

# Syllabus ...

## **1. Management of Company**

1. **Board of Directors:** Definition, Powers, Restrictions, Prohibition on Board.
2. **Director:** Meaning and Legal Position of Directors, Types of Directors, Related Party Transactions (Sec. 188).
3. Appointment of Directors, Qualifications and Disqualifications, Powers, Duties, Liabilities of Directors, Loans to Directors, Remuneration of Directors.

## **2. Key Managerial Personnel (KMP)**

1. Meaning, Definition and Appointments of Managing Director, Whole Time Director, Manager.
2. **Company Secretary (CS):** Term of Office/Tenure of Appointment, Role of Company Secretary.
3. Distinction between Managing Director, Manager and Whole Time Director - Role (Powers, Functions of above KMP).
4. Corporate Social Responsibility (CSR) [U/S 135] - Concept who is Accountable, CSR Committee, Activities under CSR.

## **3. Company Meetings**

1. **Board Meeting:** Meaning and Kinds.
2. **Conduct of Meetings:** Formalities of valid Meeting [Provisions regarding Agenda, Notice, Quorum, Proxies, Voting, Resolutions (Procedure and Kinds) Minutes, Filing of Resolutions, Virtual Meeting].
3. Meeting of Share Holders General Body Meetings, Types of Meetings:
  - (a) Annual General Meeting (AGM), (Ss. 96 to 99).
  - (b) Extraordinary General Meeting (EOGM). (Sec. 100).
4. Provisions regarding Convening, Constitution, Conducting of General Meetings contained in Ss. 101 to 114.

## **4. E-Governance and Winding up of a Company**

1. **E-Governance:** Meaning, Importance of E-Governance.
2. **E-Filing:** Basic Concept of MCA, E-Filing.
3. **Winding-up:** Meaning of Winding-up, Dissolution of Company, Conceptual understanding of Winding-up by the Tribunal.
4. Compulsory Winding-up, Members' Voluntary Winding-up, Creditors' Voluntary Winding-up.



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# Chapter 1...

## Management of Company

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### Learning Objectives ...

- To study the definition, powers, restrictions and prohibition on the Board of Directors
- To learn about the meaning and legal position of Directors
- To be aware of the types of Directors
- To examine the appointment, qualification and disqualifications of Directors
- To understand the powers, duties and liabilities of Directors
- To be able to discuss the remedies for breach of duties, loans to Directors and remuneration of Directors

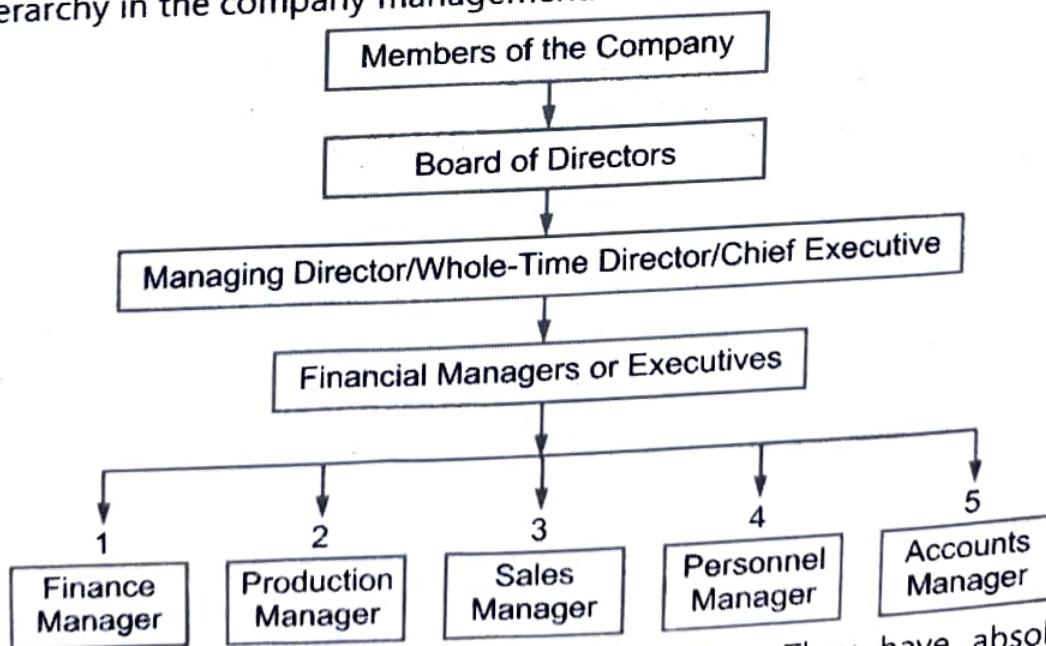
### INTRODUCTION: ORGANISATIONAL STRUCTURE OF A COMPANY

Business organisations like sole proprietorship or partnership firms are generally run by their owners. The management of such organisations is comparatively easy because of its limited activities and moderate size. However, in case of the company form of organisation, the size and scope of the business activity is large and many shareholders' interest is involved in its functioning. These shareholders are the owners of the company, however in reality, they cannot look after the management of the company as they are scattered and are not

generally aware of all the nitty-gritties of the company. On the other hand, a company has no physical existence of its own, but being an artificial person it cannot act by itself. Hence, such organisations are required to be functioned through some human agency. The persons by whom the company acts and by whom the business of the company is carried on or superintended are termed as Directors.

The company as an institution is composed of two organs, namely the general body of the shareholders and the 'Board of Directors'. Though the powers of management and administration vest in the general body of members, exercising such powers in day-to-day administration is not practicable. Hence, the general body elects their representatives called 'Directors'. As per Section 149 of the Act, "Every public company shall have at least three Directors and every private company shall have at least two Directors and one Director in case of a 'One Person Company'. These Directors are collectively referred to as the 'Board of Directors' or 'Board' and these Directors are accountable to the shareholders/members. These Directors will have to come back to the shareholders during the periodical elections so as to seek fresh mandate from them and in this way accountability of Directors to the members is said to have been assured.

The following organisation chart of a company will highlight the hierarchy in the company management.



In this chart, the members are at the top. They have absolute authority to manage, direct and control the affairs of a company. So as to exercise these rights, the members elect their representatives and these

representatives are nothing but the 'Board of Directors'. This 'Board' gets powers of management of a company from the general body of members, subject to the provisions of the Companies Act and Articles of the Company. Hence, the Board of Directors occupies the middle ground between shareholders and managers. Section 179 of the Act vests the powers of management of the company in the Directors.

### **New changes by the Act of 2013:**

Significant powers have been taken away from the Board by this Act and given to the shareholders with regards to 'related party transactions'. Now, they can approach the shareholders for many decisions. The Board is now collectively responsible for the actions that it takes as 'officers in default'. The notice of every Meeting must be provided to every Director. The Director is made responsible for all the corporate actions and decisions which are taken by the Board whether or not he participates in the process. The responsibility of correct reporting is placed on the entire Board and therefore, the Board will have to be vigilant while preparing of the Board Report. The Act of 2013 provides for constituting various committees that will recommend the Board on certain aspects of corporate governance. Various restrictions on the Board were specified under Section 293. These restrictions required a special resolution. Now the Board can sell an undertaking which has a value of less than 20% of the net worth without the concurrence of the shareholders. According to draft rules, the listed companies and public companies having either a paid up share capital of ₹ 100 crores or a turnover of ₹ 300 crores must have a women Director on its board. The new Act also provides that every company should have at least one Director who resides in India and stayed in India for a total period of not less than 182 days in the previous calendar year. It is also possible that a shareholder can challenge the decisions and actions taken by the Board in certain cases.

## **1.1 BOARD OF DIRECTORS**

**Meaning and Definition:** The Board of Directors is the brain and the only brain of the company, (the body) and the company can and does act only through them. [*Bath Vs. Standard Land Co. (1910)*]. When the brain functions, the company is said to function. It is the principal authority in all forms of company organisation. The Board of Directors exercises powers of the company, controls its property and funds and conducts its business. In simple words, all the Directors are collectively called the 'Board of Directors'.

'Board of Directors' or 'Board', in relation to a company, means the collective body of the Directors of the company. [Section 2 (10)]

### **1.1.1 Powers and Functions of Directors**

A company has to function through its Directors. The Directors of the company constitute the Board. It is the Articles of the company which grants powers to the Directors. The powers of management of all the activities of the company are vested in the Board of Directors. The Board of Directors is the supreme authority so far as the management of affairs of the company is concerned. Even the shareholders may not be in a position to interfere in the powers of the Board. The Board of Directors of a company can exercise all such powers and do all such acts which the company is entitled to exercise and do. However, the Board cannot exercise certain powers which are in fact to be exercised by the company in its General Meeting. The Directors will have to enjoy their powers by keeping themselves within the scope of the Act and Memorandum and Articles of the company.

Sections 179 to 183 of the Act deal with the powers of the Board of Directors and the restrictions thereon.

#### **1. Powers of Board of Directors (Section 179):**

The Board of Directors of a company is entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do. This power is subject to the provisions of the Act. It is to be noted that the Board has no power to do any act or thing which is directed or required by the Memorandum or Articles of the company, to be exercised or done by the company in a General Meeting.

Though the Board has substantial freedom in its functioning, the shareholders can control its activities or powers through the General Meetings.

**Shareholders' intervention in the powers of the Board of Directors:** It is possible for the shareholders to amend the Articles and thereby restrict the powers of the Board of Directors. It is an established principle of company law that the Articles of a company have granted certain powers to the Board and shareholders cannot usually interfere with such powers. If the shareholders are not satisfied with the Directors' acts and deeds then shareholders can dismiss such Directors in accordance with the provisions of the Act or the Articles. But ordinarily the Board can exercise its powers without the interference of the shareholders. However, there are certain exceptions to this proposition.

In the following exceptional cases, the general body of shareholders has inherent power to intervene in the matter delegated to the Board of Directors.

- (i) **Directors acting *mala-fide*:** The general body of shareholders can interfere where the Directors themselves act in a *mala fide* manner to promote their personal interest by ignoring the interests of the company.
- (ii) **Board becoming incompetent:** The Board becomes incompetent when the casual vacancies in the Board are not validly filled or when all the Directors are interested in a particular transaction. When the Board becomes incompetent for such valid reasons, the majority of shareholders can intervene and exercise the powers vested in the Board.
- (iii) **Deadlock in management:** Due to deadlock in the management, the Directors are unable to exercise some of their powers and bring the administration to a standstill. In such a case, the majority shareholders can take necessary steps to ensure the working of the company. For this purpose, the shareholders may usurp the Directors' powers and exercise them in the General Meeting.
- (iv) **Residuary power:** Residuary powers always remain with the shareholders and such powers may be exercised by them through the General Meeting. Such powers may be used whenever the Directors act *ultra vires* the Articles.

