

INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERE TO

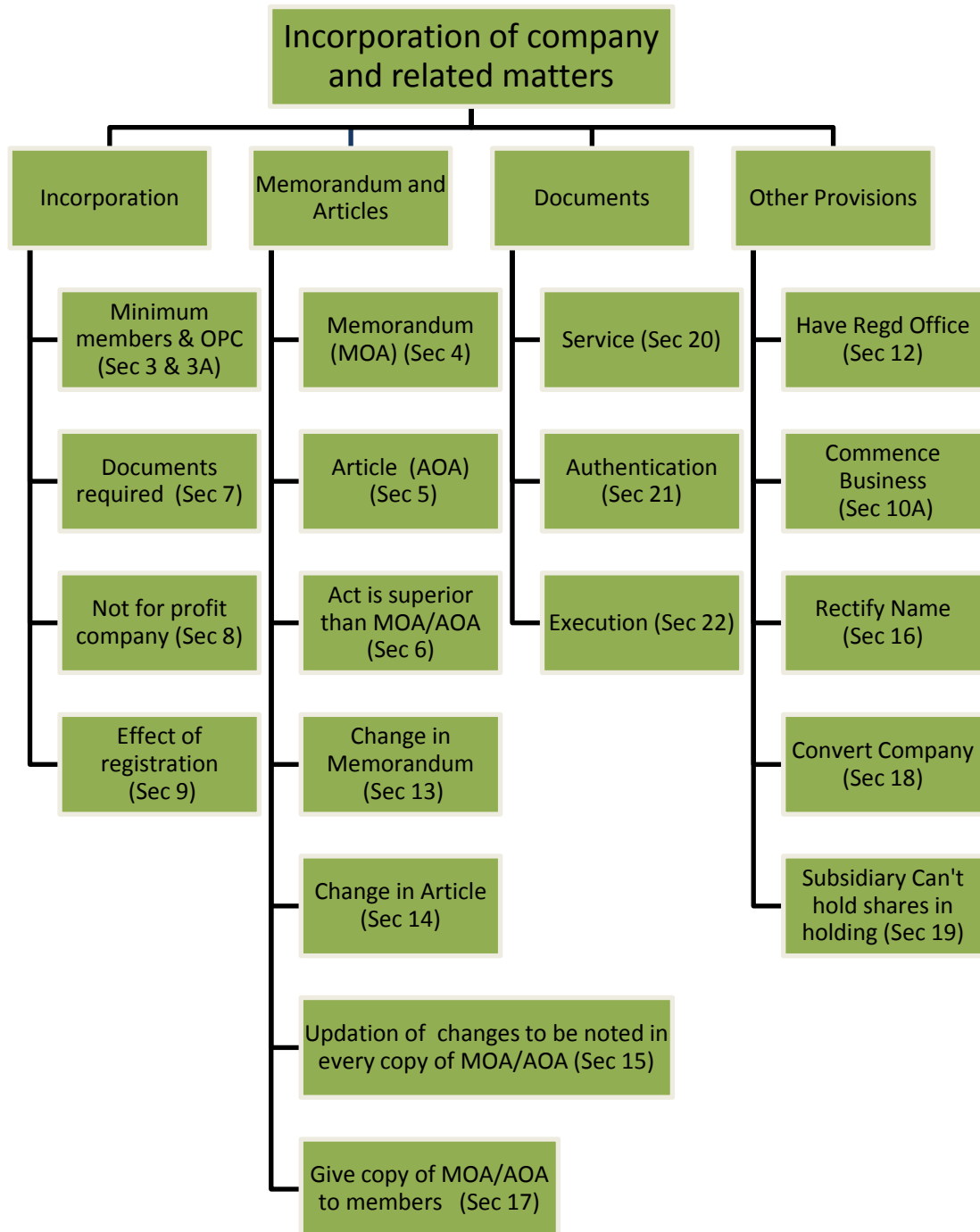


LEARNING OUTCOMES

At the end of this chapter, you will be able to:

- Explain the Formation & Incorporation of company, One person company and the formation of not for profit organization.
- Identify the need for Memorandum and Articles of Association and changes incidental thereto.
- Know the effect of registration.
- Explain and identify the concepts related to registered office of company.
- Know how the Service of documents is effected
- Know about Authentication of documents, proceedings and contracts and Execution of bills of exchange, etc.

CHAPTER OVERVIEW



1. INTRODUCTION TO INCORPORATION OF COMPANIES

A company is a **separate** legal entity with **perpetual** succession for **lawful** purpose. Development of this concept is equally significant in economic terms as invention of steam engine is for the industrial revolution.

Persons who initiate promotion of a company are known as **promoters**. All persons who take steps for the registration of a company e.g., those associated with the **preparation of a prospectus** or in drawing up the **Memorandum of Association** of the company and assisting in its **registration** are regarded as promoters.

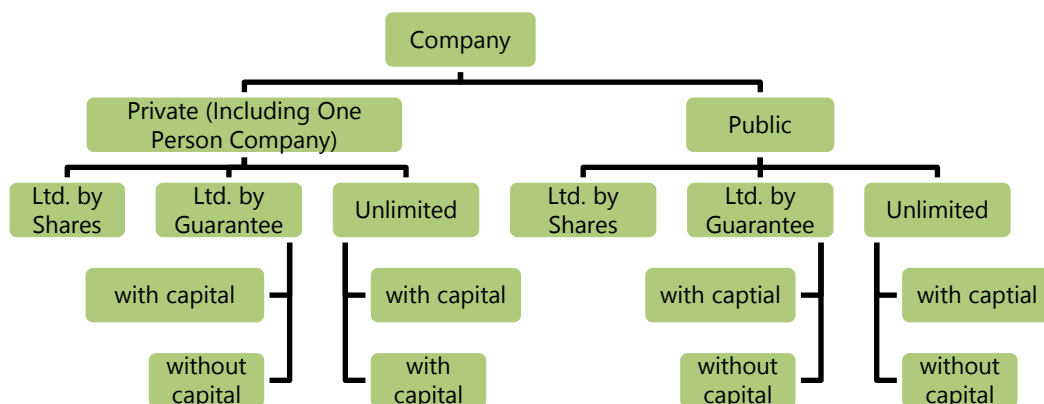
The Companies Act, 2013 defines the term “**Promoter**” under section 2(69) which means a person—

- (a) who has been named as such in a **prospectus** or is identified by the company in the **annual return** referred to in section 92; or
- (b) who has **control** over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose **advice, directions or instructions** the Board of Directors of the company is accustomed to act.

However, a person who is **acting merely in a professional Capacity**, shall not be regarded as promoter [under (c)], e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

2. FORMATION OF COMPANY (SECTION 3)

Companies are broadly of below types:



As you can observe in above chart that companies could be with limited liability (by shares or guarantee) or with unlimited liability.^{1&2}

Note: For **Government Companies**, suffix “**Pvt. Ltd / Ltd.**” **not required** (*Notification dated 5th June 2015*). This exception shall be applicable to a government company which has not committed a default in filing its financial statements under section 137 or annual return under section 92 with the Registrar [*Notification dated 13th June 2017*].

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company. In the case of a **public** company with or without limited liability any **7** or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration. In exactly the same way, **2** or more persons can form a **private** company and **1** person where company to be formed is **one person company**.

However, that one person company need to specify the **name of one nominee** in the **Memorandum of Association (MOA)** who would take his place in case of his death or his incapacity to contract. The **nominee could be changed** as per the process and this will **not attract** process for alteration of the Memorandum of Association.

Extract of Act [Section 3]

“(1) A company may be formed for any lawful purpose by—

- (a) seven or more persons, where the company to be formed is to be a public company;
- (b) two or more persons, where the company to be formed is to be a private company; or
- (c) one person, where the company to be formed is to be One Person Company that is to say, a private company,

by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration:

Provided that the memorandum of One Person Company shall indicate the name

¹ Provided that a Specified IFSC public or Specified IFSC Private company shall be formed only as a company limited by shares.

² IFSC company means a company incorporated in any International Financial Services Center in India, like in Gujarat International Finance Tec-City.

of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles:

Provided further that such other person may withdraw his consent in such manner as may be prescribed:

Provided also that the member of One Person Company may at any time change the name of such other person by giving notice in such manner as may be prescribed:

Provided also that it shall be the duty of the member of One Person Company to intimate the company the change, if any, in the name of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed, and the company shall intimate the Registrar any such change within such time and in such manner as may be prescribed:

Provided also that any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

(2) A company formed under sub-section (1) may be either—

- (a) a company limited by shares; or
- (b) a company limited by guarantee; or
- (c) an unlimited company.”

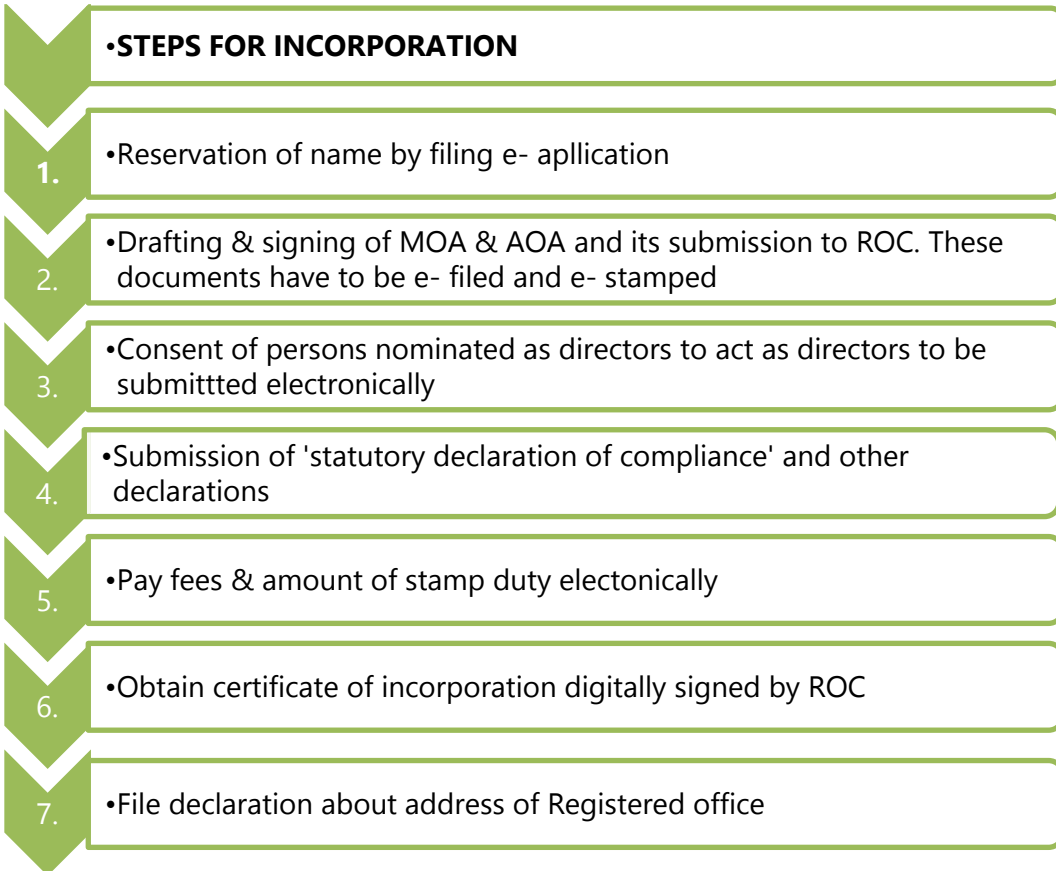
Maintain minimum number of members [Section 3A]

