oct. or any other day as notified by the Central Govt.)

- **Time:**

  An EGM can be held on any time.

- **Place of Meeting**

Type of EGM	Place of EGM	Source of Provision
EGM called by Requisition	Either at Registered Office or at any other place within city, town, or village where Registered Office is situated	As per SS-2
EGM of wholly owned subsidiary of Co. incorporated outside India	Any Place in India or Outside India	As per Companies (Amendment) Act, 2017
Other EGM	Any Place in India	As per SS-2

Business to be Transacted

An EGM shall only transact the special business and an explanatory statement to be attached with the notice of an EGM.

GENERAL MEETING FOR ONE PERSON COMPANY (OPC) Section 122 of the Companies Act, 2013

There is no need to convene an Annual General Meeting or Extra-Ordinary General Meeting for transacting ordinary or special business.

For passing any special or ordinary business, it shall be sufficient if the resolution is communicated by the member to the company and entered in the minutes book required to be maintained and signed and dated by the members.

CLASS MEETINGS:

Class meetings are those meetings which are held by holders of a particular class of securities, e.g. preference shares and debentures.

Need for such meetings arises when it is proposed to vary the rights of a particular class of shares.

MEETINGS OF DEBENTURE HOLDERS:

It is a meeting of debenture holders to protect their interest relating to redemption of debentures and interest thereon.

As per the SEBI regulation, when a company issues debentures it provides in the trust deed executed for securing the issue for the holding of meetings of debenture holders and also gives power to them to vary the terms of security or to alter their rights in certain circumstances.

NOTICE (SECTION 101 OF THE COMPANIES ACT, 2013) [Invitation]

A general meeting of a company may be called by giving not less than clear 21 days' notice either in writing or through electronic mode.

Where a notice of general meeting is sent by post, it shall be deemed to be served at the expiration of 48 hours after the letter containing the same is posted.

In simple words, an extra 48 hours be granted in addition to 21 days.

The day on which the notice is deemed to be served on the member, and the day of the general meeting have to be in addition to the 21 days.

Special Note:

A general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode in following manner:

> In case of AGM- not less than 95% of the members entitled to vote at such meeting.

> In case of EGM of Company having share capital- By majority in numbers and member holding not less than 95% of the paid up share capital.

> In case of EGM of Company not having share capital- By member who can exercise not less than 95% of the voting power.

Note: Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the General Meeting.

However, omission to serve notice of meeting on a member on the mistaken ground that he is not a shareholder cannot be said to be an accidental omission

Q4. ABC Ltd. issued a notice on 1st August, 2015 to hold its AGM on 24th August, 2015. Check the validity of the notice referring to the provisions of the relevant act, in case it is sent by post.

A4. Date of holding AGM: 24th August, 2015
Date of dispatch of notice: 1st August, 2015
Days to be excluded: (a) Day of holding AGM i.e. 24th August, 2015
(b) Day of dispatch of notice i.e. 1st August, 2015
(c) 2 days for service of notice i.e. 2nd & 3rd August, 2015
Number of days notice given: 20 days

Number of days notice required under section 101 of the Act is 21 days.

Therefore it is not a case of valid notice.

However, shortfall of 1 day can be condoned if consent is given for such shorter notice by at least 95% of the members entitled to vote at such AGM.

CONTENTS OF NOTICE

The notice of a general meeting shall specify the place, date, day and the hour of the meeting.

Agenda i.e. a statement of the business to be transacted at such meeting.

Proxy clause with reasonable prominence- a statement that a member entitled to attend and vote is entitled to appoint a proxy.

RECIPIENT OF NOTICE

The notice of every meeting of the company shall be given to:

(a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;

(b) the auditor or auditors of the company; and

(c) every director of the company.

Recipients as per Secretarial Standard on GM (SS-2)

As stated in SS-2 Notice shall be sent to:

(a) Every member of the Company

(b) Legal representative of any deceased member

(c) Assignee of an insolvent member

(d) The auditor or auditors of the company

(e) Every director of the company

(f) Secretarial Auditor of the Company

(g) Debenture trustee

(h) To other specified persons

MODE OF NOTICE

A Company may give notice either in writing or through electronic mode.

Mode of Notice as per Secretarial Standard on GM (SS-2)

As stated in SS-2 Notice shall be sent by hand or by ordinary post or by speed post or by registered post or by courier or by facsimile or by e-mail or by any other electronic means.

Notice shall be sent to Members by registered post or speed post or courier or e-mail and not by ordinary post in the following cases:

• if the company provides the facility of e-voting ;

• if the item of business is being transacted through postal ballot;

Explanatory Statement to be attached to Notice for Special Business Item

Section 102 requires that a statement detailing the material facts of the businesses to be transacted as special business be annexed to the notice of the general meeting.

Explanatory Statement as per Secretarial Standard on GM (SS-2)

Every Special Business item shall be in form of a Resolution and shall be accompanied by an explanatory statement which

shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item & to take a decision thereon.

In respect of Ordinary business items, explanatory statement is not required.

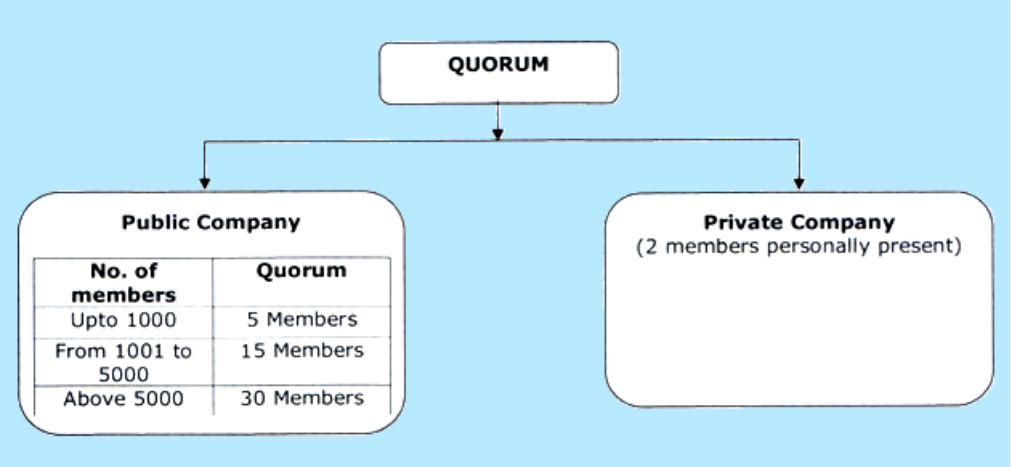
Resolutions format are not required in case of Ordinary Business Item except where the auditors or directors to be appointed are other than the retiring auditors or directors.

QUORUM (Section 103 of the Companies Act, 2013)

Quorum means presence of minimum number of members in a meeting.

Quorum is required for transaction of business.

Section 103 of the Companies Act, 2013 provides that where the articles of the company do not provide for a larger number, there the quorum shall depend on number of members as on date of a meeting.



Note: The above mentioned minimum of members is required to be present personally in the General Meeting for forming a Quorum. In other words, the proxies shall not be counted for the purpose to form a quorum.

Two joint holders shall be counted as two for quorum if both joint holders personally present in the General Meeting.

The representative of Governor of any State or President of India or Company shall be counted as member for the purpose of quorum and will have all rights of a member.

Quorum provisions in Secretarial Standard on GM (SS-2)

If the quorum provided in the Articles is higher than that provided under the Act, the quorum should be as per the AoA

One person can be an authorized representative of more than one body corporate.

In that case he will be counted separate members for the purpose of quorum.

But there should be atleast one more individual present at the meeting other than the individual

A member who is not entitled to vote on any particular item of business being a related party, if present, shall be counted for the purpose of quorum.

Consequences Of No Quorum:

Unless otherwise provided in the Articles, if the quorum is not present within half-an-hour from the time appointed for holding a meeting:

(a) The meeting shall stand adjourned to the same day in the next week at the same time and place, or

(b) to such other date and such other time and place as fixed by the Board; or

(c) the meeting, if called by requisitionists shall stand cancelled.

Q5. Khanchakar Limited whose total number of members is 400 called an AGM, in which Mr. Rajnikant was appointed as representative to appoint the meeting on behalf of A Ltd., B Ltd., C Ltd., D Ltd., and E Ltd. No other person was present at the meeting. Is the quorum present? Will your answer be different if in addition to Mr. Rajnikant, Mr. Ramakant was also present in a person?

As per section 103, the quorum in case of a public co. having upto 1000 members is 5 members present in person.

As per SS-2, One person can be an authorized representative of more than one body corporate.

In that case he will be counted separate members for the purpose of quorum.

But there should be atleast one more individual present at the meeting other than the individual.

Therefore inspite of Mr. Rajnikant counted as 5 separate members for quorum will not be sufficient to form quorum.

But if Mr. Ramakant is present there is sufficient quorum.

Q6. The articles of association of XYZ Ltd. having 700 members as on cut-off date, prescribe for physical presence of 7 members to constitute quorum of general meetings. Following are the status of persons present in a general meeting of XYZ Ltd to consider the appointment of MD. Check the quorum of the meeting.

- Mr. A, the representative of Governor of Maharashtra.
- Mr. B & Mr. C are preference shareholders
- Mr. D representing ABC Ltd. and SKY Ltd.
- Mr. E, Mr. F, Mr. G and Mr. H are proxies of shareholders

A6. Since Mr. A is the representative of the Governor of Maharashtra, shall be treated as a member personally present (Section 112).

Preference shareholders can vote only in relation to such matters which directly affect their rights.

In this case, meeting was called to take decision on appointment of MD, which does not affect their rights.

Therefore, Mr. B & Mr. C are not members personally present.

Since Mr. D represents two body corporates, he would be treated as two members personally present. (Section 113)

Since Mr. E, Mr. F, Mr. G and Mr. H are proxies of shareholders and members are not personally present.

They are not considered while counting quorum.

From the above analysis, it can be concluded that only 3 members are personally present and they do not constitute proper quorum as fixed by the company.

Note: The quorum required in respect of general meeting of a public company is 5 and the quorum can be increased by the articles of the company.

Notice of an adjourned meeting:

In case of an adjourned meeting or of a change of day, time or place of meeting, the company shall give not less than 3 days' notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated.

Adjourned meeting provisions in Secretarial Standard on GM (SS-2)

Notice of Adjourned meeting to be served as follows:

Days of Adjournment	Length of Notice
If adjournment for 30 days or more	Give proper 21 clear days' notice to members individually
If adjournment for more than 3 days but less than 30 days	Notice of 3 days is sufficient to be served individually
If adjournment is for less than 3 days and declaration of adjourned meeting done at the Original GM	Notice can be served through newspapers or individually

No quorum in an adjourned meeting:

If at the adjourned meeting also, a quorum is not present within 1/2 an hour from the time appointed for holding meeting, the members present shall form the quorum.

Resolution passed at adjourned meetings

As per Section 116 where a resolution is passed at an adjourned meeting of a company; or the holders of any class of shares in a company; or the Board of Directors, the resolution shall be treated as passed on the day it was actually passed and not on any earlier date.

CHAIRMAN (Section 104 of the Companies Act, 2013)

The Chairman plays a crucial role in a company meeting and is usually appointed by the articles.

The members present in person at a meeting shall elect on a show of hands one of their members to be the Chairman.

Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.

If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act and the Chairman elected on a show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the meeting.

- **Role of Chairman**

  The Chairman is responsible for the successful conduct of a meeting. The Chairman has a duty to keep order, to see that the business is properly conducted and to ensure that the sense of the meeting is properly ascertained in regard to any question before it.

- **Duties of Chairman**

  (i) He must ensure that the meeting is properly convened and constituted (i.e. proper notice has been served and quorum has also been observed).