## **2. Powers of the Board exercisable at Board Meeting only [Section 179(3)]:**

There are certain powers of the Board which can be exercised by it through the Board Meeting only and not by circulation. Such powers are as follows:

- (i) To make calls on shareholders in respect of money unpaid on their shares.
- (ii) To authorise the buy-back of securities under Section 68. (According to Section 68, the buy-back of shares upto 10% of the total paid-up equity capital and free reserves of the company can be done by the Board of Directors by means of a resolution passed at its Meeting. In this case, the approval of shareholders is not necessary).
- (iii) To issue securities, including debentures, whether in or outside India.

- (iv) To borrow monies.
- (v) To invest the funds of the company.
- (vi) To grant loans or give guarantee loans or provide security in respect of loans.
- (vii) To approve financial statement and the Board's report.
- (viii) To diversify the business of the company.
- (ix) To approve amalgamation, merger or reconstruction.
- (x) To take over a company or acquire a controlling or substantial stake in another company.
- (xi) Any other matter which may be prescribed.

However, the Board may, by a resolution passed at a Meeting, delegate any Committee of Directors, the Managing Director, the Manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (iv) to (vi) on such conditions as it may specify.

It should be noted that the acceptance of deposits of money by a banking company in the ordinary course of its business from the public repayable on demand or otherwise and withdrawable by cheque, draft order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

It is further stated that borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act is not treated as borrowing of money under this section.

In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (iv) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

The above mentioned provision will not affect the right of the company in General Meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section.

In addition to the above mentioned powers of Directors, there are certain other provisions of the Act, by which the Directors can exercise the following powers at a Meeting of Board:

- (i) The power to appoint additional Directors, alternate Directors and nominee Director (Section 161).
- (ii) The power to grant sanction to contracts in which particular Directors are interested/related (Section 188).
- (iii) The power to appoint first Auditors (Section 139).
- (iv) The power to make political contributions (Section 182).
- (v) The power to appoint whole-time Key Managerial Personnel such as 'Managing Director' or 'Manager', 'Chief Executive Officer', 'Company Secretary', 'Chief Financial Officer' if he is already a Managing Director or Manager of another company (Section 203).

### **Section 180 - Restrictions on Powers of Board:**

1. The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:

- (a) To sell, lease or otherwise dispose off the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

**Explanation:** For the purposes of this clause;

- (i) "Undertaking" shall mean an undertaking in which the investment of the company exceeds twenty per cent of its net worth as per the audited Balance Sheet of the preceding financial year or an undertaking which generates twenty per cent of the total income of the company during the previous financial year.
- (ii) The expression "substantially the whole of the undertaking" in any financial year shall mean twenty per cent, or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.
- (b) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation.

(c) To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium apart from temporary loans obtained from the company's bankers in the ordinary course of business; provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be borrowing of monies by the banking company within the meaning of this clause.

**Explanation:** For the purposes of this clause, the expression "temporary loans" means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.

- (d) To remit, or give time for the repayment of, any debt due from a Director.
2. Every special resolution passed by the company in a General Meeting in relation to the exercise of the powers referred to in clause (c) of sub-section (1) shall specify the total amount up to which monies may be borrowed by the Board of Directors.
3. Nothing contained in clause (a) of sub-section (1) shall affect:
- The title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith; or
  - The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.
4. Any special resolution passed by the company consenting to the transaction as is referred to in clause (a) of sub-section (1) may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions: Provided that this sub-section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

5. No debt incurred by the company in excess of the limit imposed by clause (c) of sub-section (1) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded. In addition to the above mentioned powers of Directors, there are certain other provisions of the Act, by which the Directors can exercise the following powers at a Meeting of Board.
- (i) The power to appoint additional Directors, alternate Directors and nominee Director (Section 161);
  - (ii) The power to grant sanction to contracts in which particular Directors are interested/related (Section 188).
  - (iii) The power to appoint first Auditors (Section 139).
  - (iv) The power to make political contributions (Section 182).
  - (v) The power to appoint whole-time Key Managerial Personnel such as 'Managing Director' or 'Manager', 'Chief Executive Officer', 'Company Secretary', 'Chief Financial Officer' if he is already a Managing Director or Manager of another company (Section 203)

### **3. Restrictions on Powers of Board of Directors (Section 180):**

There are certain powers, which can be exercised by the Board only with the consent of the company (i.e. shareholders) by special resolution in a General Meeting. These powers are as under:

- (i) **Sale of an undertaking:** Sale, lease or otherwise dispose off the whole or substantially the whole of the undertaking of the company.
- (ii) **Remission of time:** Remit or give time for payment of any debt due by a Director. But renewal of or continuance of an advance made by a banking company to its Director in the ordinary course of business can be made without approval of shareholders in a General Meeting.
- (iii) **Investment of compensation amount:** Investment of the amount of compensation received by the company in respect of the mergers or compulsory acquisition of any undertaking or property of the company. But, investment by a company in trust securities does not require the shareholders' approval in a General Meeting.

**(iv) Borrowings more than aggregate paid up capital:** Borrowing money exceeding the aggregate paid-up capital of the company and its free reserves. These 'borrowings' do not include temporary loans obtained from the company's bankers in the ordinary course of business. The temporary loans are the loans payable on demand or within 6 months but excluding loans for capital expenditure. Ordinarily, the company's borrowing power is laid down in its Memorandum.

**(v) Company to contribute to bona fide charitable funds**

**(Section 181):** The Board of Directors may contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees, any amounts the aggregate of which will, in any financial year, exceed 5% of its average net profits during the 3 financial years immediately preceding.

Every resolution passed by the Company in a General Meeting in relation to the exercise of the power referred to in above clauses (iv) and (v) must specify the total amount up to which money may be borrowed by the Board of Directors for such purposes.

**(vi) Restrictions regarding Political Contributions by Directors**

**(Section 182):** Companies can make contributions to political parties or for political purposes to any person, directly or indirectly, out of their profits. However, the Government Companies and Companies which have been in existence for less than 3 financial years are not allowed to make political contributions. Such contribution by a company in any financial year should not exceed 7.5 % of its average net profit during the immediately preceding three financial years. Before any such contribution is made by the company, a resolution authorising the making of the contribution shall be passed at a Meeting of the Board of Directors. However,

- a donation or payment to be given by a company to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount to such person for a political purpose.

- (b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed:
  - (i) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and
  - (ii) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

Every company has to disclose in its Profit and Loss Account any amount or amounts contributed by it to any political party during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed.

**Penalty:** If a company makes any contribution in contravention to the provisions of this section, the company shall be punishable with a fine which may extend to 5 times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months and with fine which may extend to 5 times the amount so contributed.

**Explanation:** For the purposes of this section, "political party" means a political party registered under Section 29A of the Representation of the People Act, 1951.

**(vii) Power of Board and other persons to make contribution to National Defence Fund (Section 183):**

For the purposes of making contribution to the National Defence Fund, the Prime Minister's National Funds, etc. sanction of company in the General Meeting is not necessary.

1. The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in a General Meeting, may contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.
2. Every company shall disclose in its Profits and Loss Account the total amount or amounts contributed by it to such fund during the financial year to which the amount relates.

## 1.2 DIRECTORS

### Meaning of the term 'Director':

**Definition:** 'Director' means a Director appointed to the Board of a company. [Section 2(34)]. That means, any person who occupies the position of a Director in the company would be the Director. Sometimes the functions and duties of a person are important to determine whether he is a 'Director' or not. If a person is duly appointed by the company to control the company's business; and authorised by the Articles to contract in the company's name and on its behalf then it can be said that he functions as a Director. The Articles of a company may designate its Directors, members of the Governing Council or the Board of Management, or give them any other title, but in the eyes of law, they may be simply Directors.

So far as companies registered under Section 8 (non-profit making companies indulged in the promotion of charitable objects.) are concerned, the members of the Executive Committee or the Governing Body are Directors for the purposes of the Act, though they may not be called by that name.

In reality, Directors are supposed to frame policies of the company and they do direct, control and manage the affairs enshrined in the Memorandum of the company. The Board is the supreme policy framing authority so far as company organisation is considered. In short, Directors are the persons who are elected by the members to perform the task of Managing the business of the company.

### 1.2.1 Legal Position of Directors

It is not easy to explain the position of the Director in a Company form of business organisation. They are described in various capacities such as agents, trustees, Managing partners or employees of the company. In *G. L Railway Co. Vs. Turner [(1872) L. R. 8 Ch. App. 149]* it was observed by Lord Selborne that the Directors are mere trustees or agents of the company - trustees of the company's money and property, agents in the transaction which they enter into on behalf of the company. These judicial observations help to understand the position of Directors as the Act has not specified the functions or duties to be performed by occupying this position.

#### Directors as Agents:

In a case *Ferguson Vs. Wilson [(1866) 2 Ch. App. 77]* it was very specifically stated that the Directors are agents of the company. The

Court stated, "The Company has no person, it can act only through Directors and the case is, as regards those Directors, merely the ordinary case of principal and agent." Hence, when the Directors are acting as agents they would be regulated by the ordinary rules of agency as contemplated under the Contract Act, and they would bind the company with their acts provided their acts are within the authority made available to them under the Memorandum and the Articles. When they enter into a contract on behalf of the company, the company will be held responsible for such contracts and not the Directors. While exercising such powers, Directors are expected to display a degree of care, skill and diligence in the interest of the company.

In strict legal sense, the Directors are not employed by the company as its agents. Actually, they are elected by the members and occupy the place in 'Board' on some ground and then they have to perform the role of agents.

#### **Directors as Trustees:**

The Directors stand in fiduciary position towards the shareholders of a company. The relationship is of 'trust and confidence'. The Directors are considered as trustees of money which comes into their hands. They are trustees not only of money and property of a company but also trade secrets and intellectual property of the company. They are supposed to exercise their power bona fide in the interest of the company.

Again in strict legal sense, they cannot be called as trustees because no trust has been created by the company. In case of a 'Trust', the legal ownership of trust property is handed over to the trustee by the maker of the trust and he can enter into contract in his own name for the benefit of specified persons.

The Directors are trustees of the company and not of the individual members who may have elected them. (*Pereival Vs. Wright (1902) 2 Ch. 421*). With regard to some of the obligations of the Directors of the company and certain powers, they are considered as trustees of the company. Therefore, they may be held responsible for all the Company's money and property over which they exercise control. They will have to refund to the company any of its money or property which they have improperly paid away or transferred. Taking into consideration the above circumstances, the Directors may be referred to as quasi-trustees for the following reasons: (1) the Directors are not vested with ownership of the company's property; (2) the functions of Directors are not the same as those of trustees; (3) the duties of Directors to take care are not as onerous as those of trustees.