If at any time the number of members of a company is **reduced**, in the case of a public company, **below seven**, in the case of a private company, **below two**, and the company carries on business for **more than six months** while the number of members is so reduced, **every person** who is a member of the company during the time that it so carries on business after those six months and is **cognizant** (aware) of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be **severally liable** for the payment of the whole debts of the company **contracted during that time (after six months)**, and may be severally sued therefore.



3. INCORPORATION OF COMPANY [SECTION 7]

I. INCORPORATION OF COMPANY: Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.



Note: New requirement of submitting declaration that 'all subscribers have paid the value of shares agreed to be taken by him' and 'verification of Registered office has been filed' has been inserted vide section 10A. This requirement is needed to be complied with before the commencement of business.

(1) Filing of the documents and information with the registrar: For the registration of the company following documents and information are required to be filed with the **registrar** within whose jurisdiction the registered office of the company is proposed to be situated—

- ◆ the **memorandum** and **articles** of the company duly signed by all the subscribers to the memorandum.
- ◆ a **declaration by** person who is engaged in the formation of the company

(an **advocate**, a **chartered accountant**, **cost accountant** or **company secretary** in practice), and by a person named in the articles (**director**, **manager** or **secretary** of the company), that all the **requirements** of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.

- ◆ a **declaration** from each of the **subscribers** to the memorandum and from persons named as the **first directors**, if any, in the articles stating that—
 - he is **not convicted** of any offence in connection with the promotion, formation or management of any company, or
 - he has **not** been found **guilty** of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last **five years**,
 - and that all the **documents** filed with the Registrar for registration of the company contain information that is **correct** and complete and true to the best of his knowledge and belief;
- ◆ the **address** for correspondence till its registered office is established;
- ◆ the particulars (**names**, including **surnames** or family names, residential **address**, **nationality**) of every **subscriber** to the memorandum along with proof of **identity**, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
- ◆ the particulars (**names**, including **surnames** or family names, the Director Identification Number (**DIN**), residential **address**, **nationality**) of the persons mentioned in the articles as the **first directors** and such other particulars including proof of **identity** as may be prescribed; and
- ◆ the particulars of the interests of the persons mentioned in the articles as the **first directors** of the company in **other firms** or bodies corporate along with their **consent** to act as directors of the company in such form and manner as may be prescribed.

(2) Issue of certificate of incorporation on registration: The **Registrar** on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) Allotment of Corporate Identity Number (CIN): On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) Maintenance of copies of all documents and information: The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its **dissolution** under this Act.

(5) Furnishing of false or incorrect information or suppression of material fact at the time of incorporation (i.e. during incorporation process): If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud under **section 447**.

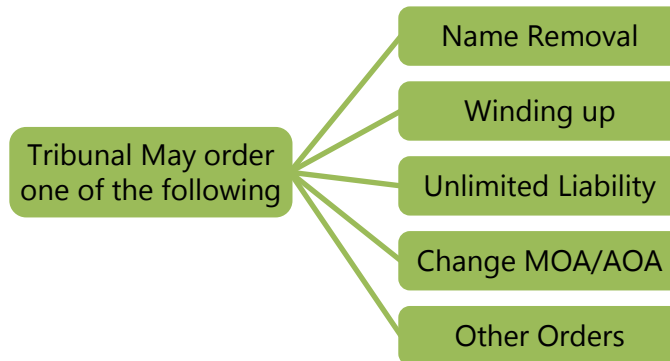
(6) Company already incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact (i.e. post Incorporation): where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any **false** or incorrect information or representation or by **suppressing** any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any **fraudulent** action, the **promoters**, the persons named as the **first directors** of the company and the persons making declaration under this section shall each be liable for action for fraud under **section 447**.

(7) Order of the Tribunal³ : Where a company has been got incorporated by furnishing **false** or incorrect information or representation or by **suppressing** any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any **fraudulent** action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants—

- (a) pass such orders, as it may think fit, for regulation of the management of the company including **changes**, if any, in its **memorandum and articles**, in public interest or in the interest of the company and its members and creditors; or
- (b) direct that liability of the members shall be **unlimited**; or
- (c) direct **removal** of the name of the company from the register of companies; or
- (d) pass an order for the **winding up** of the company; or

³ "Tribunal" means the National Company Law Tribunal (NCLT) constituted under section 408 of the Companies Act, 2013. The NCLT is a quasi-judicial body in India that adjudicates issues relating to companies in India. The NCLT was established under the Companies Act, 2013 and was constituted on 1st June, 2016.

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



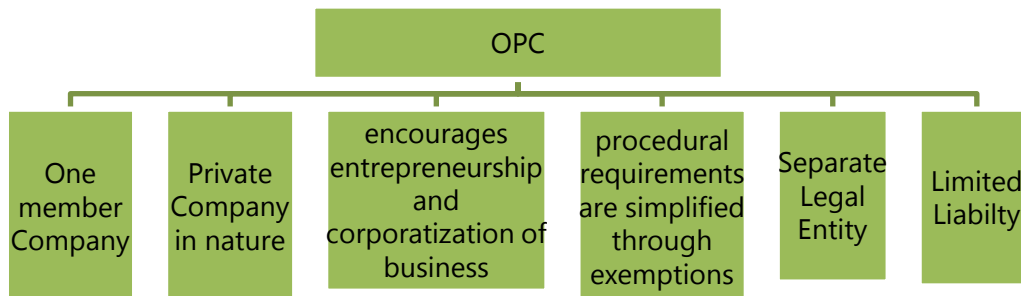
Provided that before making any order,—

- ◆ the company shall be given a reasonable **opportunity of being heard** in the matter; and
- ◆ the Tribunal shall take into consideration the **transactions entered** into by the company, including the obligations, if any, contracted or payment of any liability.


Simplified Proforma for Incorporating Company Electronically (SPICe)

The Ministry of Corporate Affairs has taken various initiatives **for ease of business**. In a step towards easy setting up of business, MCA has simplified the process of filing of forms for incorporation of a company through Simplified Proforma for incorporating company **electronically**.

4. INCORPORATION OF ONE PERSON COMPANY



Law with respect to formation of OPC provides that—

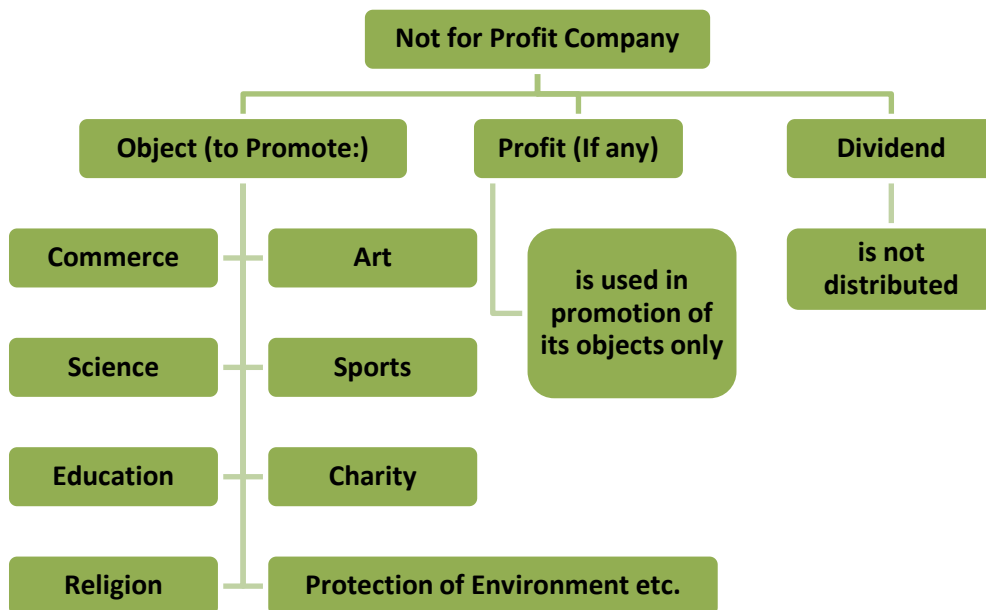
- ◆ The **memorandum** of OPC shall indicate the name of the other person (**nominee**), who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- ◆ The other person (**nominee**) whose name is given in the memorandum shall give his **prior written consent** in prescribed form and the same shall be **filed** with **Registrar** of companies at the time of incorporation along with its Memorandum of Association and Articles of Association. 
- ◆ Such other person (nominee) may be given the **right to withdraw his consent**
- ◆ The **member** of OPC may at any time **change the name** of such other person (**nominee**) by giving notice to the company and the company shall intimate the same to the Registrar
- ◆ Any such change in the name of the person shall **not** be deemed to be an **alteration of the memorandum**.
- ◆ Only a **natural person** who is an **Indian citizen** and **resident in India**-
 - (a) shall be **eligible** to incorporate a One Person Company;
 - (b) shall be a **nominee** for the sole member of a One Person Company.