  (ii) He must ensure that the provisions of the Act and the articles in regard to the meeting and its procedures are observed, and that the business is taken in the order set out in the agenda, and that the business is within the scope of the meeting.

  (iii) He must act at all times bonafidely and in the interest of the company as a whole.

  He must give a reasonable chance to the members present, to discuss any proposed resolution and ensure that views of all are adequately heard.

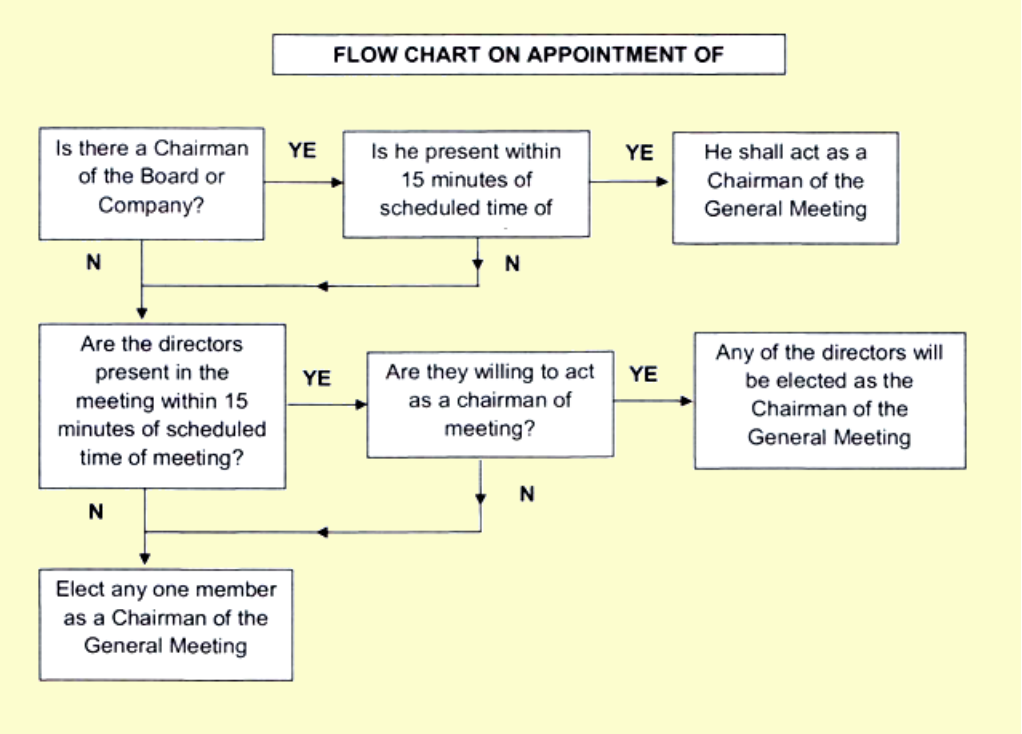
  (iv) He must decide questions arising for decisions during the meeting and must ensure that the majority hears the minority.

  (v) He must ensure that the sense of the meeting is properly ascertained in regard to any question before it.

  (vi) He must exercise correctly his powers of adjournment. He has no powers to adjourn the meeting at his own will and pleasure.

(vii) It is his duty to preserve order and to see that the business is properly conducted.

(viii) He must ensure the preparation of the minutes of meeting.



PROXY (Section 105 of the Companies Act, 2013)

A member, who is entitled to attend to vote, can appoint another person as a proxy to attend and vote at the meeting on his behalf.

Provisions related to proxy:

(a) Any member of a company who is entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

(b) A proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.

Note:

- A member of a company not having share capital cannot appoint proxy except the articles of such company provide otherwise.
- A proxy is not counted for the purpose of Quorum.
- A proxy need not be a member of the Company (In case of Section 8 Companies only member can be appointed as a proxy)
- A person may act as proxy for maximum 50 members and holding in the aggregate not more than 10% of the total share capital of the company carrying Voting Rights.

  However, a Member holding more than ten percent of the total share capital of the company carrying Voting Rights may appoint a single person as Proxy for his entire shareholding and such person shall not act as a Proxy for another person or shareholder.
- The proxy form (MGT-11) shall be deposited with the Company 48 hours before the general meeting of a company.
- Time limit for deposit of proxy forms: The instrument appointing the proxy must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall have effect as if a period of 48 hours had been specified.
- The instrument appointing a proxy shall:

(a) be in writing; and

(b) be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

Revocation of proxy:

If after appointment of proxy, the member himself attends the meeting, it amounts to automatic revocation of proxy.

But once the proxy has voted, it cannot be revoked.

If a Proxy had been appointed for the original meeting and such meeting is adjourned, any Proxy given for the adjourned Meeting revokes the Proxy given for the original Meeting, a proxy later in date revokes any Proxy/Proxies dated prior to such Proxy.

Proxy is valid until written notice of revocation has been received by the Company before the commencement of the Meeting or adjourned Meeting, as the case may be.

Note: A notice of revocation shall be signed by the same Member (s) who had signed the Proxy, in the case of joint Membership.

A Proxy need not be informed of the revocation of the Proxy issued by the Member.

Q7. Long life Limited had a provision in AoA that the proxy form be submitted by the proxies atleast 72 hours before the commencement of the meeting. Jaggan a member of the Co. submitted the form on 24th August, 2017 at 10 A.M for a meeting to be held on 26tl August, 2017 at 11 A.M. Is it valid and within specified time?

A7. As per section 105, the instrument appointing the proxy must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall have effect as if a period of 48 hours had been specified.

In this case even if the articles specify a longer minimum time it shall be deemed as 48 hours. Jaggan has served the notice on 24th August 2017 at 10.A.M for a meeting to be held on 26th August, 2017 at ll.A.M, which, meets the criteria of 48 hours and therefore it is valid and within specified time.

Q8. Mr. A, a member ofXYZ Limited, appoints Mr. B as his proxy to attend the general meeting of the company. Later he (Mr. A) also attends the meeting. Both Mr. A (the member) and Mr. B (the proxy) voted on a particular resolution in the meeting. Mr. A's vote was declared invalid by the chairman stating that since he has appointed the proxy and Mr. B's vote has been considered as valid. Mr. A objects to the decision of the Chairman. Decide, under the provisions of the Companies Act, 2013 whether Mr. A's objection shall be tenable.

A8. Decision by Chairman is invalid. Since Mr. A i.e. a member himself attended a meeting and voted on resolution, it will amount to revocation of proxy.

Thus any vote put by Mr. B i.e. proxy shall be invalid.

Q9. Annual General Meeting of a Public Company was scheduled to be held on 15.12.2015. Mr. A, a shareholder, issued two Proxies in respect of the shares held by him in favour of Mr. 'X' and Mr. ' Y'. The proxy in favour of ' Y' was lodged on 12.12.2015 and the one in favour of Mr. X was lodged on 15.12.2015. The company rejected the proxy in favour of Mr. Y as the proxy in favour of Mr. Y was of dated 12.12.2015 and thus in favour of Mr. X was of dated 15.12.2015. Is the rejection by the company in order?

A9. As per Section 105 of the Companies Act, 2013, a proxy should be deposited 48 hours before the time

of the meeting.

In the given case, the proxies should have, therefore, been deposited on or before 13.12.2015 (the date of the meeting being 15.12.2015).

X deposited the proxy on 15.12.2015.

Therefore, proxy in favour of Mr. X has become invalid.

Thus, rejecting the proxy in favour of Mr. Y is unsustainable.

Proxy in favour of Y is valid since it is deposited in time.

Q10. Abhijeet is a shareholder of Kutumb Ltd. On receipt of notice of an annual general meeting to be held on 28th September, 2004, Abhijeet issued a proxy in favour of Baljeet on 25th September, 2004. Abhijeet again issued another proxy in favour of Charanjeet on 26th September, 2004. Both Baljeet and Charanjeet attended the meeting on 28th September, 2004. Decide who is entitled to vote on a poll. 2005 - Dec. (4 marks)

A10. Abhijeet is entitled to appoint a proxy to attend an AGM of Kutumb Ltd. on 28.09.2004 in place of himself.

He appointed Baljeet as proxy on 25.9.2004 and Abhijeet again issued another proxy in favour of Charanjeet or 26th September, 2004.

As the second proxy is received prior to expiry of 48 hours from the time for holding the meeting, the earlier proxy in favour of Baljeet gets revoked.

Therefore, Charanjeet will be entitled to attend the meeting and vote on a poll.

SPECIAL AND ORDINARY BUSINESS

There are two types of businesses i.e. special business or ordinary business which are being placed in the General Meeting of the Company for Approval

There are four types of ordinary businesses which can only be approved in AGM

(i) The consideration of the accounts, balance sheet and the reports of the Board of Directors and auditors;

(ii) The declaration of a dividend;

(iii) The appointment of directors in the place of those retiring; and

(iv) Appointment of and fixation of remuneration of auditors.

All businesses, other than the above mentioned are treated as special business.

It means all general meetings other than Annual General Meeting consider only special businesses whereas an Annual General Meeting may consider both types of businesses.

If the notice convening the meeting (where at special business will be transacted) does not state the nature of the special business, the meeting would be deemed to have been convened irregularly. Consequently, that special business cannot be dealt with at the meeting.

RESOLUTIONS

Decisions of a company are made by resolutions passed by the prescribed majority of the members present at the meetings.

The purpose of a meeting is to arrive at decisions and the sense of a meeting is ascertained by voting upon proposals put to the meeting.

A formal proposal put to the meeting is resolution.

A company expresses its will by the means of resolutions.

There are only two kinds of resolutions under the Act, ordinary and special.

There are three types namely, ordinary, special and resolutions requiring special notice.

ORDINARY RESOLUTIONS (Section 114 of the Companies Act, 2013)

A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast (whether on a show of hands, or electronically or on a poll) in favour of the resolution, including the casting vote (Chairman) by members who vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes cast against the resolution by members.

SPECIAL RESOLUTIONS (Section 114 of the Companies Act, 2013)

A resolution shall be a special resolution when it is duly specified in the notice calling the general meeting and the votes cast in favour of the resolution (whether on a show of hands, or electronically or on a poll) by members who vote in person or by proxy or by postal ballot are required to be not less than 3 times the number of the votes cast against the resolution by members.

Q11. At a General meeting of a company, a matter was to be passed by a special resolution. Out of 40 members present, 20 voted in favour of the resolution, 5 voted against it and 5 votes were found invalid. The remaining 10 members abstained from voting. The Chairman of the meeting declared the resolution as passed. With reference to the provisions of the Companies Act, 2013, examine the validity of the Chairman's declaration.

A11. In the given problem, the votes cast in favour (20) being more than 3 times of the votes cast against (5), if other conditions of Section 114 are satisfied, the decision of the Chairman is in order.

RESOLUTION REQUIRING SPECIAL NOTICE (Section 115 of the Companies Act, 2013)

Special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of total voting power or holding shares on which such aggregate sum not exceeding Rs.5,00,000/- as may be prescribed has been paid-up and the company shall give its members notice of the resolution in the following manner as prescribed in Rules.

Procedure for special notice:

(a) Eligibility for sending Special Notice:

A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than 1% of total voting power or holding shares on which an aggregate sum of not less than Rs.5,00,000/- has been paid-up on the date of the notice.

(b) Notice Period:

Such notice shall be sent by members to the company not earlier than three months but at least 14 days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.