### **Directors as Managing Partners:**

Sometimes Directors are described as Managing Partners of the company for the simple reason that they are the important shareholders of the company and they exercise substantial control over the affairs of the company. In this case, the Directors work to achieve the objectives of the company in their own interest - but the principle of mutual agency is not applicable amongst the Directors. That means a Director has no authority to bind the other Directors and shareholders. Moreover, the retirement of Directors takes place by way of rotation. However, this is not true in case of partners in the partnership firm. The Directors are in a position to easily transfer their interest in the company, but partners may not be in a position do this in the case of a partnership firm easily. In this sense, it can be said that the Directors are not exactly the Managing partners of the company but they do perform a role similar to that.

### **Directors as Officers:**

For the purposes of certain matters under the Act, the Directors have been treated as officers of the company [Section 2(59)] and are liable to certain penalties if the provisions of the Act are not complied with.

### **Directors as Employees or Servants:**

The Directors are not usually considered as employees or servants of the company for the following reasons:

- (a) They are not employed by a company but their appointments are made by the members in the Annual General Meeting of the company.
- (b) They don't have any preferential claim in respect of their salaries, debts or accrued holiday remuneration which the employees are entitled to under Section 327 of the Act, in the event of winding up of the company.
- (c) The Directors can hold the office of Directorship in more than one company unless it is expressly prohibited by the Articles.

However, there are certain situations by which the Directors may become employees of the company. This is possible for a Director under a special contract of service which he may enter into with the company. For example, under Sections 188 and 202 of the Act, a Director may hold office of profit or salaried employment as Managing Director or Technical Director. Hence, in such a case, the same person will be working for the company in two different capacities, and the rights and duties and functions of such Director or employee are to be fulfilled or complied

independently by such person. In the capacity of an employee, such person is entitled to the remuneration and other benefits admissible to him. The Managing Director holds such a dual capacity.

To sum up, it may be said that although the Directors are described as trustees, agents or Managing partners etc; in strict legal sense they may not be called trustees, agents or Managing partners, etc. However, it is inferred from various cases decided by the courts that the functions performed by them are very much identical to those exercised by agents, trustees or Managing partners. Moreover, it makes no difference by what name we call them, but we must know their real position in the company and in reality, we know that they are the professionals Managing the affairs of the company for the benefit of themselves and of all the shareholders in it. They stand in a fiduciary position towards the company in respect of their powers and capital under their control.

### **1.2.2 Types of Directors**

In addition to a Managing Director and whole-time Director there may be certain other kinds of Directors also. They differ from each other on the basis of educational qualifications, mode of appointment, their tenure, their involvement in the management of a company and their powers. Hence, the other types of Directors are:

1. Nominee Director
2. Alternate Director
3. First Directors
4. Additional Directors
5. Technical Directors
6. Permanent Directors
7. Executive Director
8. Non-executive Director
9. Directors appointed in case of a casual vacancy
10. Independent Director
11. Interested Director
12. Whole time Director

**1. Nominee Director:** Nominee Director is not an independent Director. He is a person, in general, who gets the benefit of exclusion of liability which is provided by law for independent and non-executive Directors. He is a non-executive Director appointed generally by a lender institution or debenture holder to protect their interest.

Nominee Director is explained in Section 149(7) as "Nominee Director" means a Director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

**2. Alternate Director:** The Alternate Director is a person appointed by the Board in place of a Director during his absence for 3 months or more (Section 161). His appointment will be made by the Board. This can be done by means of a circular resolution. The original Director has no authority to appoint his alternate Director.

**Alternate Director is not a 'proxy' of original Director:** He cannot sign the Prospectus on behalf of original Director. Both of them will have to sign the Prospectus. His legal position is co-extensive with the original Director. He is entitled to have same rights like that of original Director. His duties, liabilities and risks are also similar to that of original Director. It is necessary to send notice of Board Meeting to all Directors including alternate Director and original Director.

**3. First Directors:** First Directors are the persons whose names appear in the Articles at the time of formation of a company (Section 152). The number of the Directors and names shall be determined by the subscribers of the Memorandum or a majority of them. [Regulation 60, Table-F of Schedule I of the Companies Act, 2013] Hence, generally the names of the first Directors are specified in the Articles of the Company. In case of a One Person Company, the individual member shall be deemed to be first Director of a company. [Section 152(1)]

In most cases, their names are specifically mentioned in the Articles as the 'First Directors'. In such circumstances, the dates of their appointments will be the date of incorporation of the Company. If a person's name is mentioned in the Articles, his consent to act as a Director is essential. [Section 152(5)] Moreover, he has to furnish the DIN and a declaration that he is not disqualified to become Director under the Companies Act. [Section 152(4)]

No provision of the Act states that the first Director should retire at the first Annual General Meeting.

However, one-third of Directors can be permanent and out of the remaining one-third shall retire every year. Besides this, it should be noted that every Director shall be appointed by the company in the General Meeting, if Articles permit.

**4. Additional Directors:** Additional Directors are appointed to hold office only up to the date of the next Annual General Meeting of the company. The Board has authority to appoint additional Directors on the Board, within the ceiling prescribed, if Articles permits. If any person, fails to get appointed as Director in the General Meeting he/she cannot be appointed as additional Director by the Board. Tenure of such Directors will be up to the date of next Annual General Meeting (AGM) or the last date on which AGM should have been held, whichever is earlier. (Section 161). Appointment of additional Director may be made through the circular resolution of the Board. Once they are elected at AGM then they can continue as Directors. It is necessary to file returns of their appointments with the ROC.

**Regulation 66 of Table-F Schedule I:** It states that:

- (i) Subject to the provisions of Section 149, the Board shall have power at any time, and from time to time, to appoint a person as an additional Director, provided the number of the Directors and additional Directors together shall not at any time exceed the maximum strength fixed for the Board by the Articles.
- (ii) Such person shall hold office only up to the date of the next Annual General Meeting of the company but shall be eligible for appointment by the company as a Director at that Meeting subject to the provisions of the Act.

This regulation is applicable to all companies, unless the companies have contrary provisions in their Articles.

**5. Technical Directors:** They are entrusted with the technical nature of work. They are entitled to get professional fees for the professional services provided by them to the company.

**6. Permanent Directors:** Permanent Directors are not liable to retire by way of rotation. The term of their office may be for life or for a specified period. (Sections 167,169)

**7. Executive Directors:** Executive Directors are Directors appointed by the Board of Directors to work whole-time for the company and be in charge of and responsible for one or more functions of the company under the overall management of the company by the Managing Director. They are entrusted with day-to-day operations of company.

**8. Non-executive Directors:** Non-executive Directors are basically the professional Directors. They provide their expertise to various companies. They do not take part in day-to-day activities of a company and do not have knowledge of routine operations of the company. They

attend the Meetings of the Board and of various committees of the company and work for the company on part-time-basis or periodically. They get information of progress of the company through periodical reports. The recent trend in the corporate world is to have good combination of executive and non-executive Directors on the Board so as to make a company broad based. Non-executive Directors can share their independent and unbiased views while discussing strategies and policies of the companies. Non-executive Directors will be held liable only when it is proved that they were personally involved in a particular offence.

**9. Directors appointed in case of casual vacancy:** If the office of any Director appointed by the company in a General Meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may be filled by the Board of Directors at a Meeting of the Board which shall be subsequently approved by members in the immediate next General Meeting. (provided that any person so appointed shall hold office only up to the date up to which the Director in whose place he is appointed would have held office if it had not been vacated) [Section 161(4)].

In case all Directors vacate office, then the Promoter is empowered to make appointments of minimum number of Directors. In their absence, the Central Government can appoint the Directors. Such Directors will be holding office till Directors are appointed at a General Meeting.

Casual vacancy means any vacancy occurring by death, resignation, disqualification, failure of an elected Director to accept office or for any reason other than requirement by rotation. It is not mandatory to have Board Meeting to fill casual vacancy. Hence, such vacancy may be filled through circular resolution.

**10. Independent Directors:** The concept of Independent Directors has been introduced by the new Act for listed companies and it extends even to prescribed public unlisted companies. The criterion for Independent Directors is more stringent than in listing agreement. The Independent Directors are required to be appointed from a Data Bank maintained for that purpose. The act has defined role and duties of Independent Directors in Schedule IV.

According to Section 2 (47), Independent Director means an Independent Director referred to in Section 149 (5).

According to Section 149 (5), every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regards as may be applicable, comply with the requirements given in Section 149 (4).

Section 149 (4) states that every listed public company is required to have at least one-third of the total number of Directors as independent Directors and the Central Government can prescribe the minimum number of independent Directors in case of any class or classes of public companies.

**Meaning / Definition of Independent Director:** [Section 149 (6)]

An independent Director in relation to a company, means a Director other than a Managing Director or a whole-time Director or a nominee Director,

- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience
- (b) (i) who is or was not a Promoter of the company or its holding, subsidiary or associate company
  - (ii) who is not related to Promoters or Directors in the company, its holding, subsidiary or associate company
- (c) who has or had no pecuniary relationship, other than remuneration as such Director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed, with the company, its holding, subsidiary or associate company, or their Promoters, or Directors, during the two immediately preceding financial years or during the current financial year
- (d) none of whose relatives:
  - (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

- (ii) is indebted to the company, its holding, subsidiary or associate company or their Promoters, or Directors, in excess

of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;

- (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their Promoters, or Directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or
  - (iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);
- (e) who, neither himself nor any of his relatives:
- (i) holds or has held the position of a Key Managerial Personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed.  
Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.
  - (ii) is or has been an employee or Proprietor or a Partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of
    1. a firm of Auditors or company secretaries in practice or Cost Auditors of the company or its holding, subsidiary or associate company; or
    2. any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent or more of the gross turnover of such firm
  - (iii) holds together with his relatives two per cent or more of the total voting power of the company; or
  - (iv) is a Chief Executive or Director, by whatever name called, of any non-profit organisation that receives 25% or more of its

receipts from the company, any of its Promoters, Directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

Every independent Director shall at the first Meeting of the Board in which he participates as a Director and thereafter, at the first Meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent Director, give a declaration that he meets the criteria of independence as provided in Section 149(6). [Section 149(7)]

The company and independent Directors shall abide by the provisions specified in Schedule IV. [Section 149(8)]

Not notwithstanding anything contained in any other provision of this Act, but subject to the provisions of Sections 197 and 198, an independent Director shall not be entitled to any stock option and may receive remuneration by way of fee provided under Section 197(9), reimbursement of expenses for participation in the Board and other Meetings and profit related commission as may be approved by the members. [Section 149(9)]

An independent Director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. [Section 149(10)]

No independent Director shall hold office for more than two consecutive terms, but such independent Director shall be eligible for appointment after the expiration of three years of ceasing to become an independent Director: Provided that an independent Director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly [Section 149(11)].

An independent Director; and a non-executive Director not being Promoter or Key Managerial Personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. [Section 149 (12)]

The provisions of sub-sections (6) and (7) of Section 152 in respect of retirement of Directors by rotation shall not be applicable to appointment of independent Directors.