Explanation I - For the purposes of this rule, the term "**resident in India**" means a person who has stayed in India for a period of not less than **182 days** during the immediately preceding financial year.
- ◆ A natural person shall **not** be a **member of more than one** OPC at any point of time and the said person shall not be a **nominee of more than one** OPC.
- ◆ Where a natural person being member in OPC **becomes member in another** such company by virtue of his being a nominee in that OPC, such person shall **meet eligibility criteria** (as given in point above) within a period of **182 days**.
- ◆ **No minor** shall become member or nominee of the OPC or can hold share with beneficial interest.
- ◆ Such Company **cannot** be incorporated or **converted** into a company under **section 8** of the Act. Though it may be **converted** to **private or public companies** in certain cases. The procedure of conversion is given in the rules 6 & 7 of Chapter II.

- ◆ Such Company cannot carry out **Non-Banking Financial Investment** activities including investment in securities of anybody corporate.
- ◆ OPC cannot **convert voluntarily** into any kind of company unless **two years** have expired from the date of incorporation, **except** where the paid up share capital is increased **beyond fifty lakh rupees** or its **average annual turnover** during the relevant period **exceeds two crore rupees**.

5. FORMATION OF COMPANIES WITH CHARITABLE OBJECTS, ETC. [SECTION 8]

1. ⁴**Object of formation of Section 8 Company** : Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed **to promote** the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc. Such company intends to **apply its profit** in promoting its objects and **prohibiting** the payment of any **dividend** to its members.



⁴ The power of Central Government to register a Section 8 company has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014]. Under the said notification, the Central Government has delegated to the Registrar of Companies, the power and functions vested in it under the said section of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers and functions under the said sections, if in its opinion, such a course of action is necessary in the public interest.

2. **Power of Central government to issue the license:** This section allows the Central Government to register such person or association of persons as a company with limited liability **without the addition of words 'Limited' or 'Private limited'** to its name, by issuing licence on such conditions as it deems fit. The registrar shall on application register such person or association of persons as a company under this section.

'Where it is proved to the **satisfaction** of the Central Government⁵ that a limited company registered under this Act or under any previous company law has been formed with any of the **objects** and with the **restrictions** and prohibitions it may, by **licence**, allow the company to be registered under section subject 8 to such **conditions** as the Central Government deems fit and to change its name by omitting the word —Limited, or as the case may be, the words —Private Limited from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company'.

3. **Privileges of limited Company:** On registration the company shall enjoy **same** privileges and obligations as of a limited company.
4. A **firm may be a member** of the company registered under section 8.
5. **Alteration of Memorandum and Articles:** A company registered under this section shall not alter the provisions of its memorandum or articles except with the **previous approval** of the **Central Government**^{6, 7}.
6. **Conversion into any other kind of Company:** A company registered under this section may **convert** itself into company of any other kind only after complying with such conditions as may be prescribed.

A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a **special resolution** at a general meeting for approving such conversion.

⁵ Power of Central Government has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014].

⁶ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

⁷ Power has been delegated to ROC, except for alteration of memorandum in case of conversion into another kind of company [S.O. 1353(E), dated 21st May, 2014.]

7. Revocation of license

- (i) The ⁸Central Government may by order **revoke the licence** of the company where the company **contravenes** any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violation of the objects of the company or **prejudicial to public interest**, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a **written notice** of its intention to revoke the licence and **opportunity** to be heard in the matter.
- (ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be **wound up** under this Act or **amalgamated** with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable opportunity of being heard.

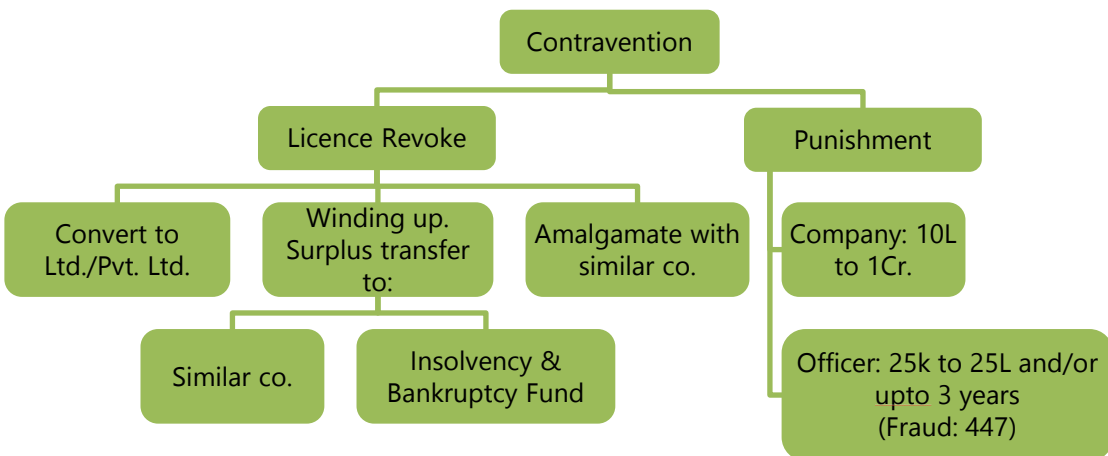
- (iii) Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be **amalgamated** with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.
- (iv) If on the **winding up** or **dissolution** of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the **Tribunal** may impose, or may be sold and proceeds thereof credited to the **Insolvency and Bankruptcy Fund** formed under section 224 of the Insolvency and Bankruptcy Code, 2016.

⁸ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

- (v) A company registered under this section shall **amalgamate only with** another company registered under this section and having similar objects.

- 8. Penalty/ punishment in contravention:** If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be **punishable with fine** varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable with **imprisonment** for a term which may extend to three years or with fine varying from twenty-five thousand rupees to twenty-five lakh rupees, or with both.

And where it is proved that the affairs of the company were conducted **fraudulently**, every officer in default shall be liable for action under **section 447**.



9. Exceptions:

- (i) Can call its general meeting by giving a clear **14 days notice** instead of 21 days.
- (ii) Requirement of **minimum number of directors**, independent directors etc. does not apply.
- (iii) Need **not constitute** Nomination and Remuneration Committee and Shareholders Relationship Committee.

Formation

- To promote Charitable objects

Application of profits

- To promote its objectives
- No payment of dividends out of profits

Type of Co.

- Limited Liability
- Without the addition of words "Ltd." or "Pvt Ltd."

How status is granted

- The CG can grant such status
- However, CG has delegated the power to grant licence to ROC

Revocation of licence

- CG may revoke licence
- If conditions of section 8 are contravened, or
- affairs of the company are conducted fraudulently, or prejudicial to public interest

Effect of revocation of licence

- Co. has to use words "Ltd." or "Pvt Ltd."



6. EFFECT OF REGISTRATION [SECTION 9]

Section 9 of the Companies Act, 2013 provides for the effect of registration of a company.

According to section 9, from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a **body corporate** by the name contained in the memorandum. Such a registered company shall be capable of exercising **all the functions** of an incorporated company under this Act and having **perpetual succession** with power to acquire, hold and dispose of **property**, both movable and immovable, tangible and intangible, to **contract** and to sue and be sued, by the said name.

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators; and there comes into existence a **binding contract** between the company and its members as evidenced by the Memorandum and Articles of Association [*Hari Nagar Sugar*

Mills Ltd. vs. S.S. Jhunjhunwala]. It has **perpetual** existence until it is dissolved by liquidation or struck out of the register. A shareholder who buys shares, **does not** buy any interest in the **property** of the company but in certain cases a writ petition will be maintainable by a company or its shareholders.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a **separate existence** and the law recognises it as a legal person separate and distinct from its members [*State Trading Corporation of India vs. Commercial Tax Officer*].

It may be noted that under the provisions of the Act, a company may **purchase** shares of another company and thus become a controlling company. However, merely because a company purchases **all shares of another company** it will **not** serve as a means of putting **an end** to the corporate character of another company and each company is a separate juristic entity [*Spencer & Co. Ltd. Madras vs. CWT Madras*].

As has been stated above, the law recognizes such a company as a juristic person separate and distinct from its members. The mere fact that the **entire share** capital has been contributed by the **Central Government** and all its shares are held by the **President of India** and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [*Heavy Electrical Union vs. State of Bihar*].



7. MEMORANDUM OF ASSOCIATION – MOA [SECTION 4]

As per **section 2(56)** — memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;

It is the base **document for the formation of the company** and alongwith the Articles of Association (AOA) is regarded as the Constitution of the Company.

The **MOA and AOA**, similar to other company agreements and resolutions is subject to the Companies Act, 2013 (Section 6) and the law of the land and therefore all its contents need to be in compliance of the Companies Act 2013 and other applicable legislations.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

I. Object of registering a memorandum of association:

- ◆ It contains the **object** for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.
- ◆ It enables **shareholders, creditors** and all those who deal with company to **know** what its powers are and what activities it can engage in.
- ◆ A memorandum is a **public document** under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is **presumed to have the knowledge** of the conditions contained therein.
- ◆ The **shareholders** must know the **purposes** for which his money can be used by the company and what risks he is taking in making the investment.

A company **cannot depart** from the provisions contained in the memorandum however imperative may be the necessity for the departure. It **cannot enter** into a contract or engage in any trade or business, which is beyond the power conferred on it by the memorandum. If it does so, it would be **ultra vires** the company and **void**.

II. The memorandum of a company shall state—

- (a) **In relation to the name clause-** the **name of the company** with the last word "**Limited**" in the case of a public limited company, or the last words "**Private Limited**" in the case of a private limited company.⁹

Exception: This clause is not applicable on the companies formed under **section 8** of the Act.

- (b) **In relation to the Registered Office Clause-** the **State** in which the registered office of the company is to be situated;

- (c) **In relation to the Object Clause-** the **objects** for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;¹⁰

⁹ In case of Specified IFSC Public Company and IFSC Private Company, name shall have the suffix, "International Financial Service company" or "IFSC" as a part of its name.

¹⁰ Specified IFSC Public Company & IFSC Private company shall state its objects to do financial services activities as permitted under the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and any matter considered necessary in furtherance thereof in accordance with license to operate, from International Financial Services Centre located in an approved multi services Special Economic Zone, granted by the Reserve Bank of India or the Securities and Exchange Board of India or the Insurance Regulatory and Development Authority of India.