(c) Notice for holding meeting:

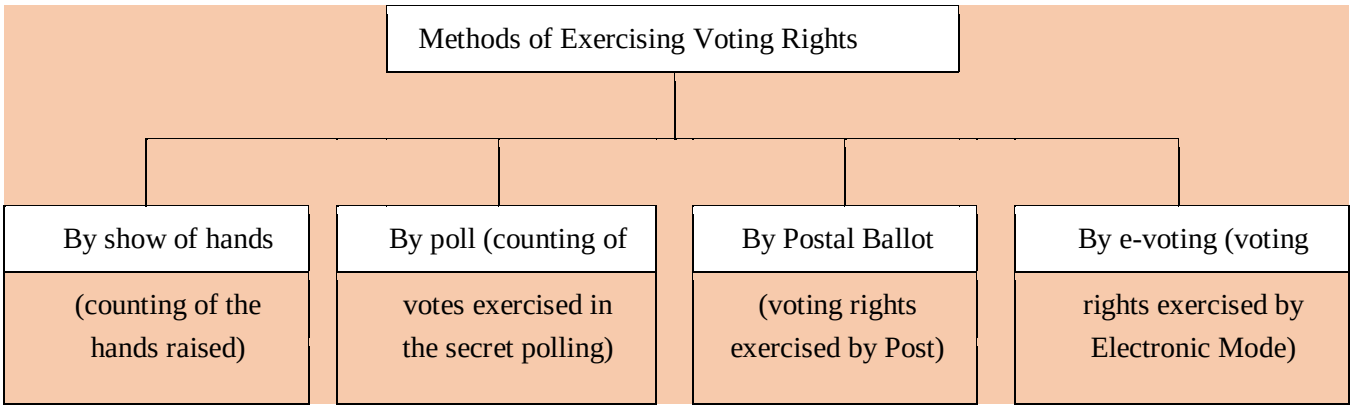
The company shall immediately after receipt of the notice, give its members notice of the resolution at least 7 days before the meeting, exclusive of the day of dispatch of notice and day of the meeting, in the same manner as it gives notice of any general meetings.

(d) Publication in the Newspapers:

If it is not practicable to give the notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated.

Such notice shall be published at least 7 days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

METHODS OF EXERCISING SHAREHOLDER'S RIGHTS WITH REGARD TO VOTING



- **Voting by show of hands:** [Sonia Gandhi]

  In this method, the Chairman calls upon the persons present who are entitled to vote to raise hands in favour of the motion and on counting them he proceeds to count the hands raised against the motion also.

  On comparison of the hands shown for and against the motion, the Chairman announces his verdict whether the resolution is carried or lost.

  Each member, irrespective of his shareholding, or voting right, has one vote.

- **Voting by poll:** [Manmohan Singh]

  Poll means counting of heads.

  In this method, the poll is taken if the Chairman or a prescribed number of members are dissatisfied with the result of voting by show of hands.

  In a poll, since the votes are counted on the basis of shareholdings of members, the true sense of meeting can be ascertained.

  Further in a poll proxies can also exercise their vote.

  In this system, the poll papers are given to persons who are entitled to vote who indicate on them their names and whether they are voting for or against the motion and also indicate there in the number of votes which they are entitled to.

  The Chairman appoints two scrutinizers to scrutinize these poll papers and submit the report to him, who declares the result of the poll.

Who can demand Poll?

> **In the case a company having a share capital:**

By the members present in person or by proxy, where allowed, and having not less than 1/10th of the total voting power or holding shares on which an aggregate sum of not less than Rs.5,00,000/- or such higher amount as may be prescribed, has been paid-up.

> **In the case of any other company:**

By any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power.

Special Note: In case of Companies for which e-voting is mandatory, poll is the only method that can be exercised in the meeting for casting votes by remaining shareholders.

- **Voting by Postal ballot:** [home delivery]

Where a company decides to pass a resolution by postal ballot, it shall send notice to all the shareholders along with a draft resolution.

In this method, MCA has notified certain business only to be transacted through the Postal Ballot like merger & amalgamation.

In the notice, the shareholders are asked to send their assent or dissent in writing on a postal ballot within a period of 30 days from the date of posting of the letter.

Such notice must be sent by registered post acknowledgement due or by any other method as may be prescribed by the Central Government.

- **Voting by Electronic Mode:** [Narendra Modi]

Section 108 of Companies Act, 2013 read with Rule 20 of Companies (Management & Administration) Rules, 2014, it is mandatory for the following companies to have e-voting facility:

- Listed Companies
- Companies having 1,000 or more Shareholders

A member may exercise his right to vote at any general meeting by electronic means and company may pass any resolution by electronic voting system.

Voting by electronic or Electronic voting system means a 'secured system' based process of display of electronic ballots, recording of votes of the members and the number of votes polled in favour or against, such that the entire voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate 'cyber security'.

VOTING THROUGH ELECTRONIC MEANS (Section 108 of the Companies Act, 2013)

It is practically not possible for every member specially members holding minor shares to travel up to the venue of GM to participate.

To eliminate this difficulty and to enhance the participation of minority members, concept of e-voting has been introduced by the Companies Act, 2013.

E-voting does not eliminate member's right to physically attend and vote at the general meeting.

However, member can cast his vote through one mode only.

A member after casting his vote through e-voting can go and attend the general meeting but cannot cast vote in that general meeting.

And if he casts his vote at the GM as well, his electronic vote will be considered as valid.

Applicability:

Section 108 of the Act shall apply to—

- All companies whose equity shares are listed on a recognized stock exchange; and
- All companies having 1000 or more members.

Non-Applicability:

Following companies are out of ambit of e-voting: —

- Companies having whose debenture/preference shares are only listed.
- Companies listed on SME trading platform.
- Companies listed on institutional trading platform.

Q12. PQR Ltd. is an unlisted company and has 400 shareholders in all. The shareholders of the company propose voting by electronic mode. Chairman of the company rejected the shareholders' proposA1. Explaining the provisions of the Companies Act, 2013, examine the validity of rejection of the shareholders' proposal by the Chairman.

2015 - June (4 marks)

A12. Section 108 of the Companies Act, 2013: Every listed company or a company having 1000 or more shareholders may provide to its members facility to exercise their right to vote at general meetings by electronic means.

A member may exercise his right to vote at any general meeting by electronic means and company may pass any resolution by electronic voting system.

Therefore, the chairman's rejection of shareholder's resolution is valid in accordance with the provisions of section 108.

PROCEDURAL REQUIREMENT OF E-VOTING FACILITY

Responsibilities of Board

The Board shall appoint

- Any person as a scrutinizer who is a person of repute who is not in the employment of the company and who can, in the opinion of the Board, scrutinise the e-voting process or the ballot process, as the case may be, in a fair and transparent manner.
- Appoint an Agency - NSDL, CDSL, etc. ,

↓

Additional Disclosure in Notice of GM ^

The Notice shall additionally disclose the following:

- Indicate the process and manner for voting by electronic means;
- Indicate the time schedule including the time period during which the votes may be cast by remote e-voting;
- Provide the details about the login ID;
- Specify the process for generating or receiving the password and for casting of vote in a . secure manner.

↓

Public Notice by way of Advertisement The public notice shall be published at least 21 days before the date of general meeting in a vernacular newspaper and in English newspaper having country-wide circulation giving details about availability of electronic votingJ
↓
Remote E-Voting The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting
↓
Voting at the General Meeting The Company may provide either Physical or electronic voting at the General Meeting as well. The Company which falls into ambit of Section 108 has to mandatorily follow voting by Poll, i.e. they cannot carry out voting by show of hands.

DECLARATION OF RESULT OF VOTING

- The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e- voting in the presence of at least two witnesses not in the employment of the company.

  The Scrutinizer will submit the scrutinizer's report within 3 days of the conclusion of the GM
- The result should be displayed at Notice Board at Registered Office, Head Office, and Corporate Office as well as on the website of the Company.

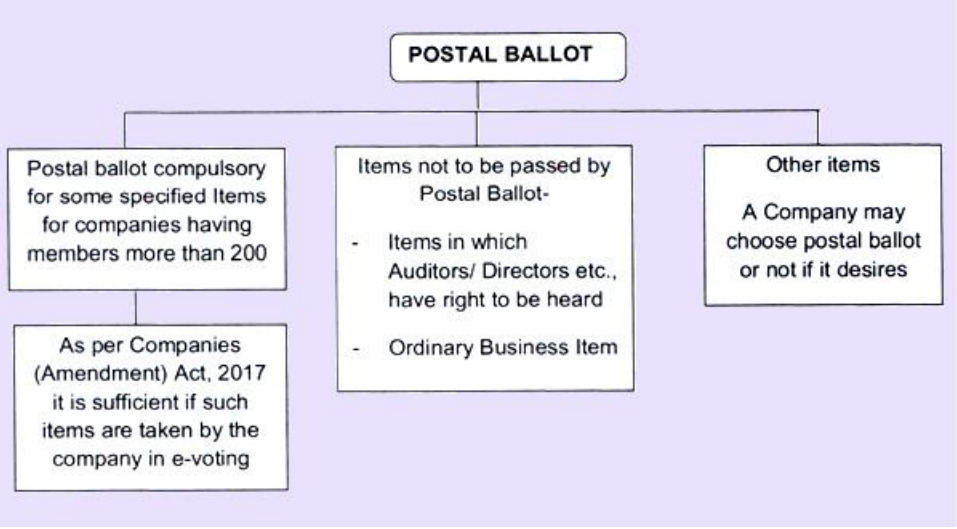
  The resolution if passed shall be deemed to be passed on the date of relevant general meeting.

  In case of listed Company report shall also be submitted to Stock Exchange.

PASSING OF RESOLUTIONS BY POSTAL BALLOT

Section 2(65) - "Postal Ballot" means voting by post or through any electronic mode.

Applicability: The postal ballot is applicable to all types of companies except One Person Company, or a Company having members upto 200.



The Companies as stated above shall get following resolution passed by postal ballot, instead of transacting the business

in general meeting of the company:

(i) Alteration of the Object Clause of Memorandum;

(ii) Alteration of Articles of Association in relation to defining private company;

(iii) Buy-back of own shares by the company;

(iv) Issue of shares with differential voting rights as to voting or dividend or otherwise;

(v) Change in place of Registered Office outside local limits of any city, town or village;

(vi) Sale of whole or substantially the whole of undertaking of a company;

(vii) Giving loans or extending guarantee or providing security in excess of the limit;

(viii) Election of a director;

(ix) Variation in the rights attached to a class of shares or debentures or other securities.

Any item of business required to be transacted by means of postal ballot (as stated above), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

PROCEDURE FOR CONDUCTING BUSINESS THROUGH POSTAL BALLOT

- **Notice:**

  Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders in writing on a postal ballot or by electronic means within a period of 30 days from the date of dispatch of the notice.

  The notice shall be sent either

  (a) by Registered Post or speed post, or

  (b) through electronic means like registered e-mail id or

  (c) through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within 30 days.

  Notice of postal ballot provisions in Secretarial Standard on GM (SS-2)

  Notice shall also specify the mode of declaration of the results of the voting by postal ballot.

  Notice shall also be given to the Directors and Auditors of the company, to the Secretarial Auditor, to

  Debenture Trustees, if any, wherever required.

  In case the facility of e-voting has been made available, the information about its availability and details thereof should be mentioned.

  Notice shall clearly specify that any Member cannot vote both by post and e-voting and if he votes both by post and e-voting, his vote by post shall be treated as invalid.

- **Advertisement**:

  An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district.

- **Notice to be placed on the website:**

  The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members.

  Such notice shall remain on such website till the last date for receipt of the postal ballots from the members.

- **Appointment of scrutinizer**:

  The Board of Directors shall appoint one scrutinizer, who is not in employment of the company and who, in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner.

- **Submission of report of the scrutinizer**:

  The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later

than 7 days thereof.

- **Declaration of result**:

  The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.