**11. Interested Director:** "Interested Director" means a Director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, Director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company; [Section 2 (49)] (Deleted by the Amendment Act of 2017).

It is obligatory upon the Director to disclose his interest in the company or any other contract or arrangement to be entered in to by the company. This has been stipulated in the following provision of the Act.

#### **Section 184 - Disclosure of Interest by Director:**

1. Every Director shall at the first Meeting of the Board in which he participates as a Director and thereafter at the first Meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board Meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed.
2. Every Director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into
  - (a) with a body corporate in which such Director or such Director in association with any other Director, holds more than two per cent shareholding of that body corporate, or is a Promoter, Manager, Chief Executive Officer of that body corporate; or
  - (b) with a firm or other entity in which, such Director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the Meeting of the Board in which the contract or arrangement is discussed and shall not participate in such Meeting: Provided that where any Director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first Meeting of the Board held after he becomes so concerned or interested.

3. A contract or arrangement entered into by the company without disclosure under sub-section.
4. Or with participation by a Director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.
5. If a Director of the company contravenes the provisions of sub-section (1) or sub-section (2), such Director shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to one lakh rupees, or with both.
6. Nothing in this section:
  - (a) shall be taken to prejudice the operation of any rule of law restricting a Director of a company from having any concern or interest in any contract or arrangement with the company;
  - (b) shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the Directors of the one company or body corporate or two or more of them together holds or hold not more than two per cent. of the paid-up share capital in the other company or the body corporate.

**12. Whole time Director:** 'whole time Director' includes a Director in the whole time employment of the company. [Section 2 (94)]

### **1.2.3 Related Party Transactions (Section 188): (Contracts in which Directors are interested parties)**

Every Director of a company has to work in the best interest of the company because his relationship with the company is of fiduciary nature. A Director is not supposed to take undue advantage of his position. He cannot derive secret profits from the company's business. Therefore certain responsibilities have been cast on him. Hence, it is necessary for the Director to make disclosure of interest in the Meeting of Board of Directors. [Section 184]

Related part transactions are business dealings or arrangements between two parties who are concerned by a special relationship prior to the deal.

In the business world, it is well known fact that the related party transactions can be used and hence, it is an important policy issue to be taken care of. India is also not free from this problem. In the old Act, the scope for related party transactions was limited.

The *Satyam-Maytas deal* is one of such issues which became responsible to recast regulations of related party transactions in the company law of India.

Related party transactions have become very common and they are inevitable in today's business world. It is expected that whenever there is conflict of interest between Director's interest and company's interest, the Director is supposed to put his interest secondary and give first priority to the company's interest. Directors can divert funds of a company for personal benefit of the Directors. This can be done through transactions with related parties.

The Companies Act, 2013 has made sufficient provisions to control such related party transactions and see to it that such transactions are not used to as a instrument to divert the funds of a company for the personal benefits of the Directors.

**Related Party [Section 2 (76)]: Definition:** "Related party", with reference to a company, means:

- (i) A Director or his relative
- (ii) A Key Managerial Personnel or his relative
- (iii) A firm, in which a Director, Manager or his relative is a partner
- (iv) A private company in which a Director or Manager is a member or Director
- (v) A public company in which a Director or Manager is a Director or holds along with his relatives, more than two per cent of its paid-up share capital
- (vi) Any body corporate whose Board of Directors, Managing Director or Manager is accustomed to act in accordance with the advice, directions or instructions of a Director or Manager
- (vii) Any person on whose advice, directions or instructions a Director or Manager is accustomed to act  
Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity
- (viii) Any company which is:
  - (a) a holding, subsidiary or an associate company of such company; or
  - (b) a subsidiary of a holding company to which it is also a subsidiary;

Such other person as may be prescribed.

### **Provisions relating to Related Party Transactions (Section 188)**

1. Except with the consent of the Board of Directors given by a resolution at a Meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to:

- (a) Sale, purchase or supply of any goods or materials
- (b) Selling or otherwise disposing of, or buying, property of any kind
- (c) Leasing of property of any kind
- (d) Availing or rendering of any services
- (e) Appointment of any agent for purchase or sale of goods, materials, services or property
- (f) Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- (g) Underwriting the subscription of any securities or derivatives thereof, of the company

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a special resolution.

Provided further that no member of the company shall vote on such special resolution to approve any contract or arrangement which may be entered into by the company, if such member is a related party.

Provided also that nothing contained in this second proviso shall apply to a company in which 90% or more members, in number, are relatives of Promoters or are related parties.

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

Explanation in this sub-section:

- (a) The expression '**office or place of profit**' means any office or place
  - (i) where such office or place is held by a Director, if the Director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as Director, by way of salary, fee, commission, perquisites, any rent-free accommodation or otherwise.

(ii) where such office or place is held by an individual other than a Director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent free accommodation, or otherwise.

(b) the expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

2. Every contract or arrangement entered into under sub-section (1) shall be referred to in contract or arrangement.

3. Where any contract or arrangement is entered into by a Director or any other employee, without obtaining the consent of the Board or approval by a special resolution in the General Meeting under sub-section (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a Meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or, as the case may be, of shareholders of and by any other Director, the Directors concerned shall indemnify the company against any loss incurred by it.

4. Without prejudice to anything contained in sub-section (3), it shall be open to the company to proceed against a Director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

5. Any Director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,

(i) in case of listed company, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ₹ 25000 but which may extend to ₹ 5 lakhs, or with both; and

(ii) in case of any other company, be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5 lakhs.

So as to have control on related party transactions, specific responsibilities have been cast on Audit Committee, Independent

Directors and Auditors, in addition to their general responsibilities. In other words, Directors will have to be very careful in complying with the requirements related to party transactions.

### **1.3 APPOINTMENT OF DIRECTORS, QUALIFICATIONS AND DISQUALIFICATIONS**

#### **1.3.1 Who may be Appointed as a Director?**

**Only Individuals to be Directors:** Every company shall have a Board of Directors consisting of individuals as Director. No body corporate, association or firm shall be appointed Director of a company and only an individual shall be so appointed. [Section 149(1)].

However, no company shall appoint or re-appoint any individual or Director of the company unless he has been allotted a Director Identification Number (DIN) under Section 154.

In (New Zealand) case of **Commercial Management Ltd. vs. Registrar of Companies** [1987] NZ LR 744, it has been pointed out that the partners of a firm cannot be collectively appointed as Directors. It would be "quite foreign to the concept of the office of Directors which calls for individual judgment and responsibility."

The Supreme Court has given reason as to why only an individual be appointed as Director. In a case **Oriental Metal Pressing Works (P.) Ltd Vs. B. K. Thakoor** [1961]31 Comp. Cas. 143, it was held that the office of the Director being to some extent an office of trust, there should be somebody readily available who can be held responsible for the failure to carry out the trust, and it might be difficult to fix that responsibility if the Director was a corporation or an association of persons.

However, deemed Directors may be considered as the exception to above mentioned provision. Where all or the majority of the Directors of a subsidiary company are accustomed to act according to its Directors.

#### **Appointment of Directors:**

**First Directors:** In case of an One Person Company (OPC), an individual being member gets the status of First Director until the Director or Directors are duly appointed by the member in accordance with the provisions of this section.

In case of other companies, where there is no specific provision in the Articles about the appointment of the Directors, the subscribers to the Memorandum, who are individuals, shall be deemed to be the First Directors of the Company.

First Directors are usually appointed by name in the Articles of Association of a company or in accordance with the manner specified therein. These names are to be provided to the Registrar at the time of registration of a company. If these first Directors are not appointed in the manner mentioned herein, the subscribers to the Memorandum who are individuals shall be deemed to be the Directors of the company, until the Directors are duly appointed in the first Annual General Meeting [Section 152(1)]. If a subscriber to the Memorandum happens to be a body corporate, it will be excluded from the list of first Directors. If incidentally all the subscribers are body corporate, in such a case, Articles of the company must contain a list of the first Directors for the purpose of registration of a company.

**(i) Appointment of Directors at a General Meeting:** Section 152 of the Act states that the Directors are required to be appointed by the shareholders in the General Meeting of the company. However, it is to be noted that, no individual shall be appointed as a Director of a company by Articles of a company unless he gives his consent to hold the office as Director and such consent has been filed with the Registrar within 30 days of his appointment in the prescribed manner. However, in case of appointment of an independent Director in the General Meeting explanatory statement stating that, in the opinion of the Board, he fulfils the conditions of the act for such an appointment, should be annexed to the notice for such General Meeting [Section 152 (5)].

**(ii) Conditions to be fulfilled before appointment:**

- (a) **DIN:** No person shall be appointed as a Director of company unless he has been allotted the Director Identification Number (DIN) under Section 154.
- (b) **Declaration:** Every person proposed to be appointed as a Director by the company in General Meeting or otherwise, shall furnish his Director Identification Number and a declaration that he is not disqualified to become a Director under this Act.
- (c) **Consent:** In case of OPC as well as private company, every Director of the company is under obligation to give his consent for appointment as such and the consent shall be communicated to the ROC.
- (d) **Recommendation** The recommendation regarding nomination and remuneration committee is required to be considered while appointing a Director.

**(iii) Appointment of other Directors:** Remaining Directors, subject to certain regulations in the Articles of the company, be appointed by the company in the General Meeting.

**(iv) One third of Directors retire every year:** At the first Annual General Meeting of a public company held next after the date of the General Meeting at which the first Directors are appointed, one-third of such of the Directors for the time being are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

That means out of retiring Directors, 1/3 of Directors must retire every year. For example in Board consisting of 12 Directors, 4 Directors can be non-retiring. Out of remaining 8 Directors, 2 Directors will have to retire every year. If the Board has 10 Directors then 3 Directors will be of non-retiring category and out of remaining 7 retiring Directors, 2 Directors must retire every year. At AGM, company can fill the vacancy by appointing the retiring Director or some other person. The retiring Director's reappointment can be done at the General Meeting only [Section 152 (6)].

**(v) Retiring Directors:** The Directors who are supposed to retire should have been of longest tenure in office since their last appointment. Violation of above provisions will attract punishment of imprisonment.

**(vi) Re-appointment of retiring Directors or appointment of fresh person:**

- (a) If the vacancy of the retiring Director is not filled-up and the Meeting has not expressly resolved not to fill the vacancy, the Meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.
- (b) If at the adjourned Meeting also, the vacancy of the retiring Director is not filled up and that Meeting also has not expressly resolved not to fill the vacancy, the retiring Director shall be deemed to have been re-appointed at the adjourned Meeting, unless:
  1. At that Meeting or at the previous Meeting, a resolution for the reappointment of such Director has been put to the Meeting and lost.

2. The retiring Director has, by a notice in writing addressed to the company or its Board of Directors, expressed his unwillingness to be re-appointed.
3. He is not qualified or is disqualified for appointment.

A resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act. In this case "Retiring Director" means a Director retiring by rotation.

**That means** the vacancy created by a retiring Director should be filled up at the same Meeting or at an adjourned Meeting. It is also possible that the General Meeting may resolve that the vacancy shall not be filled-up. But if both the things are not done, the retiring Director shall be deemed to have been re-appointed at such adjourned Meeting.

**(vii) Retirement of Directors by rotation:** The subsequent Directors can be appointed by the shareholders in the General Meeting. The Directors who are appointed shall retire by rotation. In case of public company, at least two third of the total number of Directors shall be retired by rotation. In such case, there should not be a provision in the Articles for the retirement of all the Directors at every Annual General Meeting.

### **Qualification for Directors:**

No academic and professional qualification for the Directors have been prescribed by the Act. The Articles under old Act provided that the Directors should take some qualification shares in the company. It is also stated in Article 66 of Table F of the old Act that the qualification of a Director shall be holding of at least one share in the company.

Even Section 270 of the old Act states that:

- (a) Such fact must be disclosed in the prospectus
- (b) Every Director has to take his qualification shares within 2 months after his appointment
- (c) The nominal value of one share should not exceed ₹ 5,000/- and
- (d) Share warrants will not be counted for the purpose of qualification shares. However, no such corresponding provision is made in the new Act of 2013.

There is no upper age limit for appointing a person as the Director. However, a minor cannot be appointed as a Director. But in case of listed company minimum age of Director is prescribed as 21 years [Clause 49 (I) (A) (iii) (g) of listing agreement].

### **Disqualification of Directors (Section 164):**

The following persons are disqualified for the purpose of their appointment as a Director of a company:

- (a) A person of unsound mind
- (b) An undischarged insolvent ;or
- (c) A person who has been applied to be adjudged as insolvent
- (d) A person who has been convicted by any court anywhere in the world for an offence involving moral turpitude and sentenced in respect thereof to imprisonment for a period of 6 months or more, and a period of 5 years has not elapsed from the last day of expiry of the sentence; Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a Director in any company
- (e) An order disqualifying him for appointment as a Director has been passed by a court or Tribunal and the order is in force
- (f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call
- (g) He has been convicted of the offence dealing with related party transactions under Section 188 at any time during the last preceding five years; or
- (h) He has not been allotted DIN

### **Disqualification of Directors of Defaulting Companies: [Section 164 (2)]**

A person who is or has been a Director of a company which is responsible for the following defaults will be considered as disqualified for his reappointment in such company or any other company for a period of 5 years from the date of such default:

- (a) Has not filed financial statements or annual returns for any continuous period of three financial years; or
- (b) Has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more.

Provided that where a person is appointed as a Director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

### **Additional Disqualification by Private Company [Section 164 (3)]:**

A private company may by its Articles provide for any disqualification for appointment as a Director in addition to those specified in Section 164(1) and (2).

Provided that the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

### **Effect on tenure of the Directors if the Annual General Meeting is not held:**

The tenure of the Directors cannot be extended or prolonged by not holding a Meeting in time. Those Directors who were supposed to retire by rotation, would cease to be in office after the last day on which the Annual General Meeting ought to have been held [B. R. Kundra Vs. Motion Pictures Association 1(976) 46 Comp (as. 339 Del.)]

### **Appointment of Directors by Board:**

The Board of Directors is empowered to appoint Directors in the following three matters:

- (a) Additional Directors (Section 161)
- (b) Filling up the casual vacancy (Section 161)
- (c) Alternate Directors (Section 161)

**(a) Appointment of additional Directors [Section 161]:** The Board of Directors can appoint additional Directors, if it is authorised by the Articles in this regard. However, care has to be taken to see that the number of Directors constituting the Board and additional Directors together shall not exceed the maximum number fixed by the Articles. The time span of the additional Directors to hold office will be only upto the date of the next Annual General Meeting of the company (Section 161). The appointment of additional Directors may be made either at a Board Meeting or by passing resolution by circulation as provided in Section 175. If it is provided in the Articles that a person has to acquire certain shares by way of qualification to become a Director then in such case, such requirement is to be complied with by the additional Directors within 2 months.

**(b) Filling up casual vacancies (Section 161):** 'Casual vacancy' may occur due to death, resignation, disqualification or failure of an elected Director to accept the office for any reason other than retirement by rotation.

In case of a public company or a private company which is the subsidiary of a public company, if the office of any Director appointed by

the company in the General Meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may be filled by the Board of Directors at a Meeting of the Board.

**Duration:** When such casual vacancy is filled, then the person appointed will hold office for the entire period for which the person in whose place he was appointed would have held office.

This provision is not applicable to the private company which is not the subsidiary of a public company. Hence, casual vacancies in such companies will be filled in accordance with the Articles of such companies.

**(c) Appointment of an alternate Director (Section 161):** The Board of Directors of a company may, if so authorised by its Articles or by a resolution passed by the company in the General Meeting, appoint an alternate Director to act for a Director called "the Original Director" during his absence for a period of at least 3 months from the State in which Meetings of the Board are ordinarily held.

The alternate Director will have to vacate office if and when the original Director returns to the State in which the Meetings of the Board are ordinarily held.

It is to be noted that the State in which Board Meetings are held need not necessarily be the State where the registered office of the company is situated.

By such an appointment, the vacancy so created is temporarily filled and no new office of a Director is created by such appointment. Therefore, this appointment of alternate Director is not considered as an increase in the strength of Board of Directors. The alternate Director will have to vacate office as and when the original Director returns to the State even if he does not attend the Board Meeting.

#### **Appointment of Directors by third parties (i.e. Appointment by nomination)**

There are certain situations when Directors represent certain third parties in the Board. The Articles in certain situations give power to the other creditors like lending institutions such as banks, debenture holders or other mutual funds, public financial institutions, State financial corporations who have advanced loans to the company to appoint their nominees on the Board. The role of such financial institutions in the modern corporate world is important. As these institutions finance various projects of the corporate world, they will ensure themselves that

the money which they have provided is invested in a proper manner and for stipulated purposes only. The right to nominate the Directors on the Board of Directors is generally stipulated in the contract only.

Besides this, nomination of Directors on the Board may be made if the statute provides so. But in the absence of any such provision in the statute, nominee Directors may be appointed if it is provided in the Memorandum or Articles of the company. The number of Directors so appointed shall not exceed  $\frac{1}{3}$  of the total number of Directors. These Directors are not liable to retire by rotation.

### **Appointment of Directors by Proportion Representation**

#### **[Section 163]**

The Articles of a company may provide for the appointment of not less than two-thirds of the total number of the Directors of a public company or of a private company which is a subsidiary of a public company, according to the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise. The Directors appointed under this system will hold office for a period of 3 years. By the system of proportional representation, even the minority group of shareholders can have their representatives on the Board.

#### **Number of Directors:**

According to Section 149(1), every public company should have at least 3 Directors, private company should have at least 2 Directors and one Director in case of One Person Company. The Act has not stated the maximum number of Directors permitted in a company. The maximum number of Directors is 15. However, if a public company or a private company which is a subsidiary of a public company desires to increase the maximum number of its Directors beyond 15, in such a case, special resolution is necessary.

It is to be noted that, a body corporate firm or association cannot be appointed as a Director of any company. Only individuals can be appointed as 'Directors' [Section 149].

A person cannot hold office as a Director at the same time in more than 20 companies (Section 165). While calculating the total number of companies (i.e. 20), the Directorship of the following companies will be excluded, such as a private company which is neither a subsidiary nor a holding company of a public company.

**Penalty:** Any person who acts as a Director of more than 20 companies in contravention of the above provision, shall be punishable with fine which shall not be less than ₹ 5,000 but which may extend to ₹ 25,000 for every day after the first during which the contravention continues.

For reckoning the Directorship of companies, the Directorship in a dormant company shall not be included.

#### **Interested Director:**

It is necessary for every Director who is interested in a transaction of the company to disclose his interest to the Board.

#### **Board's sanction necessary for certain contracts in which particular Directors are interested [Section 297]**

Whenever a company has to enter into a contract for the sale, purchase or supply of any material, etc. with any Director or his associate or partner, etc. the consent of the Board of Directors is must. This consent is required to be obtained by a resolution passed at its Meeting. In this case, the consent by means of a resolution passed by circulation is not enough.

However, such approval of the Board is not required in the following circumstances:

- (i) Where the contract relates to purchase and/or supply or sale of goods, etc. for cash at the current market prices; or
- (ii) Where the value of the goods/services does not exceed ₹ 5000 in the aggregate in any year and it is an item of regular trade or business of such Director, relative, firm, etc; or
- (iii) Where the transaction is with or by a banking or insurance company in the ordinary course of business.

In the circumstances of urgent necessity, however, a company may enter into any contract for the purchase, sale or supply of any goods, etc. with any Director or his relative or partner, etc. (even for a value of such goods/services exceeding ₹ 5,000/-) without obtaining the consent of the Board. But in such a case, the consent of the Board shall be obtained at a Meeting within three months of the date on which the contract was entered into [Section 297 (3)].

If consent is not accorded to any such contract, the contract shall be voidable at the option of the Board. In case of companies having a paid-up share capital of not less than rupees one crore, it is stated that the

previous approval of the Central Government is necessary for entering into any contract with any Director or his associate or partner, etc. for sale, purchase or supply of goods or services, etc., whatever its value and whether cash or otherwise. The failure to obtain such prior permission of the Central Government will make the contract illegal and void.

**Disclosure of Interests by Director [Section 299]:** A Director of a company, who is in any way, whether directly or indirectly, interested in a contract with the company, is under obligation to disclose the nature of his interest at the Board Meeting at which the question of entering into the contract is first considered.

If the Director becomes concerned or interested in the contract after it was made, he has to disclose his interest at the first Board Meeting held after he became so interested.

If the Director is a member of a specified firm or a body corporate with which the company intends to transact, he may give a general notice to the Board disclosing this fact therein and such a notice shall be considered as sufficient disclosure of concern or interest in relation to any contract or arrangement so intended to be made.

Any such general notice shall expire at the end of the financial year in which it is given, but it can be renewed for one more financial year at a time, by a fresh notice given in the last month of the financial year in which it would otherwise expire.

Such a notice must either be given at a Meeting of the Board or brought up and read at the first Meeting of the Board after it is given.

**Penalty:** If a Director fails to make proper disclosures as mentioned herein above, he shall be punishable with fine up to ₹ 50,000.

### **Interested Director not to participate or vote in Board's proceedings [Section 300]**

The interested Director cannot take part in discussion or vote on the matter of his interest in the Meeting of the Board. It is further stated that, his presence shall not be counted for the purpose of forming quorum at the time of any such discussion or vote; and if he does vote, he knowingly contravenes the provisions of this Section and this shall be punishable with fine up to ₹ 5,000.