III. Liability / Capital Clause:

- (a) This clause covers details on the **liability of members** of the company, whether limited or unlimited, and also state—
- in the case of a company **limited by shares**, that the liability of its members is limited to the **amount unpaid**, if any, on the shares held by them; and
 - in the case of a company **limited by guarantee**, the amount up to which each member undertakes to **contribute**—
 - **to the assets** of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the **debts and liabilities** of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
 - to the costs, charges and **expenses of winding-up** and
 - for adjustment of the rights of the **contributories** among themselves;
- (b) in the case of a company having a **share capital**—
- the **amount** of share capital with which the company is to be registered and the **division** thereof into shares of a fixed amount and the number of shares which the **subscribers** to the memorandum agree to subscribe which shall not be less than **one share**; and
 - the **number of shares** each subscriber to the memorandum intends to take, indicated **opposite his name**;

The clause, in the case of One Person Company, covers the name of the person (**nominee**) who, in the event of death of the subscriber, shall become the member of the company.

IV. Name Clause

Applying for the name of the company: The name stated in the memorandum shall not—

- (a) be **identical** with or **resemble** too nearly to the name of an existing company registered under this Act or any previous company law; or

- (b) be such that its use by the company—
- will constitute an offence under **any law** for the time being in force; or
 - is **undesirable** in the opinion of the **Central Government**¹¹.
- (c) **Undesirable Names:** A company shall **not** be registered with a name which contains—
- (i) any word or expression which is likely to give the impression that the company is in any way **connected with**, or having the patronage of, the Central **Government**, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or
 - (ii) such word or expression, as may be **prescribed**, unless the previous **approval** of the Central Government has been obtained for the use of any such word or expression.

As per rule 8 of Companies (Incorporation) Rules, 2014 : The following words and combinations thereof shall not be used in the name of a company unless the **previous approval** of the Central Government has been obtained for the use of any such word or expression—Board; Commission; Authority; Undertaking; **National; Union; Central;** Federal; Republic; President etc.

If the proposed name include words such as '**Insurance**', '**Bank**', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' **etc.**, unless a declaration is submitted by the applicant that the requirements **mandated by** the **respective regulator**, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant;

- (d) ¹²**Reservation of name:**

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

¹¹ Power of Central Government has been delegated to ROC [S.O. 1353(E), dated 21st May, 2014].

¹² Rule 9: **Reservation of name**

An application for reservation of name shall be made through the web service available at www.mca.gov.in by using [form RUN](Reserve Unique Name) along with fee as provided in the Companies (Registration offices and fees) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre after allowing re--submission of such application within fifteen days for rectification of the defects, if any. [Notification G.S.R. 284(E) dated 23rd March, 2018]

- (i) the **name** of the proposed company; or
- (ii) the name to which the company proposes to **change** its name.

Reserving the name: Upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of **twenty days** from the date of approval or such other period as may be prescribed:

Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of **sixty days** from the date of approval.

Cancelling name: Where after reservation of name, it is found that name was applied by furnishing wrong or incorrect information, then—

- (i) if the company has **not** been **incorporated**, the reserved name shall be **cancelled** and the person who has made the application shall be liable to a **penalty** which may extend to one lakh rupees;
- (ii) if the company has been **incorporated**, the Registrar may, after giving the company an opportunity of being heard—
 - (1) either direct the company to **change** its name within a period of **3 months**, after passing an **ordinary** resolution;
 - (2) take action for **striking off** the name of the company from the register of companies; or
 - (3) make a petition for **winding up** of the company.

Circular: As per the *General Circular No.29/2014, dated 11th of July, 2014*, Government directed that while allotting names to Companies/Limited Liability Partnerships, the Registrar of Companies concerned should exercise due care to ensure that the names are **not in contravention** of the provisions of the ***Emblems and Names (Prevention of Improper Use) Act, 1950***. It is necessary that Registrars are fully familiar with the provisions of the said Act.

Note: Rule 8–Undesirable Names of *the Companies (Incorporation) Rules, 2014*, determines whether a proposed name is identical with another or other rules which may be kept in mind while dealing with the Name clause of the MOA.

V. Domicile Clause

The name of federal **state** is mentioned where the registered office is to be situated. Registered office is the permanent address of the company. It is residence of company.

VI. Objects Clause

Covers the **objects** for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

Doctrine of Ultra Vires

In the case of a company, whatever is **not stated in the memorandum** as the objects or powers is **prohibited** by the doctrine of ultra vires. As a result, an act which is ultra vires is **void**, and does not bind the company. Neither the company nor the contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

The general rule is that an act which is **ultra vires** the company is **incapable of ratification**. An act which is intra vires the company but **outside the authority of the directors may be ratified** by the company in proper form [*Rajendra Nath Dutta v. Shilendra Nath Mukherjee, (1982) 52 Com Cases 293 (Cal.)*].

If the act is ultra vires (beyond the powers of) the directors only, the shareholders can ratify it. If it is ultra vires the articles of association, the company can alter its articles in the proper way.

The rule is meant to **protect** shareholders and the creditors of the company. The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, ***Ashbury Railway Carriage and Iron Co. Ltd. v. Riche, (1878) L.R. 7 H.L. 653***. The memorandum of the company in the said case defined its objects thus: "The objects for which the company is established are to make and sell, or lend or hire, railway plants to carry on the business of mechanical engineers and general contractors.....".

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave

power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

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

The purpose of doctrine of ultra vires has been **defeated** as now the object clause can be easily altered, by passing just a special resolution by the shareholders.

VII. Subscription Clause:

According to section 7(1)(a) there shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company **duly signed by all the subscribers** to the memorandum in such manner as may be prescribed in Rule 13 of *the Companies (Incorporation) Rules, 2014*.

VIII. Forms and schedule related to Memorandum:

The memorandum of a company shall be in respective forms specified in **Tables A, B, C, D and E** in Schedule I as may be applicable to such company.

The MOA and AOA shall be in respective forms as provided in **Schedule I** to the Companies Act, 2013:

TABLE –A

- MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

TABLE –B

- MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING A SHARE CAPITAL

TABLE –C

- MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL

TABLE –D

- MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL

TABLE –E

- MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY AND HAVING SHARE CAPITAL

TABLE –F

- ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

TABLE – G

- ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL

TABLE – H

- ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING SHARE CAPITAL

TABLE – I

- ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND HAVING A SHARE CAPITAL

TABLE – J

- ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL

IX. Any provision in the memorandum or articles, in the case of a company **limited by guarantee and not having a share capital**, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be **void**.



8. ARTICLES OF ASSOCIATION –AOA [SECTION 5]

As per **Section 2(5)**—articles means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

Actually, article of association of a company contains internal rules and regulation of the company.

Section 5 of the Companies Act, 2013 seeks to provide the contents and model of

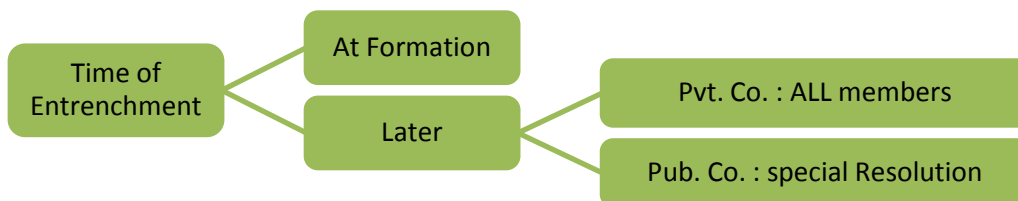
articles of association. The section lays the following law—

- (1) **Contains regulations:** The articles of a company shall contain the regulations for **management** of the company.
- (2) **Inclusion of matters:** The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such **additional matters** in its articles as may be considered necessary for its management.
- (3) **Entrenchment:** Usually an article of association may be altered by passing special resolution but entrenchment makes it more difficult to change it. So entrenchment means making something more protective.

Contain provisions for entrenchment: The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are **more restrictive than** those applicable in the case of a **special resolution**, are met or complied with.

Manner of inclusion of the entrenchment provision: The provisions for entrenchment shall only be made either on **formation** of a company, **or** by an **amendment** in the articles agreed to by **all** the members of the company in the case of a **private company** and by a **special resolution** in the case of a **public company**.

Notice to the registrar of the entrenchment provision: Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.



Example: Mr. Tarun promoted an education start up and got it registered as a private limited company. Initially he and his family are holding all shares in the company. In the article of association of company it is written that Mr. Tarun will remain director of the company for lifetime. But he has a fear that tomorrow if 75% or more shares in the company are held by non family

members then by passing a special resolution article may be changed and he may be removed from the post of director.

Therefore, it was also written in the article that he can be removed from the post of director only if 95% votes are cast in favour of the resolution. This is entrenchment.

Example: If PQR Company subscribes 20% shares of XYZ, a Private Ltd. company. Remaining 80% shares are held by promoters and family. Tomorrow if XYZ private limited approaches any Bank for a loan, the bank officials would read the Articles & would ask to get the consent of PQR Company. Now, if there is no entrenchment provision, then 'XYZ' may, after passing a special resolution remove the minority right and can borrow beyond the limit.

In order to control it, the entrenchment provisions are usually compelled by the minority to make the majority responsible and the minority in these provisions can get incorporated a clause saying that borrowing beyond a particular limit or issuances of shares is to be done only after the requisite consent of minority has been obtained.

- (4) **Forms of articles:** The articles of a company shall be in respective **forms** specified in **Tables, F, G, H, I and J** in Schedule I as may be applicable to such company.
- (5) **Model articles:** A company may adopt all or any of the regulations contained in the **model articles** applicable to such company.
- (6) **Company registered after the commencement of this Act:** In case of any company, which is registered after the commencement of this Act, in so far as the registered **articles** of such company do not exclude or modify the regulations contained in the **model articles** applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.
- (7) **Section not apply on company registered under any previous company law:** Nothing in this section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

Doctrine of Indoor Management

According to this doctrine, persons dealing with the company **cannot be assumed to have knowledge** of internal problems of the company. He can

simply assume that all the required things were get done properly in the company.

Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to **take it for granted** that the company had gone through all these proceedings in a regular manner.