Miscellaneous Postal ballot provisions in Secretarial Standard on GM (SS-2)

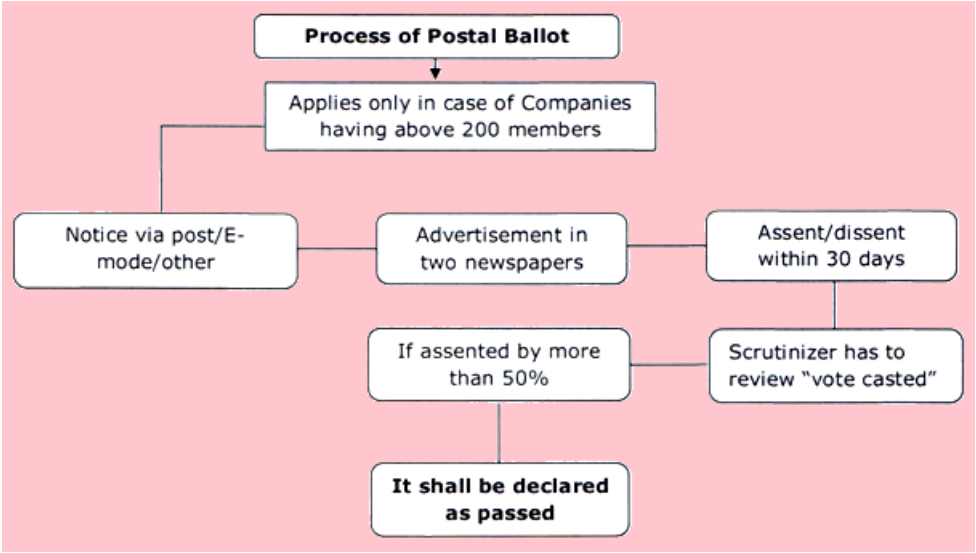
Rescinding of Resolution

A Resolution passed by postal ballot shall not be rescinded otherwise than by a Resolution passed subsequently through postal ballot.

Modification to the Resolution

No amendment or modification shall be made to any Resolution circulated to the Members for passing by means of postal ballot.

PROCESS FOR POSTAL BALLOT



> **Step-1:**

Where a company decides to pass any resolution by resorting to postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefore, and requesting them to send their assent or dissent in writing on a postal ballot within a period of 30 days from the date of posting of the letter.

> **Step-2:**

The notice shall be sent by registered post acknowledgement due, or by any other method as may be prescribed by the Central Government in this behalf.

Also with the notice, there shall be included a postage pre-paid envelope for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period.

> **Step -3:**

If resolution is assented to by a requisite majority of the shareholders by means of postal ballot, it shall be deemed to have duly passed at general meeting convened in that behalf.

> **Other Important Steps:**

(i) The board of directors shall appoint one scrutinizer, who is not in employment of the company;

(ii) The scrutinizer shall submit his report as soon as possible after the last date of receipt of Postal Ballots;

(iii) The scrutinizer will be willing to be appointed and he is available at the Registered Office of the company for the purpose of ascertaining the requisite majority;

(iv) The scrutinizer shall maintain a register to record the consent or otherwise received, including electronic media, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-voting rights and the Scrutinizer shall also maintain record for postal ballot which are received in defaced or mutilated form.

MINUTES OF PROCEEDINGS OF MEETINGS (Section 118 of the Companies Act, 2013)

Every company is required to keep minutes of the proceedings of general meetings and of the meetings of Board of Directors and its committees.

- Important provisions relating to the Minutes of the Meeting:

  Every company shall record minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board.

  (a) Record minutes within 30 days: Every company shall record within 30 days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

  (b) Fair and Correct Summary: The minutes of each meeting shall contain a fair and correct summary of the proceedings.

  (c) Appointment to be included: All appointments made at any of the meetings shall be included in the minutes of the meeting.

In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain—

(a) the names of the directors present at the meeting; and

(b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

The Chairman of the meeting has the authority to add or delete anything which:

(a) is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company.

The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes.

(d) The minutes kept shall be evidence of the proceedings recorded therein.

No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(e) Compliances with Secretarial Standard: Every company shall observe secretarial standards with respect to general and Board meetings specified by the ICSI.

Note: Every company has to follow the Secretarial Standard for convening its General Meeting and preparing its Minutes.

(f) Fine & Punishments: If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of Rs.25,000/- and every officer of the company who is in default shall be liable to a penalty of Rs.5,000/-.

(g) Fine & Punishment for Tampering of minutes: If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than Rs.25,000/- which may extend to Rs. 1,00,000/-.

Minutes provisions in Secretarial Standard on GM (SS-2)

- A distinct Minutes Book shall be maintained for Meetings of the Members of the company, creditors and others as may be required under the Act. Resolutions passed by postal ballot shall be recorded in the Minutes book of General Meetings.
- Every company shall follow a uniform and consistent form of maintaining the Minutes.
- The pages of the Minutes Books shall be consecutively numbered.
- Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.
- Loose Leaf- Minutes of Meetings, if maintained in loose-leaf form, shall be bound periodically depending on the size and volume. There shall be a proper locking device to ensure security and proper control to prevent removal or manipulation of the loose leaves.
- Place of keeping minutes: Minutes Books shall be kept at the Registered Office of the company or at such other place, as may be approved by the Board.
- In case a Meeting is adjourned, the Minutes in respect of the original Meeting as well as the adjourned Meeting shall be entered in the Minutes Book within thirty days from the date of the respective Meetings.
- Minutes of all Meetings shall be preserved permanently at the registered office of the Company with the Custody of Company Secretary in physical or in electronic form with Timestamp.

REPORT ON ANNUAL GENERAL MEETING (Section 121 of the Companies Act, 2013)

Reporting by Every Listed Company: Every listed public company is required to prepare a report on each annual general meeting including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and the rules made thereunder.

Filing with ROC:

A copy of the report is to be filed with the ROC in Form No. MGT. 15 within 30 days of the conclusion of annual general meeting along with the prescribed fee.

Rule 31 of the Companies (Management and Administration) Rules, 2014

The report shall be prepared in the following manner:

1. A report shall be prepared in addition to the minutes of the general meeting.
2. The report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the Managing director, if there is one.
3. Such report shall contain the details in respect of the following:
   - (a) The day, date, hour and venue of the annual general meeting.
   - (b) Confirmation with respect to appointment of Chairman of the meeting.
   - (c) Number of members attending the meeting.
   - (d) Confirmation of quorum.
   - (e) Confirmation with respect to compliance of the Act and the Rules, secretarial standards made There under with respect to calling, convening and conducting the meeting.
   - (f) Business transacted at the meeting and result thereof.
   - (g) Particulars with respect to any adjournment, postponement of meeting, change in venue.
   - (h) Any other points relevant for inclusion in the Report.
4. Such Report shall contain fair and correct summary of the proceedings of the meeting.

Default in filing the Report:

If the company fails to file the report with the prescribed period then the company shall be liable for fine not less than Rs.1 lac but not more than Rs.5 lacs and every officer who is in default shall be punishable with fine not less than Rs.25,000/- but not more than Rs.l,00,000/-.

MISCELLANEOUS

Presence of Statutory or Secretarial Auditor at General Meetings

Section 146 of the Act requires the presence to Auditors in general meetings unless otherwise exempted, either himself or through his authorized representative, who shall also be qualified to be an auditor and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

Provision related to presence of Auditor in Secretarial Standard on GM (SS-2)

Similarly SS-2 requires the secretarial auditor, unless exempted by the company shall, either by himself or through his authorized representative who shall also be qualified to be a secretarial auditor, attend the Annual General Meeting and shall have the right to be heard at such Meeting on that part of the business which concerns him as Secretarial Auditor.

Q13. Mrs. Rukmini is the statutory auditor of Energies Ltd. Free reserves of the company are four times more than the paid-up share capitA1. The company has Rohit, as secretarial auditor. There is a cost auditor, Amit, and an internal auditor, Sunil. Examining the provisions of the Companies Act, 2013 read with the secretarial standards, advise the company as to who is/are required to be present at the forthcoming annual general meeting of the company.

4 marks Dec 2016

A13. Rukmini (Statutory Auditor), Rohit (Secretarial Auditor) are required to be present at AGM

Filing of Resolutions and Agreements with ROC (MGT-14) (Section 117 of the Companies Act, 2013)

Section 117 provides that a copy of every resolution and an agreement shall be filed in Form No.

MGT.14 with the Registrar, within 30 days of its passing or making thereof.

Resolutions and agreements to be filed with the Registrar are as under:

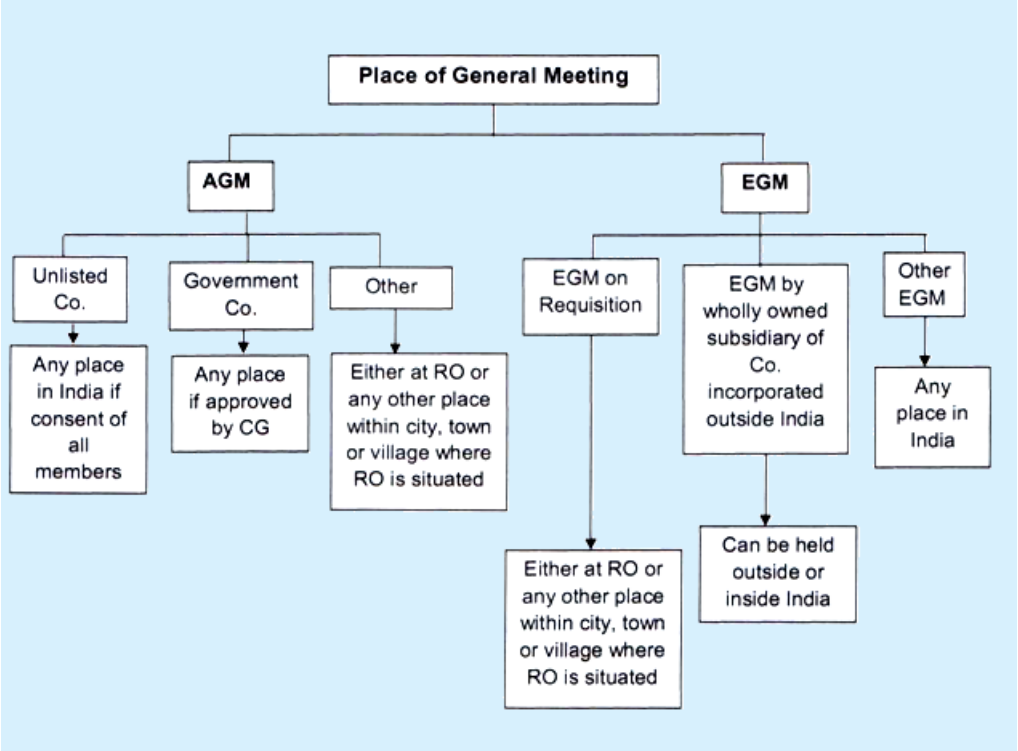
- Special resolutions;
- Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
- Any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
- Resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;
- Resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code, 2016;
- Resolutions passed in pursuance of sub-section (3) of section 179. No person shall be entitled

  under Section 399 to inspect or obtain copies of such resolutions; this clause shall not apply to a banking company in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business. This sub-clause is not applicable to private
- Any other resolution or agreement as may be prescribed and placed in the public domain.