#### **Duties of Directors:**

The Directors of the companies have immense powers which are required to be regulated for the public good as well as for the protection of the investors. Their role in company management is very important.

Because of wide powers vested in the Directors, there may be situations where such powers may be used to capitalise their strategic position in the company to serve their personal interests. There are certain duties which have been imposed upon them to minimise the misuse of their position and powers. If the Directors fail to perform their duties then the company would be entitled to take action against such Directors for damage suffered by the company.

These duties may be classified into two categories, namely:

- (a) General duties; and
- (b) Statutory duties.

**(A) General Duties of the Directors:** The general duties of the Directors are as under:

**(1) Fiduciary Duties:** The Directors are expected to exercise their powers honestly and *bona fide* for the benefit of the company. Their position in a company is of a fiduciary nature. Fiduciary position means a position of 'trust and confidence'. The 'goodwill' of the Directors helps the company to procure funds and the investors and creditors repose trust and confidence in the Directors, and therefore it becomes the duty of the Directors to act in good faith so as to protect the interest of the present and future members of the company. Therefore, Directors are not supposed to make secret profits.

### **Cook Vs. Deeks (1916) A.C. 554 (P.C.)**

**Facts:** Three Directors of a company carrying on the business of railway construction contractors obtained a contract in their own name to the exclusion of the company. The Directors also procured a resolution of the company ratifying their act. By their votes as holders of three-fourths of the shares, they had resolved that the company had no interest in the contract. The shareholders of the company brought an action against the Directors.

**Privy Council Held:** It was a breach of trust on the part of the Directors and of the company, the benefit of the contract belonged to the company and they were bound to account to the company for it.

**(2) Duty of Care, Skill and Diligence:** While performing their duties, the Directors must take reasonable care and exercise such degree of skill and diligence as is reasonably expected of persons of their knowledge and status.

Here extraordinary care is not expected from the Director while performing his functions as a Director, but he should take that much care

only which a man of ordinary prudence would take in his own case. However, a Director cannot be held responsible for mere error of judgment, if he acts honestly and with reasonable care.

The Directors are required to adhere to the standard of reasonable care, if they fail to do that they would be held liable for negligence. If a company suffers any loss on account of the negligence of Directors, they will have to compensate the company.

**Power of Court to grant relief:** If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against the Director of a company, it appears to the court that he is or may be liable in respect of such acts but that he has acted honestly and reasonably and having regard to all the circumstances of the case, he ought fairly to be excused, the Court may relieve him either wholly or partly from his liability on such terms as it may think fit.

**(3) Duty not to delegate:** The maxim '*delegatus non potest delegare*' is applicable to the Directors as they are agents of the company. The meaning of the above maxim is "the delegates cannot further delegate". That means a Director cannot delegate his authority to someone, the reason lies in the agency because shareholders have reposed trust and confidence in him while appointing him as a Director. However, in the following cases, a Director can delegate his authority:

- (a) if it is permitted by the Companies Act or Articles of the company; or
- (b) where business exigencies require that certain functions may be delegated to some other officials of the company.

#### **(B) Statutory duties of the Directors:**

Statutory duties are the duties and obligations which are required to be performed under the provisions of the Companies Act. Some of them are as under:

1. Duty not to make allotment of share capital to the public for subscription until the minimum subscription is raised (Section 39).
2. Duty to file return of allotments with the Registrar, within a period of 30 days. Failure to perform this duty will attract a penalty, for each default, of ₹ 1,000/- for each day during which such default continuous or ₹ 1 lakh, whichever is less. [(Section 39 (5))].

3. Duty not to issue irredeemable preference shares or shares redeemable after 20 years (Section 55).
4. Duty to sign annual returns and the certificate attached thereto (Section 92).
5. Duty to prepare financial statement and lay before the company with the Director's Report as to the state of the company's affairs (Sections 128, 129, 134).
6. Duty to disclose interest [(Section 184(1))]: A Director who is directly or indirectly concerned or interested in a contract or arrangement of the company is under obligation to disclose the nature of his interest at a Meeting of the Board of Directors. This disclosure should be made at a first Meeting of the Board held after he has become interested. [(Section 184(1))].
7. Duty of such interested Director not to participate or vote on any transaction or contract or discussion on the matter of his interest [(Section 184(2))].
8. Duty to disclose receipt from transfer of property (Section 191): When Directors receive money from the transferee in connection with the transfer of the company's property or undertaking, they must disclose this fact to the members of the company and get it approved by the company in the General Meeting.
9. Duty to disclose receipt of compensation from transferee of shares (Section 191).
10. Duty to convene the statutory Annual General Meeting (AGM) and Extraordinary General Meetings [Sections 96, 100].
11. Duty to prepare and place before the AGM the financial statement, a report on the company's affairs including the report of the Board of Directors (Sections 102, 129 and 134).
12. Duty to authenticate and approve the annual financial statement (Section 134).
13. Duty to appoint first Auditor or Auditors of a company at the first Annual General Meeting of the company (Section 139).
14. Duty to appoint Cost Auditor of the company with the previous approval of the Central Government (Section 148).
15. Duty to make a declaration of solvency in case of a member's proposal to wind up voluntarily (Section 305).

It is to be noted that the list of duties of the Directors given herein above is illustrative and not exhaustive.

## Liabilities of Directors:

When the Director does something within the scope of his authority, he may not be held liable if he acts in good faith. But if the Director himself is negligent in performing his duties or if he fails to act in good faith and does not take any reasonable care in discharging his duties, he would be held personally liable for such acts. The Directors liability may be civil liability or criminal liability. In case of civil liability, ordinarily a person has to pay compensation to the aggrieved person. However, in case of criminal liability a Director will be held liable for fine or imprisonment.

The liabilities of Directors are enumerated under the following categories:

1. Liability to the third parties
2. Liability to the company
3. Liabilities for breach of statutory duties
4. Liability for acts of co-directors
5. Criminal liability

**1. Liability to the third parties:** A Director is liable to the third parties in the following matters:

(a) **Under the provisions of the Companies Act; 2013:** A Director is liable to the third party in the following matters:

(i) **Prospectus:** If a Director fails to state any particulars as per Section 26 of the Act or makes any mis-statement in the Prospectus, he will be held personally liable for damages to the third party.

**Civil liability for mis-statement in Prospectus (Section 35):** A Director shall be liable to pay compensation to every person who subscribes for any securities (shares or debentures, etc.) on the faith of the Prospectus for any loss or damage he may have sustained by reason of any untrue or misleading statement included therein.

(ii) **Irregular allotment:** If allotment is made before minimum subscription is received (Section 39), any Director who is in default for this, shall be liable to compensate the company and allottee if loss or damage is sustained (Section 40).

**Failure to repay application money:** Under certain circumstances, the company has to return the application money received from the applicants at the time of issue of shares. If Directors fail to do this in the stipulated time, they are jointly and severally liable to repay that money with interest [Section 39 (3), 40].

(iii) **Fraudulent Trading:** During the winding up of a company, if it is found that the business of the company has been carried on with the intent to defraud the creditors of the company and a Director is involved in such activity, he may be held personally liable to outsiders for all or any of the debts of the company by an order of the Tribunal (Section 339).

- (b) **Liability in case of *ultra vires* act:** The Directors should function within the scope of their authority. If they enter into any kind of business deal which is *ultra vires* the company or *ultra vires* the Articles, they may be held personally liable for any loss sustained by any third party. This is also termed as liability for breach of warranty of authority.
- (c) **Contractual liability:** The Directors of a company may enter into a contract and thereby make themselves personally liable to the third parties.

2. **Liability to the Company:** When a person accepts the Directorship in the company, he owes certain duties to the company. They have to function like agents and trustees of the company. If they fail to perform such duties or if they are negligent in their conduct, they will be held liable to the company and its shareholders.

The Directors may be held liable to the company in the following instances:

(a) **Negligence:** If the Directors perform their duties negligently, they will be held liable to compensate the company for any loss suffered due to such negligence. It is expected from the Director to exercise due care and diligence while performing his duties. Failing to do that will amount to negligence. However, the Directors will not be liable for mere errors of judgment if they acted *bona fide* and for the benefit of the company.

(b) **Misfeasance:** Misfeasance may be defined as any breach of duty in the conduct of the company's affairs which causes loss to the company. It is nothing but misconduct or wilful misuse of

powers. If the misconduct is not wilful, it would not amount to 'misfeasance'. During the winding up of a company, if a Director indulges in the act of misfeasance in relation to the company, the court can ask him to repay or restore the money or property or any part thereof respectively with interest. In case of death of a Director, a misfeasance proceeding can be continued against his legal heirs or legal representatives [Section 340]

Under Section 463 of the Act, the Directors can avail relief against liability for breach of trust or misfeasance.

(c) ***Ultra vires act:*** Directors are supposed to act within the scope of the Companies Act, Memorandum and Articles. If they exceed these limits, they will personally be held liable for such acts being *ultra vires* the Act, Memorandum and Articles.

(d) **Breach of trust:** Being Trustees of the company's property, the Directors should act in the interest of the company and not in their personal interest. The assets of the company are entrusted to the Directors to be applied to certain defined objects and they will be held liable for breach of trust if they apply them to some other objects.

(e) ***Mala-fide act:*** A Director may indulge in a fraudulent or dishonest activity for the purpose of personal gain thereby making the company suffer the loss. In such a case, Director has to compensate.

3. **Liabilities for breach of statutory duties:** There are various statutory duties imposed on the Directors under the Act. Some of these duties have been already discussed under the heading "Statutory duties of the Directors". Failure on the part of Directors to perform these duties would attract either civil or criminal liability.

4. **Liability for the acts of co-directors:** If a Director is not a part to a wrongful act of the Board or co-director, he cannot be held liable to the company or to the third party. However, if a Director is made liable for the acts of a co-director, he gets the right to recover contribution from the other Directors or co-directors who were a party to the wrongful act.

5. **Criminal Liability:** Besides the civil liability, the Directors of the companies may also face criminal liability if they indulge in wrongful acts or if they fail to perform various duties imposed by the Companies Act. For failure to perform certain duties, the Directors

are liable to penalties by way of fine or imprisonment. They can also be held liable under the common law and the Indian Penal Code. Some of the provisions of the Companies Act under which the Directors incur criminal liability are:

- (a) For failure to repay deposits within the prescribed time limit under Section 73, 74, is punishable with fine ranging from ₹ 1 Crore to ₹ 10 Crore and penalty for every defaulting officer is imprisonment up to 7 years or with fine ranging from ₹ 25 lakhs to ₹ 2 Crore or with both [Section 74 (3)].
- (b) For issuing a Prospectus containing untrue statement, penalty is ranging from ₹ 50,000 to ₹ 3 lakhs. [Section 26(9)].
- (c) If a company with intent to defraud issues a duplicate certificate of shares, the company shall be punishable with fine which shall not be less than 5 times the face value of the shares involved in the issue of the duplicate certificate but which may extend to 10 times the face value of such shares or ₹ 10 crores whichever is higher and every officer of the company who is in default shall be liable for action under Section 447 [Section 46(5)].
- (d) For failure to lay annual accounts/financial statements at the Annual General Meeting, penalty is imprisonment up to 1 year or with fine ranging from ₹ 50,000 to ₹ 5 lakhs, or with both [Section 129].