The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management evolved around 150 years ago in the context of the doctrine of constructive notice. **The role of doctrine of indoor management is opposed to of the role of doctrine of constructive notice.**

Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a possible safeguard against the possibility of abusing the doctrine of constructive notice.

Basis for Doctrine of Indoor Management

1. What happens internal to a company is not a matter of public knowledge. An outsider can only **presume** the intentions of a company, but not know the information he/she is not privy to.
2. If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)

Knowledge of irregularity: In case this 'outsider' has **actual knowledge** of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

Negligence: If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances company does not make proper inquiry.

Forgery: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.

9. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC. [SECTION 6]

According to section 6 of the Act,

'Save as otherwise expressly provided in this Act—

- (a) the **provisions of this Act shall have effect** notwithstanding anything to the contrary contained in the **memorandum** or **articles** of a company, or in any **agreement** executed by it, or in any **resolution** passed by the company in general meeting or by its **Board** of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and
- (b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant (in conflict) to the provisions of this Act, **become or be void**, as the case may be.'

In simple words, the provisions of this Act shall have overriding effect. But keep in mind that this section starts with **"Save as otherwise"**. It means that if any other section of the Act says that article is superior then we will treat it accordingly.

For **example** section 47 of the Act deals with voting power of members. And a notification dated 5th June, 2015 says that section 47 is applicable to a private company subject to its Article of Association (AOA). Now if AOA of a private company says that section 47 is not applicable to it then in this case AOA will become superior and section 47 of the Act will not be applicable.

10. EFFECT OF MEMORANDUM AND ARTICLES [SECTION 10]

- (1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, **bind the company and the members** thereof to the same extent as if they respectively had been **signed** by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

It means that, on the basis of MOA and AOA:

- a) Company is liable to members
- b) Members are liable to company
- c) But normally members are not liable to each other

- (2) All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company. [For example a company can recover call in arrear from a member as forcefully as it is recovering loan due.]



11. ALTERATION OF MEMORANDUM [SECTION 13]

As per **Section 2(3)**—alter or —alteration includes the making of additions, omissions and substitutions.

I. Procedure of alteration of memorandum: Section 13 of the Companies Act, 2013 provides the provisions that deals with the alteration of the memorandum. The provision says that—

- (1) **Alteration by special resolution:** Company may alter the provisions of its memorandum with the approval of the members by a special resolution.
- (2) **Name change of the company:** Any change in the name of a company shall be effected only with the approval of **the Central Government**¹³ in writing:

However, **no** such **approval** shall be necessary where the change in the name of the company is only the **addition/deletion** of the word “**Private**”, on the conversion of any one class of companies to another class in accordance with the provisions of the Act.

According to *the Companies (Incorporation) Rules, 2014*:

The change of name shall **not** be **allowed** to a company which has not filed **annual returns or financial statements** due for filing with the Registrar or which has failed to pay or repay matured **deposits** or **debentures** or **interest** thereon: Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

- (3) **Entry in register of companies:** On any change in the name of a company, the **Registrar** shall enter the new name in the register of companies in place of the old name and issue a **fresh certificate** of incorporation with the new

¹³ Notification S.O. 1353(E), dated 21st May, 2014. In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government. hereby **delegates to the ROC** the power & functions vested in it under this section [i.e. section 13(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

name and the change in the name shall be complete and effective only on the issue of such a certificate.

(4) **Change in the registered office:** The alteration of the memorandum relating to the place of the registered office from one State to another shall not have any effect unless it is approved by the **Central Government**¹⁴ on an application in such form and manner as may be prescribed.

(5) **Dispose of the application of change of place of the registered office:** The ¹⁵Central Government shall dispose of the application of change of place of the registered office within a period of **60 days**.

Before passing of order, Central Government may satisfy itself that-

- the alteration has the **consent** of the **creditors, debenture-holders** and other persons **concerned** with the company, or
- the sufficient provision has been made by the company either for the due **discharge** of all its debts and obligations, or
- adequate **security** has been provided for such discharge.

(6) **Filing with Registrar:** A company shall, in relation to any alteration of its memorandum, file with the Registrar—

- the **special resolution** passed by the company under sub-section (1);
- the approval of the **Central Government** under sub-section (2), if the alteration involves any change in the name of the company.

(7) **Filing of the certified copy of the order with the registrar of the states:** Where an alteration of the memorandum results in the transfer of the registered office of a company from **one State to another**, a certified copy of the order of the Central Government approving the alteration shall be **filed** by the company with the **Registrar of each of the States** within such time and in such manner as may be prescribed, who shall register the same.

(8) **Issue of fresh certificate of incorporation:** The Registrar of the State where the registered office is being shifted to, shall issue a **fresh certificate** of incorporation indicating the alteration.

(9) **Change in the object of the company:** A company, which has raised money from public through prospectus and still has any **unutilized amount** out of the money so raised, shall not change its objects for which it raised the money

¹⁴ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

¹⁵ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

through prospectus unless a **special resolution** through **postal ballot** is passed by the company and—

- the details, in respect of such resolution shall also be published 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 and shall also be placed on the **website** of the company, if any, indicating there in the justification for such change;
- the **dissenting shareholders** shall be given an opportunity to **exit** by the **promoters** and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

(10) Registrar to certify the registration on the alteration of the objects: The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of **30 days** from the date of filing of the special resolution.

(11) Alteration to be registered: No alteration made under this section shall have any **effect until** it has been **registered** in accordance with the provisions of this section.

(12) Only member have a right to participate in the divisible profits of the company: Any **alteration of the memorandum**, in the case of a company limited by guarantee and not having a share capital, intending to give any person a **right to participate** in the divisible profits of the company otherwise than as a member, shall be **void**.

II. Alteration noted in every copy: Every **alteration** made in the memorandum or articles of a company shall be **noted in every copy** of the memorandum or articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a **penalty** of one thousand rupees for every copy of the memorandum or articles issued without such alteration. **[Section 15]**

MOA clause	Members' Resolution	External approvals	Outcome	Applicability
Name Clause	Special Resolution	Approval of Central Government and subject to Section 16	New incorporation certificate issued by ROC	Not applicable where only word "Private" is added or deleted on company class conversion
Domicile Clause	Special resolution	Approval of Central Government required only when registered office is changed from one state to another	The Central Government shall dispose of the application within a period of sixty days and before passing its order may satisfy itself that the consent of the creditors, debenture-holders and other persons concerned or that the sufficient provision has been made for the due discharge or that adequate security has been provided for discharge of obligations.	
Objects Clause	Special resolution	-	A company, which has raised money from public through prospectus and still has any	

			<p>unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—</p> <p>(i) the details, as may be prescribed, in respect of such resolution shall also be published 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 and shall also be placed on the website of the company, if any, indicating therein the justification for such change;</p> <p>(ii) the dissenting shareholders</p>	
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			shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.	
Liability /Capital Clause	Special resolution	–	Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void .	



12. ALTERATION OF ARTICLES [SECTION 14]

I. Section 14 of the Companies Act, 2013, vests companies with power to alter or add to its articles. A company cannot divest itself of these powers [*Andrews vs. Gas Meter Co. [1897] 1 Ch. 161*]. Matters as to which the memorandum is silent can be dealt with by the alteration of article. Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows:

(1) Alteration by special resolution: Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.

(2) Alteration to include conversion of companies: Alteration of articles include alterations having the effect of conversion of—

- (a) a **private** company into a public company; or
- (b) a **public** company into a private company:

Even where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall, as from the date of such alteration, **cease to be a private company**:

Provided further that any alteration having the effect of **conversion** of a public company into a private company shall not be valid unless it is approved by an order of the **Central Government** on an application made in such form and manner as may be prescribed:

Provided also that any application **pending** before the **Tribunal**, as on the date of commencement of the Companies (Amendment) Ordinance, 2019, shall be **disposed** of by the Tribunal in accordance with the provisions applicable to it before such commencement.

(3) Filing of alteration with the registrar: Every alteration of the articles and a copy of the **order** of the Central Government approving the alteration, shall be filed with the Registrar, together with a printed copy of the **altered articles**, within a period of **fifteen days** in such manner as may be prescribed, who shall register the same.

(4) Any alteration made shall be valid: Any alteration of the articles registered as above shall, subject to the provisions of this Act, be **valid as if it were originally** contained in the articles.

II. Alteration noted in every copy: Every **alteration** made in articles of a company shall be **noted in every copy** of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a **penalty** of one thousand rupees for every copy of the articles issued without such alteration. **[Section 15]**

13. COPIES OF MEMORANDUM, ARTICLES, ETC., TO BE GIVEN TO MEMBERS [SECTION 17]

According to section 17 every company on being so requested by a **member**, shall send copies of the following documents within **seven days** of the request on

the payment of **fees**—

- (a) the **memorandum**;
- (b) the **articles**; and
- (c) every **agreement** and every resolution referred in section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum and articles.

In case of **default**, the company and every officer who is in default shall be liable for each default, to a **penalty** of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

14. REGISTERED OFFICE OF COMPANY [SECTION 12]

A company is considered to be a separate legal entity from the members. Once a company gets incorporated, it is required to maintain a registered office. This is a **physical office** where the corporation will **receive service of legal documents** from ROC or in case of a lawsuit, etc. This address cannot be a P.O. box but must be a physical location where someone is present, to receive service of legal documents during normal business hours. **It could be different from a Head Office or Corporate office.**

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices letters etc. The **domicile** and the nationality of a company **is determined by the place of its registered officer**. This is also important for determining the jurisdiction of the court.

- (1) **Registered office:** A company shall, within **thirty** days of its **incorporation** and at all times thereafter, have a **registered office** capable of receiving and acknowledging all communications and notices as may be addressed to it.¹⁶

¹⁶ With the respected specified IFSC public & IFSC private companies, they shall have its registered office at the IFSC located in the approved multiservice SEZ set up under the SEZ Act, 2005 read with SEZ Rules, 2006.