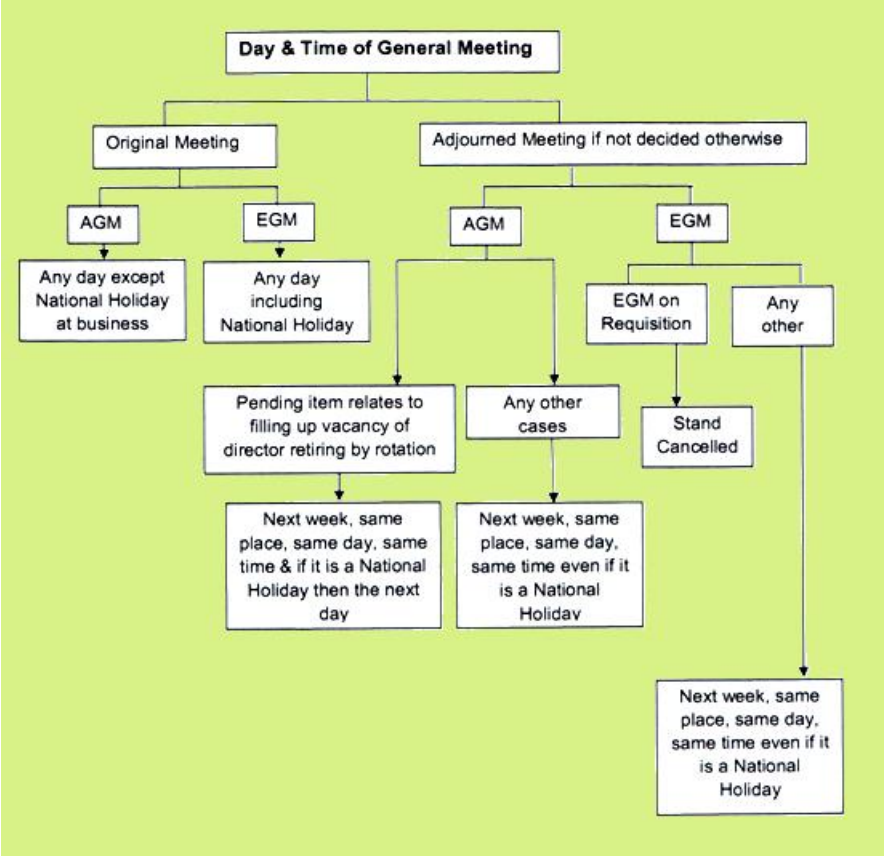
Default:

The Company and every officer who is in default including the liquidator shall be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5 Lakh.

SUMMARY CHART 1 (Place of General Meeting)



SUMMARY CHART 2 (Day & Time of General Meeting)


Day & Time of General Meeting
Original Meeting
Adjourned Meeting if not decided otherwise
AGM
EGM
AGM
EGM
Any day except National Holiday at business
Any day including National Holiday
EGM on Requisition
Any other
Pending item relates to filling up vacancy of director retiring by rotation
Any other cases
Stand Cancelled
Next week, same place, same day, same time & if it is a National Holiday then the next day
Next week, same place, same day, same time even if it is a National Holiday
Next week, same place, same day, same time even if it is a National Holiday

CHAPTER 19
VIRTUAL MEETING

INTRODUCTION

With the development of advanced technology, virtual meetings are being used to bring people in various locations together to conduct business.

Virtual meetings have become a widespread acceptable medium to reach large participants. They are far cheaper than face-to-face events.

It involves people interacting on the web, rather than meeting in a physical location.

A virtual meeting is when people around the world irrespective of their location, use video, audio, web, and text to link up online.

It permits real-time sharing of information without being physically located together.

Success of virtual meetings depends on technical equipment, the software used and trained manpower which should work well and be operated with ease.

Virtual Equipment should be simple and easy to use and understand by the users with little instruction or training.

Requirements of Virtual Meeting

- Meeting rooms
- Software, which can be either purchased or can be provided by vendor for a fee on yearly rental basis.
- Hardware equipment like Monitor or LED screen, Webcams.
- High quality mike system.
- Projectors.
- Document scanners.
- Leased Lines.
- High speed wireless internet.
- Recording & Storage Equipment for recording the proceeding.
- Have trial run before the meeting to ensure all the systems are working properly.

VIRTUAL BOARD MEETINGS

Any Director may participate through Electronic Mode in a Meeting unless the Act or any other law specifically prohibits such participation through Electronic Mode.

Directors shall not participate through Electronic Mode in the discussion on certain restricted items.

Salient points:

1. The notices of the meeting shall be sent to all the directors in accordance with the provisions of section 173 of the Act. The Notice shall inform the Directors about the option available to them to participate through Electronic Mode and provide them all the necessary information.
2. If a Director intends to participate through Electronic Mode, he shall give sufficient prior intimation to the Chairman or the Company Secretary to enable them to make suitable arrangements in this behalf.

   The Director may intimate his intention of participation through Electronic Mode at the beginning of the Calendar Year also, which shall be valid for such Calendar Year.

   Though such declaration shall not debar him from participation in the meeting in person, in such case a sufficient intimation of attending in person is required to be sent to the company.
3. Directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless

they are to be excluded for any items of business under the provisions of the Act or any other law.

Even if the law does not allow to be a part of quorum they can still participate in an item if the quorum is present in the meeting.

4. The attendance register shall be deemed to have been signed by the Directors participating through Electronic Mode, if their attendance is recorded in the attendance register and authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman or by any other Director present at the Meeting.

Brief Procedure of Video Conferencing/Virtual Meeting

- Roll call by chairperson
- Directors to introduce themselves at each and every time they speak on matters
- Presence will be counted for quorum
- No unauthorized access.
- Differently abled Director may have person accompanying them
- Directors to repeat if there is any disturbance
- Chairperson to announce summary at the end of the Meeting
- Minutes of the meeting to contain the names of Directors who participated through Video conference.

Matters not to be dealt with in a Meeting through Video Conferencing or other Audio Visual Means

1. Approval of the annual financial statements;
2. Approval of the Board's report;
3. Approval of the prospectus;
4. Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub-section (1) of Section 134 of the Act; and
5. Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

VIRTUAL GENERAL MEETINGS

Virtual meetings of members have many advantages for companies and their shareholders.

In modern corporate world shareholders are spread across the country and around the globe, which makes it difficult for the shareholders to attend the meetings as it involves lot of travel time and cost. With less participation, the agenda items are often passed without any discussion with fewer members. Virtual meetings will help in increasing shareholder's participation as compared to physical meetings.

Advantages of Virtual AGM/EGM

- Increase shareholder's participation in meetings,
- Saves time on travel and cost because of remote voting.
- Encourages more participation by investors across the world.

  Provides greater accessibility to shareholders who cannot be physically present due to distance.
- Enable institutional investors to attend more than one meeting in a day and protect shareholder's interest.
- Reduce the cost of holding and conducting shareholder's meeting, including the costs of the venue, stationary, transport and refreshments.
- Saves time of the Company's personal.

Difficulties in holding Virtual Meetings of Members:

- Security of the systems used.
- streaming with quality without interruption.

- providing with secure login and shareholder authentication for attendance, with ease of access for shareholders, and remote voting.
- Combined registration, voting and reporting software.
- customized instant results screen and detailed audit reporting.
- Data Security of Logins and Passwords.
- allowing the shareholders, the choice of device.

Today's Scenario:

As of today, holding of total virtual shareholder's meeting is not allowed, at present Hybrid meetings are permitted, "hybrid" to refer to those meetings are combination of online participation as well as option of attending the meeting in-person, "virtual meetings" are those conducted wholly online with no physical meeting of shareholders.

As of now the Companies Act, 2013 has introduced E-Voting as a step to encourage corporate democracy and promote good corporate governance.

ROLE OF CHAIRPERSON & COMPANY SECRETARY

The Chairperson of the meeting and the company secretary shall take due and reasonable care with respect to the following:

> To safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

> To ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

> To record proceedings and prepare the minutes of the meeting;

> To store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.

> To ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

> To ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting.

> The persons, who are differently abled, may be facilitated by the Board to allow a person to accompany him.

CHAPTER 20
LEGAL FRAMEWORK GOVERNING COMPANY SECRETARIES

INTRODUCTION

This chapter is made part of the syllabus with an intent to impart ethical conduct to the future Company Secretary. Company Secretary being one of the most respectful profession in India expects a certain standard of conduct, whether ethical, personal or professionA1. To maintain that decorum we need to understand the code of conduct or code of ethics of our profession.

EVOLUTION

Stage 1	• Advisory Board on non- statutory basis setup by Government in 1950's
Stage 2	• Government Diploma in Company Secretaryship (GDCS) exams conducted by Department of Company Affairs
Stage S	• Institute of Company Secretaries of India set-up on 4th October 1968 as Section 25 Company (Non Profit Company) under Companies Act, 1956
Stage 4	• Government moved the Company Secretaries Bill to convert ICSI into Statutory Body
Stage 5	• Current Legal Framework comprise of The Company Secretaries Act, 1980 and The Company Secretaries Regulation 1982

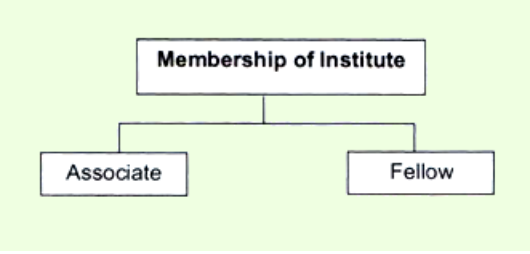
IMPORTANT TERMINOLOGIES

Company Secretary:

According to section 2(1) (c) of the Company Secretaries Act, 1980 "Company Secretary" means a person who is a member of the Institute of Company Secretaries of India.

Associate and Fellow Members

The members of the Institute can be categorized into following 2 classes:



Associate Members:

As soon as a person's name is entered into the Register of Members maintained by the Institute of Company Secretaries of India, he becomes the Associate Member of the Institute. He can use the letters "A.C.S." after his name to indicate that

he is an Associate.

Fellow Members:

An associate member who fulfills following conditions can become a fellow member:

- An associate who has been in continuous practice in India as a Company Secretary for at least 5 years and a person who has been an Associate for a continuous period of atleast 5 years.
- Possesses such qualifications or practical experience as the Council may prescribe.
- Paid prescribed fee.
- Whose name is entered in Register as Fellow?

Certificate of practice

A member can practice as a Company Secretary, whether in India or elsewhere, only after obtaining a Certificate of Practice.

Deemed "to be in practice"

A member of the Institute shall be deemed "to be in practice" if he, either

- Individually or
- In partnership with
- One or more members of the Institute in practice or
- Members of such other recognised professions as may be prescribed.

Carries out the following activities:

1. Engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or
2. offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganization or winding up of companies; or
3. Offers to perform or performs such services as may be performed by—
    - an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,
    - a share transfer agent,
    - an issue house,
    - a share and stock broker,
    - a secretarial auditor or consultant,
    - an adviser to a company on management, including any legal or procedural matters,
    - issuing certificates on behalf of, or for the purposes of, a company, or
    - holds himself out to the public as a Company Secretary in practice, or
4. Renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or
5. Renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice.

Register of Members

The Council shall maintain in the prescribed manner a Register of the members of the Institute.

The Register shall include the following particulars about every member of the Institute:

- His full name, date of birth, domicile, residential and professional addresses;
- The date on which his name is entered in the Register;
- His qualifications;
- Whether he holds a certificate of practice; and

- Any other particulars which may be prescribed.

Every member of the Institute shall whose name is entered in the Register, pay annual membership fee as may be decided by the council from time to time.

Removal from the Register of Members

The Council may remove from the Register the name of any member of the Institute:

(a) Who is dead; or

(b) Who has requested for name removal; or

(c) Who has not paid any prescribed fee required to be paid by him; or

(d) Who have or subsequently developed any of the disabilities mentioned in section 8.

The Council shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.