The Central Government may require such class or classes of unlisted companies, as may be prescribed,— (a) to prepare the financial results of the company on such periodical basis and in such form as may be prescribed;

- (b) to obtain approval of the Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and (c) file a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed." [Section 129-A]
- (e) Penalty where no specific penalty is provided in the Act: Where a Director fails to comply with the provisions of the Act for which there is no specific penalty in the Act, in such a case, the Director is punishable with fine up to ₹ 10,000 and in case the default is of continuing nature, with a further fine upto ₹ 1,000 for every day after the first during which the default continues, liable to a

penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person" (Section 450).

It has been already discussed that a Director acting honestly and reasonably may in proper cases, be relieved of his liability (Section 463).

**Remedies for breach of duties:** There are various duties stipulated in the Companies Act to be performed by the Directors of the companies. If any Director fails to perform such duties, he will have to face civil and criminal sanctions under the provisions of the Act.

### Civil Remedies

1. **Injunction:** Injunction is an order of the court restraining a person from doing a particular act. It is a preventive relief. It is generally invoked when damages is not an adequate relief. It is an equitable remedy wherein the Tribunal can pass orders to a person and direct him to do or to refrain from doing certain acts. The shareholders and depositors have right to file class suit and to prevent a Director from doing any illegal or wrongful activity.
2. **Damages/Compensation:** Claim for compensation against the Directors can be made in the following circumstances
  - (i) Prospectus is issued with an intention to defraud the creditors
  - (ii) Where deposits have been taken to defraud the depositors
  - (iii) When a Director is found to be guilty in an investigation initiated by the government for misfeasance, fraud or mismanagement
  - (iv) Any other fraudulent, unlawful acts or omissions
3. **Restoration of Company's Property:** When an action is initiated at the instance of a company or the Central Government in pursuance of an investigation report or by shareholders, the order may be passed against the Directors to restore the property wrongly withheld by the Directors.
4. **Return the profits or gains Illegally Received:** When undue gains are received by the Director, he is under obligation to return the same to the company; e.g. if it is found that a Director has entered into an illegal cash back transaction and has

pocketed the money, he may be compelled to return the gains illegally made. Sometimes, a Director diverts the client of the company towards his own business or for his profits, he may be asked in such a case to return the profits he has made out of such transactions. This relief can also be claimed through class action.

5. **Dismissal of Directors:** A Director may be dismissed by taking class action and for oppression and mismanagement. Dismissal is also possible when fraud is committed in the process of incorporation of the company. Such dismissal will disqualify the Director from becoming a Director of the company subject to certain conditions. Powers of dismissal of the Director may be exercised by the tribunal.

#### **1.4 LOANS TO DIRECTORS [SECTION 185]**

According to **Black's Law Dictionary**, 'Loan' means a lending, advance of money with absolute promise to repay, a borrowing with a promise to repay, delivery of money by one party and receipt by another is an agreement, express or implied, to repay, or a deposit.

The essential requirement of a loan is the advance of money (or some article) upon the understanding that it shall be returned, and it may or may not carry interest.

As per Section 185, except as provided in the Act, a company (herein after referred as 'lending company' for the purposes of this Act) cannot give directly or indirectly, any loan to or give any guarantee or provide any security for any loan.

##### **Section 185:**

1. No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by:
  - (a) any Director of a Company, or of a company which is its holding company or any Partner or relative of any such Director; or
  - (b) any firm in which any such Director or relative is a Partner.
2. A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in

whom any of the Director of the company is interested, subject to the condition that:

- (a) a special resolution is passed by the company in a General Meeting:

Provided that the explanatory statement to the notice for the relevant General Meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

- (b) the loans are utilised by the borrowing company for its principal business activities.

Explanation – For the purposes of this sub-section, the expression "any person in whom any of the Director of the company is interested" means:

- (a) any private company of which any such Director is a Director or member;
- (b) any body corporate at a General Meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such Director, or by two or more such Directors, together; or
- (c) any body corporate, the Board of Directors, Managing Director or Manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any Director or Directors, of the lending company.

3. Nothing contained in sub-sections (1) and (2) shall apply to:

- (a) the giving of any loan to a Managing or whole-time Director:
  - (i) as a part of the conditions of service extended by the company to all its employees; or
  - (ii) pursuant to any scheme approved by the members by a special resolution; or
- (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or

- (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or
- (d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

#### **Penalty:**

4. If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section:
  - (i) the company shall be punishable with fine which shall not be less than **five lakh rupees** but which may extend **to twenty-five lakh rupees**;
  - (ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to **six months** or with fine which shall not be less than **five lakh rupees** but which may extend **to twenty-five lakh rupees**; and
  - (iii) the Director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.'

One has to keep in mind that the restrictions of Section 185 cover not only transactions directly relating to loans, etc. but they equally apply to indirect lendings.

Whether a deposit is to be treated as a loan or not will normally depend upon the nature of the transaction and the facts gathered from the terms and conditions attached to the transactions.

**Indirect loans to Directors:** In *Dr. Freddie Adeshir Mehta Vs. Union of India* [1991] 70 Comp. Cases 210 (Bom), the Bombay High Court held that, when a company gives official accommodation in the matter of

payment of debt to one of its Directors, it is not and does not amount to a loan, and company in this case, is not liable for contravention of Section 295 (Corresponding Section 185 of the Companies Act, 2013). When Section 295 (of the old Act) refers to an indirect loan to a Director, what it means is that the company shall not give a loan to a Director through the agency of one or more intermediaries. The word 'indirectly' cannot be used to convert into a 'loan' something which is not in substance a loan. The court has concluded in this case that a company selling one of its flats to one of its Directors on receiving half price in cash and agreeing to accept the balance in installments does not amount to "giving loan" to the Director. It is a credit sale. It cannot be described even as a indirect loan. There is difference in the terms a 'loan' and a 'credit'.

### **1.4.1 Remuneration of Directors**

#### **(Managerial Remuneration)**

The Act provides certain provisions to make the managerial remuneration within reasonable limits and also transparent. The issue of managerial remuneration has been discussed in various provisions of the Act. These provisions are applicable to a public company and a private company which is subsidiary of a public company but not to the other private company.

The person holding a managerial position would be entitled to receive managerial remuneration. Therefore, we must know the term 'managerial position'; however, this term has not been defined in the Act. There are certain provisions (e.g. Sections. 197) in the Act, which suggest that Directors, Statutory Manager (Managing Director or Whole Time Director) are the persons holding managerial positions. Hence, the term 'managerial remuneration' refers to remuneration payable to Managers or Directors (which includes Managing Director or Whole Time Director). But it does not include the salary payable to executives who do not form part of the Board of Directors.

Managerial remuneration may be in the form of monthly payments, salary or specified percentage of net profits or a commission or in the form of sitting fee for attending the Board Meetings.

The term 'remuneration' has been explained in Explanation to Section 197 (4) of the Act.

Ordinarily, the Directors have no right to receive remuneration unless it is sanctioned by the Articles or by a resolution. The Directors would be

entitled to remuneration if the Articles so stipulate by passing a special resolution at the General Meeting of the company (Section 197). Moreover, they are not treated as servants as they are elected and not employed. A Director or a Manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other [Section 197 (6)].

In case of a public company, various restrictions are there on remuneration payable to Managing Director (MD)/ whole-time Director (WTD)/Manager, however there are more restrictions on remuneration in case of a private company. The remuneration includes salary, dearness allowance, perquisites, commission and other allowances. Contribution to PF, gratuity, superannuation, encashment of leave, education and travelling allowance are included in the term 'Perquisites'.

#### **Remuneration if a person is working in more than one companies:**

A Managing Director or a whole-time Director is entitled to get remuneration from two companies. In such case, total remuneration received by him should not be more than the maximum limit admissible from in any one of the companies where he is working as a managerial person. This restriction is applicable to both profit making and non-profit making companies. [Section V, Part II of schedule V of the Act of 2013].

#### **Remuneration in case of profit making company:**

If the company is making profits, the maximum remuneration payable is 5% of net profits, however in case there are more than one MD/WTD, the total managerial remuneration should not exceed 10% of net profits of the company. [Sections 197 (1) (i), 198] It should be noted that above mentioned limit of 10% does not apply to 'Manager', if he is not a Director.

#### **Remuneration in case company is making losses:**

The ceiling on minimum remuneration is specified in Part II of Schedule V of the Act of 2013 in case company is making losses.

#### **Provisions relating to Managerial Remuneration:**

- 1. Maximum managerial remuneration:** The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, to its Directors and its Manager in respect of any financial year shall not exceed 11% of the net profits of that company for that financial year. However, remuneration payable to Directors shall not be deducted from the gross profits of the company.

While computing the above mentioned 11% amount, the fees payable to Directors for attending Board Meetings shall not be included (Section 197).

**2. Remuneration of Directors:** Remuneration must be determined as per Section 197 and in accordance with Articles or by resolution or by a special resolution passed by the company in the General Meeting and the remuneration payable to such Director determined as aforesaid shall be inclusive of the remuneration payable to such Director for services rendered by him in any other capacity except where: (a) the services are of a professional nature, and (b) in the opinion of the Central Government, the Director possesses the requisite qualifications for the practice of the profession (Section 197).

**Manner of payment of remuneration:** A Director who is either in the whole-time employment of the company or a Managing Director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by other. However, without the approval of the Central Government such remuneration shall not exceed 5% of the net profits for one such Director, and if there is more than one such Director, 10% for all of them together [Section 197].

A Director who is neither in the whole time employment of the company nor a Managing Director may be paid remuneration by fixing a particular period of receiving remuneration or by way of commission but it should not exceed:

- (i) 1% of the net profits of the company, if the company has a Managing or whole-time Director, or a Manager
- (ii) 3% of the net profits of the company, in any other case.

It is possible for the company through the General Meeting, to authorise the payment of such remuneration at a rate exceeding 1% or as the case may be, 3% of its net profits. However, Central Government's approval is necessary to such an arrangement (Section 197).

If a company has no profits or if its profits are inadequate then the company cannot pay any remuneration to its Manager, Managing Director or whole time Director without the approval of the Central Government.

Section 196 and Schedule V has laid down provisions for the purpose of appointment and remuneration of managerial personnel without the approval of the Central Government. These provisions are made with a

view to reduce governmental control over the functioning of the companies. This change was made in the light of economic reforms undertaken by India. Hence, companies can now make payment of remuneration without the approval of the government especially in the years when there were no or only inadequate profits. In such situation of no profits and inadequate profits, three schemes of alternatives have been given in Part II of Schedule V.