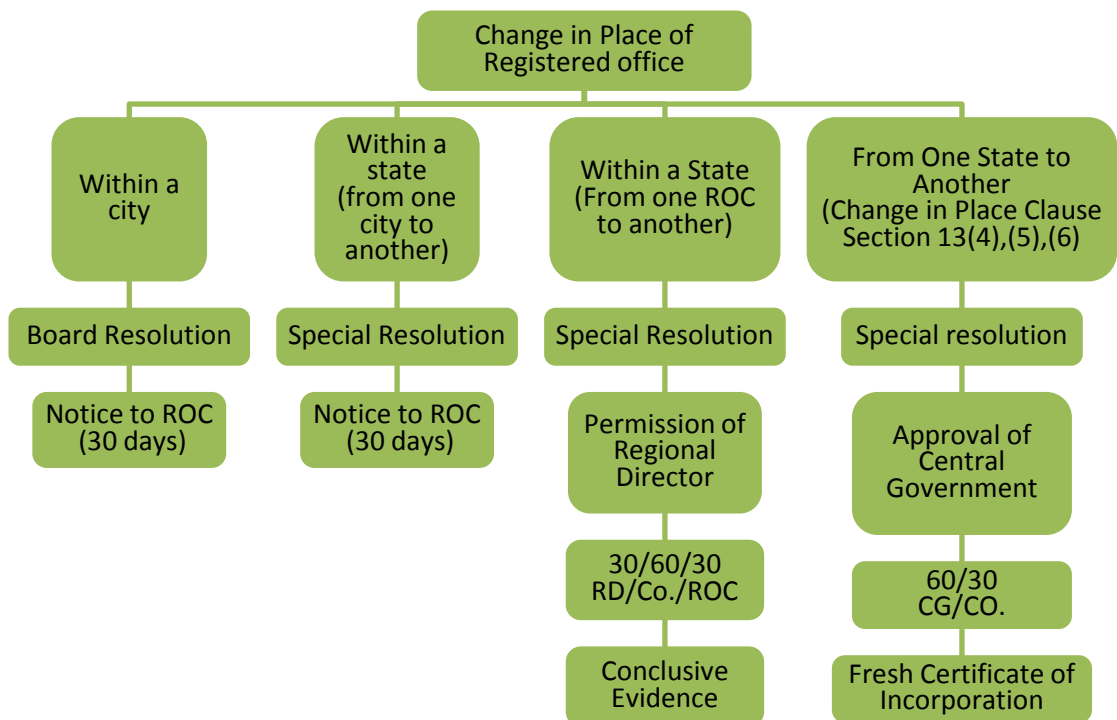
- (2) **Verification of registered office:** The company shall furnish to the Registrar verification of its registered office within a period of **thirty days** of its incorporation.¹⁷
- (3) **Labeling of company:** Every company shall—
- **paint** or affix its **name**, and the **address** of its registered office, and keep the same painted or affixed, on the **outside of every office** or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the **language/s in general use in that locality**, then **also** in the characters of that language/s.
 - have its **name** engraved in legible characters on its **seal**, if any;
 - get its **name, address** of its registered office and the Corporate Identify Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in **all** its business letters, billheads, letter papers and in all its notices and other official publications; and
 - have its **name** printed on hundies, promissory notes, bills of exchange and such other **documents** as may be prescribed:
- (4) **Name change by the company:** Where a company has changed its name/s during the **last two years**, it shall **paint** or **affix** or **print**, along with its name, the **former name** or **names so changed** during the last two years.
- (5) **In case of OPC:** The words “**One Person Company**” shall be mentioned in **brackets** below the name of such company, wherever its name is printed, affixed or engraved.
- (6) **Notice of change to registrar:** Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar **within 30 days of the change**, who shall record the same.¹⁸
- (7) **Change by passing of special resolution:** The registered office of the company shall be changed only by passing of **special resolution** by a company, **outside the local limits** of any city, town or village where such

¹⁷ In case of specified IFSC public & IFSC private company word “thirty days” will be read as “sixty days”.

¹⁸ In the case of specified IFSC public & IFSC private companies for the word “30 days” read as “60 days”.

office is situated or where it may be situated later by virtue of a special resolution passed by the company.

- (8) Change of registered office outside the jurisdiction of registrar:** Where a company changes the place of its registered office from the jurisdiction of **one Registrar** to the jurisdiction of **another Registrar** within the same State, there such change is to be confirmed by the **Regional Director** on an application made by the company.
- (9) Communication and filing of confirmation:** The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be—
- **communicated** within **30 days** from the date of receipt of application by the Regional Director to the company, and
 - the company shall **file** the confirmation with the Registrar within a period of **60 days** of the date of confirmation who shall register the same, and
 - **certify** the registration within a period of **thirty days** from the date of filing of such confirmation.



- (10) **Certificate, a conclusive evidence of compliance of requirements of this Act:** The certificate shall be **conclusive evidence** that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.
- (11) **In case of default:** If any default is made in complying with the requirements of this section, the company and every officer who is in default shall be liable to a **penalty** of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees. [Sub- section (8)]
- (12) If the Registrar has reasonable cause to believe that the company is **not carrying on any business** or operations, he may cause a **physical verification** of the registered office of the company in such manner as may be prescribed and if any default is found to be made in complying with the requirements of sub-section (1), he may without prejudice to the provisions of sub-section (8), initiate action for the **removal of the name** of the company from the register of companies under Chapter XVIII.



15. COMMENCEMENT OF BUSINESS ETC. [SECTION 10A]

- (1) A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2019 and having a share capital shall not **commence** any **business** or exercise any **borrowing** powers unless—
- (a) a **declaration** is filed by a director within a period of **180 days** of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the **Registrar** that every subscriber to the memorandum has **paid** the value of the shares agreed to be taken by him on the date of making of such declaration; and
- (b) The company has filed with the Registrar a **verification of its registered office** as provided in sub-section (2) of section 12.
- (2) If any default is made in complying with the requirements of this section, the company shall be **liable to a penalty** of fifty thousand rupees and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.
- (3) Where no declaration has been filed with the Registrar under clause (a) of

sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is **not carrying on any business** or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the **removal of the name** of the company from the register of companies under Chapter XVIII.

As per Rule 23A [Declaration at the time of commencement of business.] of the *Companies (Incorporation) Rules, 2014*, the declaration under section 10A by a director shall be in prescribed form with prescribed fees and the contents of the said form shall be verified by a Company Secretary or a Chartered Accountant or a Cost Accountant, in practice:

Provided that in the case of a company pursuing objects requiring registration or approval from any sectoral regulators such as the Reserve Bank of India, Securities and Exchange Board of India, etc., the registration or approval, as the case may be from such regulator shall also be obtained and attached with the declaration.

16. RECTIFICATION OF NAME OF COMPANY [SECTION 16]

According to **Section 16**

- (1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is **registered by a name** which, —
 - (a) in the opinion of the Central Government¹⁹, is **identical** with or too nearly resembles the name by which a **company** in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to **change its name** and the company shall change its name or new name, as the case may be, within a period of **three months** from the issue of such direction, after adopting an ordinary resolution for the purpose;
 - (b) on an application by a registered proprietor of a **trade mark** that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the ²⁰Central Government within **3 years** of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion

¹⁹ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

²⁰ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

of the ²¹Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of **6 months** from the issue of such direction, after adopting an ordinary resolution for the purpose.

(2) Where a company changes its name or obtains a new name under subsection (1), it shall within a period of **15 days** from the date of such change, **give notice** of the change to the Registrar along with the order of the ²²Central Government, who shall carry out necessary changes in the **certificate of incorporation** and the memorandum.

(3) If a company makes default in complying with any direction—

Liable person	Penalty/punishment
Company	Fine of 1,000 rupees for every day during which the default continues
Every Officer who is in default	Fine varying from 5,000 rupees to 1 lakh rupees.



17. CONVERSION OF COMPANIES ALREADY REGISTERED [SECTION 18]

According to Section 18 of the Companies Act, 2013, a company may **convert** itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

1. By alteration of memorandum and articles: A company of **any class** registered under this Act may **convert** itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.

2. File an application to the Registrar: Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, **close the former registration of the company.**

²¹ Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

²² Power deleted to Regional Director [S.O. 4090(E), dated 19th December, 2016]

3. Issue a certificate of incorporation: After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.

4. No effect on the debts, liabilities etc. incurred before conversion: The registration of a company under this section **shall not affect any debts, liabilities**, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

18. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY [SECTION 19]

As per Section 19 of the Companies Act, 2013,

(1) No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be **void**:

Provided that nothing in this sub-section shall apply to a case—

- (a) where the subsidiary company holds such shares as the **legal representative** of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a **trustee**; or
- (c) where the subsidiary company is a shareholder even **before it became a subsidiary** company of the holding company:

However, the subsidiary company referred to in the preceding proviso shall have a **right to vote** at a meeting of the holding company only in respect of the shares held by it as a **legal representative** or as a **trustee**, as referred to in clause (a) or clause (b) of the said proviso.

(2) The reference in this section to the shares of a holding company which is a company limited by **guarantee or an unlimited company**, not having a share capital, shall be construed as a reference to the interest of its members, whatever be the form of interest.

Example: RPIP Ltd. has invested 51% in the shares of SSP Pvt. Ltd. on 31 March 2017. SSP Pvt. Ltd. have been holding 2% equity of RPIP Ltd since 2011. SSP Pvt. Ltd. cannot increase its equity beyond that 2% on or after 31 March 2017. However, it could continue to hold or reduce its initial 2% stake.



19. SERVICE OF DOCUMENTS [SECTION 20]

Section 20 of the Companies Act, 2013, provides the mode in which documents may be served on the company, on the members and also on the registrars.

Law with respect to the service of documents is as follows—

(1) **Serving of document to company:** A document may be served on a company or an officer thereof by sending it to the company or the officer at the **registered office** of the company by-

- **registered post**, or
- **speed post**, or
- **courier service**, or
- **leaving** it at its registered office, or
- means of such **electronic or other mode** as may be prescribed:

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

(2) **Serving of document to registrar or member:** Save as provided in this Act or the rules made there under for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by—

- **Post**, or
- **registered post**, or
- **speed post**, or
- **courier**, or
- by **delivering** at his office or address, or
- by such **electronic** or other mode as may be prescribed:

However, a member may request for delivery of any document through a **particular mode**, for which he shall pay such **fees** as may be determined by the company in its annual general meeting.

Explanation—For the purposes of this section, the term “courier” means a person or agency which delivers the document and provides **proof of its delivery**.