DISCIPLINARY MECHANISM AND APPELATE AUTHORITY

Disciplinary

Disciplinary Directorate	Board of Discipline	Disciplinary Committee
Established by the Act	Established by the Council	Established by the Council
• Director (Discipline) is the head and have other employees. • It receives complaint against member's misconduct, investigate and arrive at a prima facie opinion on the occurrence of the alleged misconduct. • If Director believes that the member is guilty of any professional or other misconduct mentioned in the 1st Schedule, the matter shall be placed before the Board of Discipline. • If Director believes that the member is guilty of any professional or other misconduct mentioned in the 2nd Schedule or both the schedules, the matter shall be placed before the Disciplinary Committee	• The Board of Discipline shall follow summary disposal procedure to dispose the cases placed before it. • It can deal with the issues mentioned in the 1st Schedule. • On receipt of the information from Director (Discipline) if the Board also believes that a misconduct has taken place, the board will pass an order after giving opportunity of being heard to the member. • The Board can pass following order: 1. reprimand the member; 2. remove the name of the member from the Register up to 3 months; 3. Impose fine upto Rs. 1 lakh.	• The President or the Vice-President of the Council will become the Presiding Officer along with other 2 council members & 2 members representing CG. • It can deal with the issues mentioned in the 2nd Schedule or issues related to both the schedules. • On receipt of the information from Director (Discipline) if the Committee also believes that a misconduct has taken place, the board will pass an order after giving opportunity of being heard to the member. • The Committee can pass following order: 1. reprimand the member; 2. remove the name of the member from the Register permanently; 3. Impose fine upto Rs. 5 lakh.

Note: All the above three have powers of the Civil Court.

Appellate Authority

Appellate Authority constituted under sub-section (1) of section 22A of the Chartered Accountants Act, 1949, shall be deemed to be the Appellate Authority for the purposes of this Act.

Against whom appeal can be filed?

Appeal can be filed against:

- Board of Discipline
- Disciplinary Committee

Who can file Appeal?

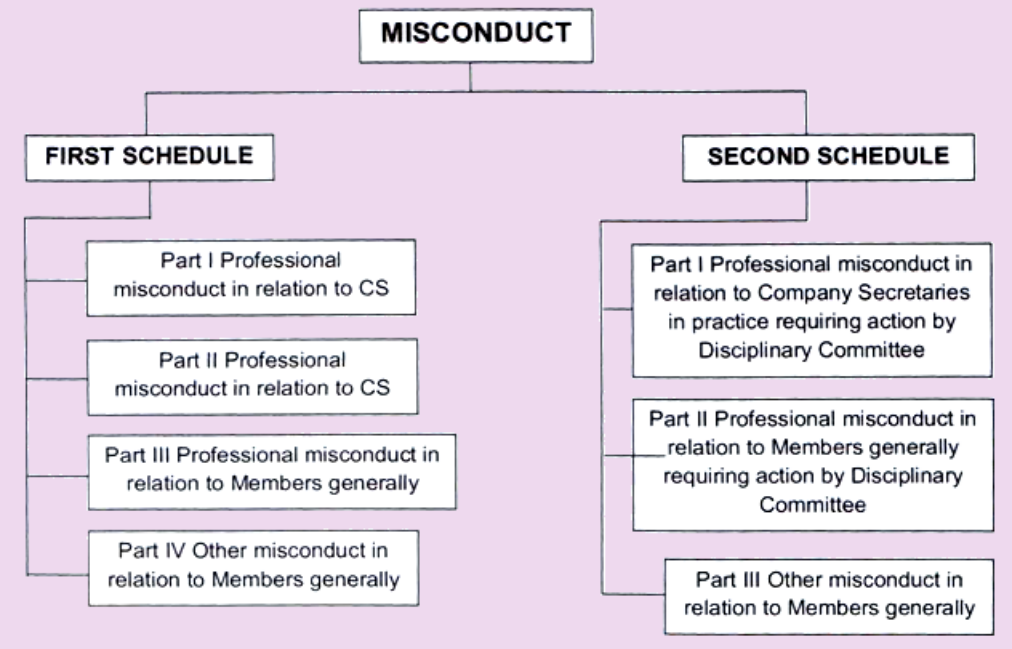
An appeal can be filed by:

- Any person aggrieved by decision of Board of Council or Disciplinary Committee
- Director (Discipline), if authorised by the Council

Time Limit for filing appeal

Appeal should be filed within 90 days of the decision of Board of Council or Disciplinary Committee. Extension may be granted if it is satisfied that there was sufficient cause for not filing the appeal in time.

MISCONDUCT UNDER THE COMPANY SECRETARIES ACT, 1980



	FIRST SCHEDULE		
Part - I (Professional Misconduct - CS in Practice)	A CS in Practice is deemed to be guilty of professional Misconduct if he		
	Clause 1	Allows any person to practice in his name as a Company Secretary, unless such person is also a Company Secretary in practice, and is in partnership with or employed by him.	
	Clause 2	> Pays or allows or agrees to pay or allow, directly or indirectly, > any share, commission or brokerage in fees or profits > of his professional business to any person other than ■ a member of the Institute, or ■ partner/retired partner, or ■ legal representative of deceased partner, or	

		* member of any other professional bodies (ICAI, ICWAI, Bar Council of India, Indian Institute of Architects, Institute of Actuaries of India, etc.) or • With such other persons having prescribed qualifications (CA, CWA, Actuary, B.E. Bachelor in Technology, Bachelor in Architecture, Bachelor in Law; MBA).	
	Clause 3	Accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of Institute. However, such restriction does not apply in respect of following persons: ■ Member of any other professional bodies ICAI, ICWAI, Bar Council of India, Indian Institute of Architects, Institute of Actuaries of India, etc.) or ■ With such other persons having prescribed qualifications (CA, CWA, Actuary, B.E. Bachelor in Technology, Bachelor in Architecture, Bachelor in Law; MBA).	
	Clause 4	Enters into partnership in or outside India, with any person other than the following: 1. C.S. in practice, or 2. Member of any other professional body having prescribed qualifications, or 3. A person who but for his residence abroad would be entitled to be registered as member, or 4. A person whose qualifications are recognized by CG or Council for the purpose of permitting such partnerships. Permitted Membership for Partnership means: Members of ICAI, ICWAI, Bar Council of India, Institution of Engineers, Indian Institute of Architects, Institute of Actuaries of India and professional Bodies outside India whose qualifications are recognised by the Council.	
	Clause 5	Secures any professional business through the services of a person who is not an employee or not his partner or by means which are not open to a CS.	
	Clause 6	Solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or by any other means. However, following are permitted: Securing professional work from another CS in practice. Responding to tenders or enquiries issued by various users of professional services	
	Clause 7	■ Advertises his professional attainments or services, or ■ Uses any designation or expressions other than CS	
		On professional documents, visiting cards, letter heads or sign boards. However, recognized degree of university or membership recognized institution may be used: PROVIDED that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council	
	Clause 8	Accepts the position of a Company Secretary in Practice previously held by another Company Secretary in Practice without first communicating	

		with him in writing In following cases it shall not be mandatory (though desirable) to send a prior written communication to the earlier incumbent:	
		■ Certifying e-forms for various companies. ■ Giving Due Diligence Certificate for consortium borrowers. ■ Holding assignment as retainer for a company or group of companies. • Issuing search reports. ■ Issuing certificates as contemplated under SEBI (LODR) Regulations, 2015. ■ Giving legal opinion In following cases, it shall be mandatory to send a prior written communication ■ Signing/Certification of Annual Return ■ Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013 * Issuance of Certificate of Securities Transfers. ■ Certificate of reconciliation of capital, updating of Register of Members, etc. as per the Securities & Exchange Board of India's Circular D & CC/Cir-16/2002, dated December 31, 2002. ■ Conduct of Internal Audit of Operations of the Depository Participants. ■ Certification of corporate governance under SEBI (LODR) Regulations, 2015.	
	Clause 9	Charges or offers to charge, accepts or offers to accept, in respect of any professional employment, - fee which is based on a %age of profits or which are contingent upon findings, or results of such employment, except as permitted under regulations	
	Clause 10	Engages in any Business or occupation, other than profession of C.S. unless permitted by council so to engage. Note: However, a member may become director in a company	
	Clause 11	Allows a person not being a member of Institute in practice or a member not being his partner, to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary	
Part - II (Professional Misconduct - CS in Service)	A CS in Service shall be deemed to be guilty of professional misconduct if he:		
	Clause 1	Pays or allows or agrees to pay directly or indirectly to any person any share in the emoluments of the employment undertaken by him	
	Clause 2	Accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.	
Part - III (Professional	A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he		

Misconduct - CS	Clause 1	Not being a fellow of the Institute, but acts as a fellow of the Institute	
	Clause 2	Does not supply the information called for, or does not comply with the	

Generally)		Requirements asked for by the Institute, Council or any of its committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the appellate authority.
	Clause 3	While inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up or anything as provided for in clauses (6) and (7) of Part I of this schedule, gives information knowing it to be false.
Part - IV (Other Misconduct - CS Generally)	A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct,—	
	Clause 1	If he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding 6 months;
	Clause 2	In the opinion of the Council brings disrepute to the profession or the Institute as a result of his action whether or not related to his professional work.
SECOND SCHEDULE		
Part - I (Professional Misconduct - CS in Practice)	A CS in Practice is deemed to be guilty of professional Misconduct, if he	
	Clause 1	discloses information acquired in the course of his professional engagement to any person other than the client so engaging him, without the consent of such client, or otherwise than as required by any law for the time being in force.
	Clause 2	certifies or submits in his name or in the name of his firm a report of an examination of the matters relating to Company Secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or any employee in his firm or by another Company Secretary in practice.
	Clause 3	Permits his name or the name of his firm, to be used in connection with an estimate of earnings contingent upon future transactions in manner which may lead to the belief that he vouches for the accuracy of the forecast
	Clause 4	expresses his opinion on any report or statement given to any business enterprise in which he, his firm or a partner in his firm has a substantial interest;
	Clause 5	- fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity.
	Clause 6	fails to report a material misstatement known to him and with which he is concerned in a professional capacity.

	Clause 7	does not exercise due diligence, or is grossly negligent in the conduct of his professional duties.
	Clause 8	- fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion.
	Clause 9	fails to invite attention to any material departure from the qenerally accepted procedure relating to the secretarial practice.
	Clause 10	fails to keep moneys of his client, - other than fees or remuneration or money meant to be expended, in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.
Part - I (Professional Misconduct - CS Generally)	A member of the Institute will be held guilty of professional misconduct if he	
	Clause 1	Contravenes any of the provisions of this Act or the regulations made thereunder or any guidelines issued by the Council.
	Clause 2	Being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer
	Clause 3	Includes in any information, statement, return or form to be submitted to the Institute, Council or any of its committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority, any particulars knowing them to be false
	Clause 4	Defalcates or embezzles money received in his professional capacity.
Part - III (Other Misconduct - CS Generally)	Clause 1	A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is guilty by any civil or criminal court for an offence which is punishable for a term exceeding 6 months.

Complaints NS Enquiries Relating To Professional or Other Misconduct of Members

Any complaint received against a member of the Institute under Section 21 shall be investigated, and enquiry relating to misconduct of such member shall be held, by the Disciplinary Committee.

Every Complaint shall contain the acts or omissions and the oral or/and documentary evidence.

Ordinarily within 60 days send particulars of

- the act of omissions alleged or a copy of the complaint to such member at his address
- in case if it is the firm send particulars of the acts of omission alleged or a copy of the complaint at the address of the head office of the firm.

Within fourteen days of issue of intimation or within such further time allowed, the member shall forward a written statement in this defence verified in the same manner as the complaint.

Council on receipt of the written statement shall give an opinion and may also call for any additional particulars or documents connected therewith.

Procedure in enquiry before the disciplinary committee

The disciplinary committee shall give the complainant and respondent a noticed of the meeting at which the case shall be considered by the committee.

Such complaint and respondent may be allowed to defend themselves before the Disciplinary Committee either in person or through legal practitioner or any other member of the Institute.