Exemption-Section 20 (2) shall apply to a **Nidhi Company**, subject to the modification that in the case of a Nidhi, the document may be served only on members who hold shares of more than ₹ 1,000 in face value or more than 1%, of the total paid-up share capital of the Nidhis whichever is less.

For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi. [Notification dated 5th June, 2015.]

As per the *Companies (Incorporation) Rules, 2014*,

1. The term, "**electronic transmission**" means a communication that creates a record that is capable of retention, retrieval (recovery) and review, and which may thereafter be rendered into clearly legible tangible form. It may be made by—
 - facsimile telecommunication (**fax**) or electronic mail (**email**), which the company or the officer has provided from time to time for sending communications,
 - posting of an electronic message board or **network** that the Registrar or the member has designated for those communications, and which transmission shall be validly delivered upon the posting , or
 - **other means** of electronic communication, in respect of which the company or the officer has put in place **reasonable systems** to verify that the sender is the person purporting to send the transmission.
2. In case of delivery by post, such service shall be deemed to have been effected—
 - (i) in the case of a **notice of a meeting**, at the expiration of **48 hours** after the letter containing the same is posted; and
 - (ii) in **any other case**, at the time at which the letter would be delivered in the **ordinary course** of post.

20. AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS [SECTION 21]

As per section 21 of the Companies Act, 2013, a document or proceeding requiring authentication by a company or contracts made by or on behalf of a company may be **signed by**–

- (i) any key managerial personnel, or
- (ii) an officer or employee of the company duly **authorized** by the Board in this behalf.²³

Authentication of documents, proceedings and contracts

As per Sec.21 these may be signed by any "key managerial personnel" or an officer or employee of the company duly authorised by the Board in this behalf.

As per **Sec.2(51) —Key managerial personnel**, in relation to a company, means—

- (i) the CEO or the MD or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the CFO;
- (v) 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
- (vi) such other officer as may be prescribed;

21. EXECUTION OF BILLS OF EXCHANGE, ETC. [SECTION 22]

- (1) A **bill of exchange**, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if made,

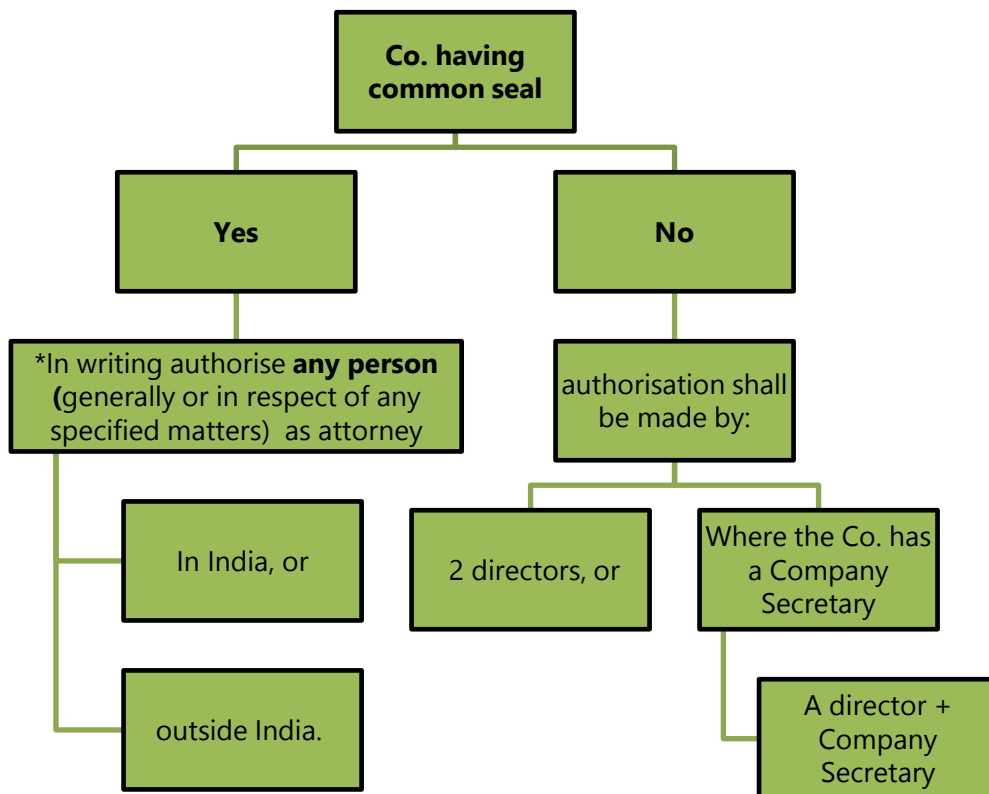
²³ In the case of specified IFSC public company and IFSC private company, for the word "An officer" read as "An officer or any other person".

accepted, drawn, or endorsed in the name of, or on behalf of or on account of, the company by any person **acting under its authority**, express or implied.

- (2) A company may, by writing under its **common seal**, if any, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other **deeds** on its behalf in any place either in or outside India.

However, in case a company does not have a common seal, the above authorisation shall be made by **2 directors** or **by a director and the Company Secretary**, wherever the company has appointed a Company Secretary.

- (3) A deed signed by such an attorney on behalf of the company and under his seal shall **bind the company**.



*It can be observed from above that a company may or **may not have a common seal**. If company decides to have a common seal then it has to affix the same for specified matters, execution of deeds on behalf of the company.

SUMMARY

- ◆ A company can be defined as an “**artificial person**”, invisible, intangible, created by or under law, with a **distinct** legal personality and **perpetual** succession. It is not affected by the death, insanity, or insolvency of an individual member.
- ◆ The **memorandum** of association is the document that sets up the company and the **articles** of association set out how the company is run, governed and owned.
- ◆ Once an association becomes incorporated it acquires a new legal status – it becomes a legal entity in its **own right**, separate from the individual members.
- ◆ A company of any class may **convert** itself as a company of other class by alteration of its MOA and AOA

TEST YOUR KNOWLEDGE

Multiple Choice Questions

1. The minimum number of members in a private company and public company are
 - (a) Three and Seven respectively
 - (b) Two and seven respectively
 - (c) Two and nine respectively
 - (d) None of the above
2. Which one of the following is not the content of the Memorandum of Association?
 - (a) Name clause
 - (b) Registered office clause
 - (c) Objects clause
 - (d) Board of Directors clause
3. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of _____ from the date of filing of the special resolution.

- (a) 30 days
 - (b) 60 days
 - (c) 90 days
 - (d) 6 months
4. Only a natural person who is an Indian citizen and who has stayed in India for a period of at least ____ days during the immediately preceding one calendar year shall be eligible to incorporate a OPC.
- (a) 180 days
 - (b) 181 days
 - (c) 182 days
 - (d) 183 days
5. A section 8 company can call its general meeting by giving a clear at least _____ notice.
- (a) 7 days
 - (b) 14 days
 - (c) 21 days
 - (d) 27 days
6. XYZ Co; is having 15% share capital held by X Company and 50% held by central Government and 10% held by State Government and 25% held by other people then that company will be _____ .
- (a) Government Company
 - (b) Private Company
 - (c) Public Company
 - (d) None of these
7. Which one of the following statements is least likely to be true. A company is a subsidiary if another company:
- (a) exercises more than 50% of the total voting power
 - (b) controls the composition of its board of directors
 - (c) is subsidiary of a company which is subsidiary of the first mentioned company

- (d) is holding of a company which is the holding for the first mentioned company
8. Forms of (1) Articles of guarantee company having a share capital (2) Articles of a guarantee company not having a share capital (3) Memorandum of an unlimited company with share capital (4) Memorandum of a company limited by shares; are respectively given in:
- (a) Table G; H; E & B
(b) Table G; H; E & A
(c) Table G; H; D & A
(d) Table G; H; B & A
9. Tweeter Ltd. has invested 51% in the shares of Snapchat Pvt. Ltd. on 31 March 2018. Snapchat Pvt. Ltd. have been holding 2% equity of Tweeter Ltd since 2011. Snapchat Pvt. Ltd. wants to increase its holdings in equity upto 4% in Tweeter Ltd. after 31 march 2017.Can Snapchat Pvt. Ltd. increase its holdings in equity upto 4% in Tweeter Ltd. after 31 march 2018?
- (a) Yes; it can increase its holdings
(b) No; it cannot increase its holdings
(c) Can't say
(d) None of the above
- 10 A director member deposited with company ₹ 5000 and demanded that AGM notice should be sent by Blue Dart courier only. Is that company bound to serve it that way only?
- (a) Yes because he is a director
(b) No because company is allowed to serve documents by ordinary post
(c) Yes because member has deposited money
(d) No because directors can't get special privileges
11. To entrench its article after incorporation a public company:
- (a) will have to pass a special resolution
(b) will have to take consent of all members
(c) is not allowed to do so

- (d) will have to pass special resolution and take approval of Tribunal
12. AOA of a private company says that Preference shareholders will have right to vote only if last 3 years dividend is not paid. This is:
- (a) Void as it is against the companies act
 - (b) Valid because section 47 is applicable to a private company subject to AOA.
 - (c) Void because as per section 6 act is superior
 - (d) Valid because companies act allows voting power to preference shareholders if there dividend is not paid for last 3 years.
13. If a company is registered by incorrect information then its winding up may be ordered by:
- (a) Central Government
 - (b) Registrar of Companies
 - (c) National Company Law Tribunal
 - (d) Court
14. "A not for profit company shall not alter the provisions of its memorandum or articles".
- (a) False; it can freely change it
 - (b) False; It can do so with permission of Central Government
 - (c) True; because it will be violation of terms of licence
 - (d) True; because MOA/AOA of a section 8 company is unalterable
15. If a company changes its name; which of the following is most accurate:
- (a) It is not allowed to use old name in any way
 - (b) New name should not be identical with old name
 - (c) Old name should be painted/printed for next 1 years along with new name
 - (d) Old name should be painted/printed for next 2 years along with new name
16. A company registered with the name of a trade mark already in existence:
- (a) Central Government can give it an order anytime to change its name

- (b) Company will have to change its name within 3 months from the order of Central Government
- (c) Trademark owner will make complaint within three years
- (d) All of the above

Answer to MCQs

1. (b) 2. (d) 3. (a) 4. (c) 5. (b) 6. (a)
 7. (c) 8. (b) 9. (b) 10. (c) 11. (a) 12. (b)
 13. (c) 14. (b) 15. (d) 16. (c)

Question and Answer

Question 1

XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Pune (within the State of Maharashtra, but from Mumbai ROC to Pune ROC). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.

Answer

The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Pune, **does not result in the alteration of the Memorandum** and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under section 12 (5) of the Act which deals with the registered office of company, the change in registered office from one town or city to another in the same state, must be approved by a **special resolution** of the company. Further, registered office is shifted from one ROC to another, therefore company will have to seek approval of Regional director.

Question 2

The persons (not being members) dealing with the company are always protected by the doctrine of indoor management. Explain. Also, explain when doctrine of Constructive Notice will apply.

Answer

Doctrine of Indoor Management

According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.

Stakeholders **need not enquire** whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to **take it for granted** that the company had gone through all these proceedings in a regular manner.

The doctrine helps to **protect external** members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management is **opposite to the doctrine of constructive notice**. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a safeguard against the possibility of abusing the doctrine of constructive notice.

Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)

- (i) **Knowledge of irregularity:** In case an 'outsider' **has actual knowledge** of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.
- (ii) **Negligence:** If, with a **minimum of effort**, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so **suspicious as to invite inquiry**, and the outsider dealing with the company does not make proper inquiry.
- (iii) **Forgery:** The rule does not apply where a person relies upon a document that turns out to be forged since **nothing can validate forgery**. A company can never be held bound for forgeries committed by its officers.

Question 3

Alfa school started imparting education on 1.4.2010, with the sole objective of providing education to children of weaker society either free of cost or at a very nominal fee depending upon the financial condition of their parents. However, on 30th March 2018, it came to the knowledge of the Central Government that the said school was operating by violating the objects of its objective clause due to which it was granted the status of a section 8 company under the Companies Act, 2013. Describe what powers can be exercised by the Central Government against the Alfa School, in such a case?

Answer

Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, education, sports etc. Such company intends to apply its profit in promoting its objects. Section 8 companies are registered by the Registrar only when a licence is issued by the Central Government to them. Since, Alfa School was a Section 8 company and it had started violating the objects of its objective clause, hence in such a situation the following powers can be exercised by the Central Government:

- (i) The Central Government may by order **revoke the licence** of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and **opportunity** to be **heard** in the matter.
- (ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be **wound up** under this Act or **amalgamated** with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable **opportunity** of being heard.
- (iii) Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be **amalgamated** with another company registered

under this section and having **similar objects**, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

Question 4

The object clause of the Memorandum of Vivek Industries Ltd., empowers it to carry on real-estate business and any other business that is allied to it. Due to a downward trend in real-estate business the management of the company has decided to take up the business of Food processing activity. The company wants to alter its Memorandum, so as to include the Food Processing Business in its objects clause. Examine whether the company can make such change as per the provisions of the Companies Act, 2013?

Answer

Alteration of Objects Clause of Memorandum

The Companies Act, 2013 has made alteration of the memorandum simpler and more flexible. Under section 13(1) of the Act, a company may, by a **special resolution** after complying with the procedure specified in this section, alter the provisions of its Memorandum.

In the case of alteration to the objects clause, Section 13(6) requires the filing of the Special Resolution by the company with the Registrar. Section 13 (9) states that the Registrar shall register any alteration to the Memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution by the company. Section 13 (10) further stipulates that no alteration in the Memorandum shall take effect unless it has been **registered with the Registrar** as above.

Hence, the Companies Act, 2013 permits any alteration to the objects clause with ease. Vivek Industries Ltd. can make the required changes in the object clause of its Memorandum of Association.

Question 5

Explain in the light of the provisions of the Companies Act, 2013, the circumstances under which a subsidiary company can become a member of its holding company.

Answer

In accordance with the provisions of Section 19 of the Companies Act, 2013, a subsidiary company cannot either by itself or through its nominees hold any shares in its holding company and no holding company shall allot or transfer its shares to any subsidiary companies. Any such allotment or transfer of shares in a company to its subsidiary is void. The section however does not apply where:

- (1) the subsidiary company holds shares in its holding company as the **legal representative** of a deceased member of the holding company,
- (2) the subsidiary company holds such shares as a **trustee**, or
- (3) the subsidiary company was a shareholder in the holding company even **before it became its subsidiary**.

Question 6

Explain the provisions of the Companies Act, 2013 relating to the 'Service of Documents' on a company and the members of the company.

Answer

Under section 20 of the Companies Act, 2013 a document may be served on a company or an officer thereof by sending it to the company or the officer at the **registered office** of the company by **registered post** or by **speed post** or by **courier** service or by **leaving** it at its registered office or by means of such **electronic** or other mode as may be **prescribed**. However, in case where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

Under section 20 (2), save as provided in the Act or the rule thereunder for filing of documents with the **registrar** in **electronic** mode, a document may be served on Registrar or any **member** by sending it to him by **post** or by **registered** post or by **speed** post or by **courier** or by **delivering** at his office or address, or by such **electronic** or other mode as may be prescribed. However, a member may request for delivery of any document through a **particular mode**, for which he shall pay such **fees** as may be determined by the company in its annual general meeting.

Question 7

Yadav dairy products Private limited has registered its articles along with memorandum at the time of registration of company in December, 2014. Now

directors of the company are of the view that provisions of articles regarding forfeiture of shares should not be changed except by a resolution of 90% majority. While as per section 14 of the Companies Act, 2013 articles may be changed by passing a special resolution only. One of the directors said that they cannot make a provision against the Companies Act. You are required to advise the company on this matter.

Answer

As per section 5 of the Companies Act, 2013 the article may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if more restrictive conditions than a special resolution, are met.

The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in prescribed manner.

In the present case, Yadav dairy products Private Limited is a private company and wants to protect provisions of articles regarding forfeiture of shares. It means it wants to make entrenchment of articles, which is allowed. But the company will have to pass a resolution taking permission of all the members and it should also give notice to ROC regarding entrenchment of articles.

Question 8

Anushka security equipments limited is a manufacturer of CCTV cameras. It has raised ₹ 100 crores through public issue of its equity shares for starting one more unit of CCTV camera manufacturing. It has utilized 10 crores rupees and then it realized that its existing business has no potential for expansion because government has reduced customs duty on import of CCTV camera hence imported cameras from china are cheaper than its own manufacturing. Now it wants to utilize remaining amount in mobile app development business by adding a new object in its memorandum of association.

Does the Companies Act allow such change of object. If not then what advise will you give to company. If yes, then give steps to be followed.

Answer

According to section 13 of the Companies Act, 2013 a company, which has raised

money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—

- (i) the details in respect of such resolution shall also be published 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 and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
- (ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with SEBI regulations.

Company will have to file copy of special resolution with ROC and he will certify the registration within a period of thirty days. Alteration will be effective only after this certificate by ROC.

Looking at the above provision we can say that company can add the object of mobile app development in its memorandum and divert public money into that business. But for that it will have to comply with above requirements.

Question 9

Manglu and friends got registered a company in the name of Taxmann advisory private limited. Taxmann is a registered trade mark. After 5 years When the owner of trade mark came to know about the same, it filed an application with relevant authority. Can the company be compelled to change its name by the owner of trade mark? Can the owner of registered trade mark request the company and then company changes its name at its discretion?

Answer

According to section 16 of the Companies Act, 2013 if a company is registered by a name which,—

- in the opinion of the Central Government, is identical with the name by which a company had been previously registered, it may direct the company to change its name. Then the company shall by passing an ordinary resolution change its name within 3 months.
- is identical with a registered trade mark and owner of that trade mark apply to the Central Government within three years of incorporation of registration of the company, it may direct the company to change its name.

Then the company shall change its name by passing an ordinary resolution within 6 months.

Company shall give notice to ROC along with the order of Central Government within 15 days of change. In case of default company and defaulting officer are punishable.

In the given case, owner of registered trade mark is filing objection after 5 years of registration of company with a wrong name. While it should have filed the same within 3 years. Therefore, the company cannot be compelled to change its name.

As per section 13, company can anytime change its name by passing a special resolution and taking approval of Central Government. Therefore, if owner of registered trade mark request the company for change of its name and the company accepts the same then it can change its name voluntarily by following the provisions of section 13.

Question 10

Shri Laxmi Electricals Ltd. (S) is a company in which Hanumaan power suppliers Limited (H) is holding 60% of its paid up share capital. One of the shareholder of H made a charitable trust and donated his 10% shares in H and ₹ 50 crores to the trust. He appoint S as the trustee. All the assets of the trust are held in the name of S. Can a subsidiary hold shares in its holding company in this way?

Answer

According to section 19 of the Companies Act, 2013 a company shall not hold any shares in its holding company either by itself or through its nominees. Also, holding company shall not allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Following are the exceptions to the above rule—

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or

where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company but in this case it will not have a right to vote in the meeting of holding company.

In the given case one of the shareholders of holding company has transferred his

shares in the holding company to a trust where the shares will be held by subsidiary company. It means now subsidiary will hold shares in the holding company. But it will hold shares in the capacity of a trustee. Therefore, we can conclude that in the given situation S can hold shares in H.

Question 11

Parag Constructions Limited is a leading infrastructure company. One of the directors of the company Mr. Parag has been signing all construction contracts on behalf of company for many years. All the parties who ever deal with the company know Mr. Parag very well. Company has got a very important construction contract from a renowned software company. Parag constructions will do construction for this site in partnership with a local contractor Firoz bhai. Mr. Parag signed partnership deed with Firoz bhai on behalf of company because he has an implied authority. Later in a dispute company denied to accept liability as a partner. Can the company deny its liability as a partner?

Answer

As per section 22 of the Companies Act, 2013 a company may authorise any person as its attorney to execute deeds on its behalf in any place either in or outside India. But common seal should be affixed on his authority letter or the authority letter should be signed by two directors of the company or it should be signed by one director and secretary. This authority may be either general for any deeds or it may be for any specific deed.

A deed signed by such an attorney on behalf of the company and under his seal shall bind the company as if it were made under its common seal.

In the present case company has not neither given any written authority nor affixed common seal of the authority letter. It means that Mr. Parag is not legally entitled to execute deeds on behalf of the company. Therefore, deeds executed by him are not binding on the company. Therefore, company can deny its liability as a partner.