Where, in the course of a disciplinary enquiry, a change occurs in the composition of the Disciplinary Committee, unless any of the parties to such enquiry makes a demand within fifteen days of receipt of a notice of a meeting of such Disciplinary Committee, that the enquiry be made de novo report of the Disciplinary Committee shall be called in question on the ground that any member of the Disciplinary Committee did not possess sufficient knowledge of the facts relating to such inquiry.

The Disciplinary Committee shall after investigation report the result of its enquiry to the Council for its consideration.

Procedure in a hearing before the Council

After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent is not guilty of any professional or other misconduct, it shall record its findings accordingly and direct that the proceedings shall be filed or the complaint shall be dismissed as the case may be.

Finding is that the member of the Institute has been guilty of a professional or other misconduct, the Council shall afford to the member an opportunity of being heard before orders are passed against him in the case.

The Council after hearing the respondent, if he appears in person or after considering the representations, if any, made by him, pass such orders as it may think fit, as provided under Subsection (4) of Section 21.

The orders passed by the Council shall be communicated to the complainant and the respondent.

CHAPTER 21
SECRETARIAL STANDARD BOARD

INTRODUCTION

As per section 118(10), every Company has to comply with Secretarial Standards on Board Meeting (SS-1) & Standard on General Meeting (SS-2) as issued by ICSI which became effective on 1st July, 2015 (amended with effect from 1st October, 2017).

Further it is the duty of Secretarial Auditor to report on compliance of Secretarial Standards.

The Body which formulates Secretarial Standards is Secretarial Standard Board (SSB).

SSB was constituted in the year 2000 when there was no such Board or body throughout the world.

COMPOSITION OF SSB

The SSB comprises of representatives from major industry associations viz,

- The Federation of Indian Chambers of Commerce and Industry (FICCI),
- Confederation of Indian Industry (CII),
- The Associated Chambers of Commerce & Industry of India (ASSOCHAM),
- PHD Chamber of Commerce and Industry,
- representatives of regulatory authorities, such as the Ministry of Corporate Affairs, Securities & Exchange Board of India, Reserve Bank of India, Bombay Stock Exchange, National Stock Exchange of India Ltd. and the sister professional bodies viz. the Institute of Chartered Accountants of India and the Institute of Cost Accountants of India and eminent members of the Institute of Company Secretaries of India in employment and in practice.

FUNCTIONS OF SSB

The main functions of SSB are:

(i) Formulating Secretarial Standards;

(ii) Clarifying issues arising out of the Secretarial Standards;

(iii) Issuing Guidance Notes; and

(iv) Reviewing and updating the Secretarial Standards / Guidance Notes at periodic intervals.

NEED OF SECRETARIAL STANDARDS

Companies follow diverse secretarial practices and, therefore, there is a need to integrate, harmonies and standardize such practices so as to promote uniformity and consistency.

Secretarial Standards are developed in a transparent manner after extensive deliberations, analysis, and research and after considering the views of corporates, regulators and the public at large.

SCOPE OF SECRETARIAL STANDARD

Secretarial Standards do not substitute any existing laws or rules but, in fact only supplement such laws, rules and regulations.

Secretarial Standards should be in conformity with the provisions of the applicable laws.

If SS is inconsistent with any law, the provisions of the said law shall prevail.

PROCEDURE FOR FORMULATION & ISSUE OF SECRETARIAL STANDARD

1. **Determination of Area of Need:** SSB, in consultation with the Council, determine the areas in which Secretarial Standards need to be formulated and the priority thereof.
2. **Formulation of Working Groups:** In the preparation of Secretarial Standards, SSB may constitute Working Groups to formulate preliminary drafts of the proposed Standards.
3. **Circulation of Primary Draft amongst members of SSB:** The preliminary draft of the Secretarial Standard prepared by the Working Group shall be circulated amongst the members of SSB for discussion and shall be modified appropriately, if so required.
4. **Circulation of Primary Draft to Members of Institute and other authorities:** The preliminary draft will then be circulated to the members of the Central Council, as well as to Regional Councils/ Chapters of ICSI, various professional bodies, Industry Association/Chambers of Commerce, regulatory authorities such as the Ministry of Corporate Affairs, the Securities and Exchange Board of India, Reserve Bank of India, Department of Public Enterprises and to such other bodies/organisations as may be decided by SSB, for ascertaining their views, specifying a time- frame within which such views, comments and suggestions are to be received.
5. **Preparation and publishing of exposure Draft:** On the basis of suggestions received on the preliminary draft, an Exposure Draft of proposed Secretarial Standard will be prepared and published in the "Chartered Secretary", the journal of ICSI, and placed on the Website of ICSI for inviting suggestions/comments from public at large.
6. **Submission to Council:** After taking into consideration the comments received, the draft of the proposed Secretarial Standard will be finalised by SSB and submitted to the Council of ICSI.
7. **Finalisation and Issue of Secretarial Standard:** The Council will consider the final draft of the proposed Secretarial Standard and finalise the same in consultation with SSB. The Secretarial Standard on the relevant subject will then be issued under the authority of the Council.

SECRETARIAL STANDARD ISSUED BY ICSI:

ICSI has so far issued the following Standards:

Secretarial Standards on Meetings of Board of Directors (SS-1)

Secretarial Standards on General Meetings (SS-2)

Secretarial Standard on Dividend (SS-3)

Secretarial Standard on Registers and Records (SS-4)

CHAPTER 22
An Introduction to MCA 21
& filling in XBRL

AN INTRODUCTION TO MCA 21

MCA-21 has been designed virtually to eliminate the physical interface between the companies and the offices of ROCs, RDs and even MCA.

It has not only saved time and energy of the company representatives but also enabled them to focus on other creative tasks.

BENEFITS

The MCA21 application offers the following:

1. Enables the business community to register a company and file statutory documents quickly and easily.
2. Provides easy access of public documents
3. Helps faster and effective resolution of public grievances
4. Helps registration and verification of charges easily
5. Ensures proactive and effective compliance with relevant laws and corporate governance
6. Enables the MCA employees to deliver best of breed services

SERVICES OFFERED

- **Obtain Digital Signature Certificate –**
  The Information Technology Act, 2000 has provisions for use of Digital Signatures on the documents submitted in electronic form in order to ensure the security and authenticity of the documents filed electronically.
  This is secure and authentic way to submit a document electronically.

- **LLP Services for Business User –**
  A business user can enter or update partner details of an LLP, enter Form 3 or Form 3 & 4 details for LLP filing and verify partner details for filing Annual Return.

- **E-Filing –**
  User can download LLP Forms or Company Forms from the Portal, submit application for PAN and TAN, upload e-forms, download Submitted Form for resubmission, check annual filing status of the company, upload details of security holders or debenture holders or depositors.

- **Complaints –**
  A user can raise service related complaints, track the complaints created, create investor/serious complaint, track the status of complaints created as 'investor/serious complaint, give feedback or suggestions to MCA-21 and raise employee grievances.

- **Fee and Payment Services –**
  A user can avail services through Enquire Fees, pay later, link NEFT payment, pay miscellaneous fee, pay stamp duty and track the payment status.

- **Investor Services –**
  A user can search amount unclaimed/unpaid amount due to be transferred to the Investor Education and Protection Fund (IEPF), upload investor details, and confirm uploaded files.

CENTRAL REGISTRATION CENTRE (CRC)

The Central Registration Centre (CRC) is an initiative of Ministry of Corporate Affairs (MCA) in Government Process Re-engineering (GPR) with the specific objective of providing speedy incorporation related services in line with global best practices.

CRC is presently tasked to process applications for RUN service for reserving a name and forms related to new companies incorporations (SPICe/ SPICe MOA/ SPICe AOA /INC-22 andDIR-12).

CORPORATE IDENTITY NUMBER (CIN)

- Every company is allocated a Corporate Identity Number (CIN).
- CIN can be found from the MCA-21 portal through search based on:
  - ROC Registration No.
  - Existing Company Name
  - Old Name of Company (in case of change of name, user is required to enter old name and the system displays corresponding current name).
  - Inactive CIN [In case of change of CIN, the user is required to enter previous (inactive) CIN Number].
- Each Indian company (Listed or Unlisted) has a unique 21 Digit CIN.
- This is required to be quoted on all e-forms.
- Once this number is filled, company details are automatically filled in E-Forms issued by MCA by using pre-fill function.
- As stated above, CIN is a 21 digit number assigned to every company incorporated on or after November 1, 2000.
- The Corporate Identity Number allotted to a company indicates listing status, economic activity (industry), and state, year of incorporation, ownership and sequential number assigned by ROC (Registration Number).
- 1st Digit Listing Status Next 5 digits Economic Activity (industry) Next 2 digits State Next 4 digits Year of Incorporation Next 3 digits Ownership.
- Status of the company Private (PTC)/ public (PLC) / government companies (GOI) etc….. Last 6 digits Sequential number assigned by ROC (Registration Number).

Foreign Company Registration Number (FCRN)

Every Foreign Company has been allotted a Foreign Company Registration Number (FCRN).

Corporate Identity Number (CIN), work as a unique identifier of an Indian company.

Foreign Company Registration Number (FCRN) is a unique identifier in the case of a Foreign Company.

Director Identification Number (DIN)

DIN is an identification number which the Central Government may allot to any individual, intending to be appointed as director or to any existing directors of a company, for the purpose of his identification All existing and any person intending to be appointed as a director are required to obtain the Director Identification Number (DIN).

DIN is also mandatory for directors of Indian Companies who are not citizens of India.

However, DIN is not mandatory for directors of foreign company having branch offices in India.

Every individual, who is intending to be appointed as Director of a company or designated partner of a limited liability partnership is required to make an application electronically in Form DIR -3 to Central Government for obtaining Director Identification Number (DIN) or in case the company is being incorporated through Form SPICe, a maximum of three directors can apply for DIN.

DIN is a unique identification number and once obtained is valid for life time of a director.

A single DIN is required to be obtained irrespective of the number of directorships.

RUN FACILITY

The MCA Affairs has simplified the Company Name Approval Process from 26th January 2017 by introducing a new simple web-based application called RUN (Reserve Unique Name) for Company Registration.

RUN (Reserve Unique Name) is a simple and easy process for reserving a name for a new company or for change of name of an existing Company.

This facility can be availed only by a registered user of MCA portal.

The complete name of proposed company, including suffix like (OPC) Private Limited / Private Limited / Limited, should be submitted at the time of application for approval.

Also, the object of the proposed Company is also to be submitted through RUN application.

In case of change of name of an existing Company the Corporate Identification Number (CIN) of the existing company should be submitted at the time of application through RUN Process to reserve a new name.

INTEGRATED PROCESS OF NAME RESERVATION, COMPANY INCORPORATION, DIN ALLOTMENT AND ISSUANCE OF PAN &TAN THROUGH SPICe (FORM INC-32) BY MCA-21

An integrated process through which reservation of name, incorporation of a new company, application for allotment of DIN and/or application for PAN and TAN can be applied simultaneously through a single application e-Form i.e. Form INC-32 (SPICe).

After filing the SPICe Form and making payment the user is required to visit the MCA portal and access the service 'Submit application for PAN and TAN'.

He has to download Form 49A (PAN) and 49B (TAN) and upload them on the same screen after attaching his DSC.

He has to upload these forms (PAN & TAN) within 2 days of filing the SPICe form failing which the entire SPICe form would be marked as 'Invalid and Not to be taken on record'.

Once the e-Form is processed and found complete, company would be registered and CIN would be allocated.

DIN gets issued to the proposed Directors who do not have a valid DIN.

Maximum three proposed Directors are allowed using this integrated form for filing application of allotment of DIN while incorporating a company.

Also PAN and TAN would get issued to the Company.

On approval of SPIC e forms, the Certificate of Incorporation (COI) is issued with PAN as allotted by the Income Tax Department.

An electronic mail with Certificate of Incorporation (COI) as an attachment along with PAN and TAN is also sent to the user.

Further PAN card shall be issued by the Income Tax Department.

After receipt of Certificate of Incorporation (with PAN indicated there in as allotted by the Income Tax Department), in case of non-receipt of PAN card, stakeholders shall check the status at www.TINNSDL.com

DIGITAL SIGNATURE CERTIFICATE (DSC)

The e-forms are required to be authenticated by the authorized signatories using digital signatures as defined under the Information Technology Act, 2000.

A digital signature is the electronic signature duly issued by a certifying authority that shows the authority of the person signing the same.

It is an electronic equivalent of a written signature.

Every user who is required to sign an e-form for submission with MCA is required to obtain a Digital Signature Certificate.

For MCA-21, the following four types of users are identified as users of Digital Signatures and are required to obtain digital signature certificate:

1. MCA (Government) Employees.
2. Professionals (Company Secretaries, Chartered Accountants, Cost Accountants and Lawyers) who interact with MCA and companies in the context of Companies Act.
3. Authorized signatories of the Company including Managing Director, Directors, Manager or Secretary.
4. Representatives of Banks and Financial Institutions.

A person requiring a Digital Signature Certificate can approach any of the Certifying authorities identified by the MCA, with original supporting documents and self-attested copies, for issuance of Digital Signature Certificate.

DSCs can also be obtained, wherever offered by CA, using Aadhare KYC based authentication, and herein supporting documents are not required.

Such Certifying Authorities are authorized to issue a Digital Signature Certificate with a validity of one or two years. Registration of DSC is a onetime activity on the MCA portal.

For registration of DSC, steps are given on the MCA Portal.

All companies (Public Company, Private Company, Company not having share capital, Company limited by share or guarantee, Unlimited Company) must comply with this requirement of registration of DSC by the director, manager and secretary.

Foreign directors are required to obtain Digital Signature Certificate from an Indian Certifying Authority (List of Certifying Authorities is available on the MCA portal).

The process of registration of DSC is same as applicable to others.

IMPORTANT TERMS USED IN E-FILING

- **PRE-FILL**
  - Pre-fill is functionality in an e-Form that is used for filling automatically, the requisite data from the system without repeatedly entering the same.
  - For example, by entering the CIN of the company, the name and registered office address of the company shall automatically be pre-filled by the system without any fresh entry.

- **ATTACHMENT**
  - An attachment refers to a document that is sent as an enclosure with an e-Form by means of an attached file.
  - The objective of the attachment is to provide details relevant to the e-Form for processing.
  - While some attachments are optional, some are mandatory in nature.
  - The attachments to an e-Form have to be in Adobe PDF format only and My MCA portal has a facility to convert any document format to PDF format.
  - My MCA portal does not accept big attachments and the users are advised to keep the attachment size to minimum (Not exceeding 2.6 MB of the total size of the Form including attachments).

- **MODIFY**
  - Once the user has done "Check Form" the form gets locked and it cannot be edited.
  - If the user wishes to make any alteration, the form can be overwritten by clicking the "Modify" button.
  - If the user wants to modify the form after pre-scrutiny failure, the user can get the e-form and whichever fields have to be changed only those may be modified by using the "Modify" button.

- **RADIO BUTTON**
  - Frequent use of radio buttons has been done in the e-Form.
  - While filling the e-Form one is required to select applicable option out of two or more radio buttons given against each point.

- **CHECK BOX**
  - Applicable Check box is required to tick out of the two or more boxes wherever it appears in the e-Form.

- **DROP**
  - Down Box Drop down box is a box wherein at the end, a downward arrow is provided.
  - On clicking the arrow various applicable choices appear.

- One is required to highlight the applicable choice and that will be filled in the box.

- **TEXT BOX**
  - Text box is meant to provide details on the relevant point by the person filling the e-form.
  - Space provided is generally adequate for the text to be written.
  - However, if the space is not sufficient for a particular matter, information can be given in the annexure to the form indicating the same in the box.

- **COUNTRY CODE**
  - Sometimes the applicant is required to fill up the country code in the e-Form.
  - This is available in the instruction kit.

- **STOCK EXCHANGE CODE**
  - All the stock exchanges of the country have been divided into two categories A and B.
  - Listed companies are required to mention the stock exchange where the shares are listed with the help of the code.

- **CHECK FORM**
  - By clicking "Check Form", the user will be in a position to find out whether the mandatory fields in an e-Form are duly filled-in.
  - For example, if the user enters alphabets in "Date of Appointment of Director" field, he/she will be asked to correct the entered information.
  - If the size of e-Form including attachment is of bigger size then the attachment may be filed through an addendum.

- **PRE-SCRUTINY**
  - Pre-scrutiny is a functionality that is used for checking whether certain core aspects are properly filled in the e- Form. The user has to make the necessary attachments in PDF format before submitting the eForm for pre scrutiny.
  - After this affix digital signature.

- **SUBMIT**
  - An e-Form can be submitted after it has been digitally signed.
  - The process of submission of an e-Form in case of off-line filling is presented below:
  - User logs in to MCA21 portal and uses e-Form upload service
  - User browses the e-Form and clicks on "Submit¨ button
  - User will be shown errors, if any
  - If e-Form is successfully submitted, user will get confirmation message and will be lead to the fee payment screen.
  - The digital certificate is validated to ensure that the certificate has not expired and the current status of the same is valid and that the certificate has not been revoked or suspended.

- **SERVICE REQUEST NUMBER (SRN)**
  - Each transaction under e-filing is uniquely identified by a Service Request Number (SRN).

- On filing of an e-form, the system generates and provides an in e character alpha numeric string starting with an alphabet (A-Z), called a Service Request Number (SRN).
- A user can check the status of the document/transaction, by entering the SRN.

XBRL

XBRL stands for eXtensible Business Reporting Language.

XBRL is a language for the electronic communication of business and financial data which has revolutionized business reporting around the world.

It provides major benefits in the preparation, analysis and communication of business information.

It offers cost savings, greater efficiency and improved accuracy and reliability to all those involved in supplying or using financial data.

XBRL is a data-rich dialect of XML (Extensible Markup Language), the universally preferred language for transmitting information via the Internet.

It was developed specifically to communicate information between businesses and other users of financial information, such as analysts, investors and regulators.

XBRL provides a common, electronic format for business reporting.

It does not change what is being reported, It only changes how it is reported.

XBRL is a world-wide standard, developed by an international, non-profit-making consortium - XBRL International Inc. (XII).

XII is made up of many hundred members, including government agencies, accounting firms, software companies, large and small corporations, academics and business reporting experts.

XII has agreed the basic specifications which define how XBRL works.

BENEFITS OF XBRL

- XBRL offers major benefits at all stages of business reporting and analysis.
- The benefits are seen in automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision-making.
- All types of organisations can use XBRL to save costs and improve efficiency in handling business and financial information.
- Because XBRL is extensible and flexible, it can be adapted to a wide variety of different requirements.
- All participants in the financial information supply chain can benefit, whether they are preparers, transmitters or users of business data.
- XBRL enables producers and consumers of financial data to switch resources away from costly manual processes, typically involving time-consuming comparison, assembly and re-entry of data.
- They are able to concentrate effort on analysis, aided by software which can validate and manipulate XBRL information.

- However, big the size of balance sheet is, .XML will be in a capsule form to project such details, thus consuming lesser file size in comparison to normal pdf attachments.

CHAPTER 23
MEGA FIRM

WHAT IS MULTIDISCIPLINARY/MEGA FIRM?

Mega Firm can be described as a Partnership firm with more than twenty five partners.

A firm which provides core professional service of a particular profession along with the allied and ancillary service with equal competence under one roof is a multidisciplinary firm.

For example, company and corporate law is core knowledge for company secretaries, however, they can acquire expertise in any other area like direct indirect taxation, labour laws, economic laws, finance, accounting, insurance, international business and IPRs and they may be in position to provide single window business solutions.

Regulation 168B of Company Secretaries Regulations, 1982 determines the membership of professional body for partnership, accordingly For the purposes of entering into partnership under clauses (4) and (5) of Part I of the First Schedule to the Act, a person shall be a member of any of the following professional bodies, namely:-

- The Institute of Chartered Accountants of India established under the Chartered Accountants Act, 1949 (No. 38 of 1949);
- The Institute of Cost and Works Accountants of India established under the Cost and Works Accountants Act, 1959 (No.23 of 1959);
- Bar Council of India established under the Advocates Act, 1961 (No. 25 of 1961);
- The Institute of Engineers or Engineering from a University established by law or an institution recognized by law;
- The Indian Institute of Architects established under the Architects Act, 1972 (No. 20 of 1972);
- The Institute of Actuaries of India established, under the Actuaries Act, 2006 (No. 35 of 2006);
- Professional bodies or institutions outside India whose qualifications relating to Company Secretary recognized by the Council under Sub-section (2) of Section 38 of the Act

This actually introduces the concept of multi-disciplinary firms or mega firms.

PRE REQUISITES

MDF is a joint or collaborative venture amongst independent individuals. Therefore, every one wishing to join hands should understand that:

1. All minds should work together and in unison;
2. Say go to ego;
3. Mutual faith and respect lays strong foundation;
4. Unanimity shall be the rule on important policy decisions;
5. Financial discipline is a must;

6. Founder partners shall be given equal status;
7. Income of the firm shall be distributed at short regular intervals;
8. One shall not put undue influence on the others or show that he is king pin of the association.

Even the small crack in the above stated pre requisites ruin the things.

PROCESS OF CONSTITUTION

The process of formation of MDF shall be an outcome of conscious and sincere decision and it is essential that the like-minded professional should deliberate and take this decision.

It shall be ensured that the proposed constituents have expertise in different disciplines.

There could be series of meetings before MOU is reached.

It is advisable to work under MOU for one year.

This works as a cooling period and for better understanding each other such trial period help in getting acclimatized.

Mutual faith and understanding is sine qua non.

Time has to be given to understand the compatibility of the individuals to each other.

Once the initial bridge is successfully crossed then formal partnership may be constituted on the agreed terms.

It will be in the long term interest of the MDF to have all the founder partners on equal footing.

Their intellectual level shall be at par.

During the reasonable period individual practice existing if any, shall be introduced in the firm.

When it is proposed to add new partner, apart from settling commercial terms, it is suggested that the MDF shall enter into MOU effective at least for one year with the proposed partner and after understanding each other's compatibility he or she may be admitted to the MDF.

REVENUE SHARING MODELS

In the long term success of the MDF the revenue sharing model has to be designed to suit the given situation.

Partners may adopt simple revenue sharing model to share profits and losses equally.

In this model it is assumed that each one is bringing equal business and generating equal revenue.

However, in reality if it doesn't happen it may give rise to sense of discomfort against the person who is continuously showing less contribution but at the same time getting equal share of profits.

Therefore, it is essential to device "performance, contribution and efficiency based" revenue sharing model.

Assume a situation where A, B, C, D and E are the partners expert in different disciplines.

The revenue sharing model could be the following:

1. Partner bringing new client shall be given referral or induction share, say, @ 15% of the fees settled and received; it can be for the first year or for given number of years;
2. Certain percentage of fees, say 15% shall be retained in business in common pool for meeting expenses;

3. 70% of the fees shall be given to the partner or partners who actually work on the assignment (assignment share). When more than one partners are involved in an assignment their share can be determined based on respective role;

4. At the year-end after meeting expenses resultant profit shall be shared in proportion of contribution of individual in the gross earnings/ net profit of the firm.

5. Internally, different verticals can be created and surplus generated by each one can be assessed as an independent cost centre.

This model motivates each partner to bring more and more business into the firm and also to work for maximization of his share and wealth of the firm.

There could be more tailor made revenue sharing models, however, the model based on performance, contribution and efficiency is likely to work better.