### **Central Government or company to fix a limit with regard to remuneration (Section 200):**

The company has power to fix the remuneration for Directors within the limits specified in this Act. That means it can lower the upper limit for remuneration fixed by the other provisions of the Act. While doing this, the government will have to take into consideration the following aspects:

- (a) The financial position of the company
- (b) The remuneration on commission drawn by the individual concerned in any other capacity
- (c) The remuneration or commission drawn by him from any other company
- (d) Professional qualifications and experience of the individual concerned
- (e) Such other matters as may be prescribed

### **Provisions regarding Managerial Remuneration contained in Schedule V:**

The rules regarding the remuneration payable to managerial personnel are provided in Part II of Schedule V, which are as under:

#### **Section I: Remuneration payable by companies having profits**

Subject to the provisions of Section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in such section.

#### **Section II: Remuneration payable by companies having no profit or inadequate profit without Central Government approval**

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) given below:

(A):

| (1)   | (2)  |
|---|--|
| <b>Where the effective capital is:</b>                  | <b>Limit of yearly remuneration payable shall not exceed:</b>            |
| (i) Negative or less than ₹ 5 crores                    | ₹ 30 lakhs   |
| (ii) ₹ 5 crores and above but less than 100 crores      | ₹ 42 lakhs   |
| (iii) ₹ 100 crores and above but less than ₹ 250 crores | ₹ 60 lakhs   |
| (iv) ₹ 250 crores and above                             | ₹ 60 lakhs plus 0.01% of the effective capital in excess of ₹ 250 crores |

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

**Explanation:** It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

**(B)** In case of a managerial person who was not a security holder holding securities of the company of nominal value of rupees five lakh or more or an employee or a Director of the company or not related to any Director or Promoter at any time during the two years prior to his appointment as a managerial person, – 2.5% of the current relevant profit:

Provided that if the resolution passed by the shareholders is a special resolution, this limit shall be doubled:

Provided further that the limits specified under this section shall apply, if:

- (i) Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of Section 178 also by the Nomination and Remuneration Committee
- (ii) The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person;

- (iii) A special resolution has been passed at the General Meeting of the company for payment of remuneration for a period not exceeding three years;
- (iv) A statement along with a notice calling the General Meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:

**(a) General Information:**

1. Nature of industry
2. Date or expected date of commencement of commercial production
3. In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the Prospectus
4. Financial performance based on given indicators
5. Foreign investments or collaborations, if any.

**(b) Information about the Appointee:**

1. Background details
2. Past remuneration
3. Recognition or awards
4. Job profile and his suitability
5. Remuneration proposed
6. Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)
7. Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

**(c) Other Information**

1. Reasons of loss or inadequate profits
2. Steps taken or proposed to be taken for improvement
3. Expected increase in productivity and profits in measurable terms.

**(d) Disclosures**

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the financial statement:

- (i) All elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc. of all the Directors.
- (ii) Details of fixed component and performance linked incentives along with the performance criteria.
- (iii) Service contracts, notice period, severance fees.
- (iv) Stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

### **Section III: Remuneration payable by companies having no profit or inadequate profit without Central Government approval in certain special circumstances**

In the following circumstances a company may, without the Central Government approval, pay remuneration to a managerial person in excess of the amounts provided in Section II above:

- (a) Where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in General Meeting to make such payment, and treats this amount as managerial remuneration for the purpose of Section 197 and the total managerial remuneration payable by such other company to its managerial persons including such amount or amounts is within permissible limits under Section 197.
- (b) Where the company
  - (i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or
  - (ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction or National Company Law Tribunal, for a period of five years from the date of sanction of scheme of revival, it may pay remuneration up to two times the amount permissible under Section II.
- (c) Where remuneration of a managerial person exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal.

Provided that the limits under this Section shall be applicable subject to Meeting all the conditions specified under Section II and the following additional conditions:

- (i) Except as provided in para (a) of this Section, the managerial person is not receiving remuneration from any other company.
- (ii) The Auditor or Company Secretary of the company or where the company has not appointed a Secretary, a Secretary in whole-time practice, certifies that all secured creditors and term lenders have stated in writing that they have no objection for the appointment of the managerial person as well as the quantum of remuneration and such certificate is filed along with the return as prescribed under sub-section (4) of Section 196.
- (iii) The Auditor or Company Secretary or where the company has not appointed a Secretary, a Secretary in whole-time practice certifies that there is no default on payments to any creditors, and all dues to deposit holders are being settled on time.
- (d) a company in a Special Economic Zone as notified by the Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in any financial year, may pay remuneration up to ₹ 2,40,00,000 per annum.

#### **Section IV: Perquisites not included in managerial remuneration**

1. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:
  - (a) contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961 (43 of 1961);

- (b) gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and
- (c) encashment of leave at the end of the tenure
2. In addition to the perquisites specified in paragraph 1 of this section, an expatriate managerial person (including a non-resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III:
- (a) **Children's education allowance:** In case of children studying in or outside India, an allowance limited to a maximum of ₹ 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.
- (b) **Holiday passage for children studying outside India or family staying abroad:** Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.
- (c) **Leave travel concession:** Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave be spent in home country instead of anywhere in India.

**Explanation I:** For the purposes of Section II of this Part, "effective capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company

whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

**Explanation II:**

- (a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment
- (b) In any other case, the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made

**Explanation III:** For the purposes of this Schedule, "family" means the spouse, dependent children and dependent parents of the managerial person.

**Explanation IV:** The Nomination and Remuneration Committee while approving the remuneration under Section II or Section III, shall

- (a) Take into account, financial position of the company, trend in the industry, appointee's qualification, experience, past performance, past remuneration, etc.
- (b) Be in a position to bring about objectivity in determining the remuneration package while striking a balance between the interest of the company and the shareholders.

**Explanation V:** For the purposes of this Schedule, "negative effective capital" means the effective capital which is calculated in accordance with the provisions contained in Explanation I of this Part is less than zero.

**Explanation VI:** For the purposes of this Schedule:

- (a) "Current relevant profit" means the profit as calculated under Section 198 but without deducting the excess of expenditure over income referred to in sub-section 4 (I) thereof in respect of those years during which the managerial person was not an employee, Director or shareholder of the company or its holding or subsidiary companies.

(b) "Remuneration" means remuneration as defined in clause (78) of Section 2 and includes reimbursement of any direct taxes to the managerial person.

### **Section V: Remuneration payable to a managerial person in two companies:**

Subject to the provisions of Sections I to IV, a managerial person shall draw remuneration from one or two companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

### **PART III**

Provisions applicable to Parts I and II of this Schedule:

1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in the General Meeting.
2. The Auditor or the Secretary of the company or where the company is not required to appoint a Secretary, a Secretary in whole-time practice shall certify that the requirement of this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of Section 196.

### **PART IV**

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.

### **QUESTIONS FOR DISCUSSION**

1. Define 'Director'. What is his legal position in a company?
2. To what extent can the Director of a company be considered as trustees, agents or Managing partners of the company?
3. Discuss the provisions of law relating to appointment and tenure of alternate Director and additional Director?
4. Explain in brief the provisions of the Companies Act regarding appointment of Directors of a company?

5. How can Directors of a company be removed from office before the expiry of their term? State the procedure for filing the vacancy caused by removal of a Director.
6. What are the restrictions on the powers of the Board of Directors of a company? Can members in General Meeting change the decisions taken by the Board? What powers can be exercised by the Board only at its Meetings?
7. Explain appointment of Directors, their rights, duties, and liabilities.
8. What are the powers of Directors? What are their duties under the Companies Act? Discuss briefly their liabilities.
9. Explain in brief the various types of Directors and their mode of appointment.
10. Who is a Director?
11. Who can be appointed as a Director?
12. What is meant by share qualification of a Director?
13. What is the minimum and the maximum number of Directors of a private and a public company?
14. Who are 'rotational Directors'?
15. What is meant by 'additional Director'?
16. How can the shareholders of a company remove a Director?
17. Can the Central Government appoint Directors of a company?
18. What is the maximum number of companies of which a person can act as a Director at a time?
19. What is the limit of managerial remuneration as per Section 198 of the Companies Act?
20. What is meant by resolutions by circulation?
21. Explain 'Managerial Remuneration.'
22. State the legal provisions relating to the 'appointment of first Directors.'
23. What are the qualifications of 'Directors' of a company?
24. What are the disqualifications of 'directors'?

25. What are the statutory duties of the Directors?
26. Distinguish between 'Managing Director' and 'Manager'.
27. Write short notes on:
- (i) Directors as agents
  - (ii) Directors as trustees
  - (iii) Appointment of Directors by proportional representation
  - (iv) Appointment of Directors by the Central Government
  - (v) Remuneration of Directors
  - (vi) Types of Directors
  - (vii) Resignation by a Director
  - (viii) Rules regarding holding of office or place of profit by a Director
  - (ix) Loans to Directors.
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# **Key Managerial Personnel (KMP)**

## **Contents ...**

- 2.1 Introduction - Key Managerial Personnel (KMP)
  - 2.1.1 Managing Director
  - 2.1.2 Whole Time Director
  - 2.1.3 Manager
- 2.2 Distinction between Managing Director and Manager
- 2.3 Company Secretary (CS) - Term of office, Tenure of appointment, Role of a Company Secretary (CS)
- 2.4 Corporate Social Responsibility
  - Questions for Discussions

## **Learning Objectives ...**

- To learn the definition of Key Managerial Personnel
- To understand the role of a Managing Director, Whole Time Director, Manager
- To understand the distinction between a Managing Director and a Manager and also between a Managing Director and a Whole Time Director
- To learn about the role of a Company Secretary
- To understand about Corporate Social Responsibility

### **2.1 INTRODUCTION - KEY MANAGERIAL PERSONNEL (KMP)**

The term *Key Managerial Personnel* has been introduced in the new Act of 2013. It takes in its territory a broader set of officials who play a major role in the corporate affairs in the light of the new corporate world. The Board of Directors is responsible to take major decisions in relation to the affairs of the company. However, the Board of Directors can take decisions when the periodical Meetings take place.

As the Board cannot look after the day-to-day affairs of the company, this task of the company is entrusted to the Key Managerial Personnel (KMP) and other Managers or Executives.

### **Meaning of KMP:**

The Key Managerial Personnel in relation to the organisation includes:

- (i) The Chief Executive Officer (CEO) or the Managing Director (MD) or the Manager.
- (ii) The Company Secretary (CS)
- (iii) The Whole Time Director (WTD)
- (iv) The Chief Financial Officer and other such officers as may be prescribed [Section 2(51)]

The old Act of 1956 did not define the term 'KMP'. According to the Accounting Standard 18 (AS - 18), 'KMP' is defined as a person who has the authority and responsibility for planning, directing and controlling the activities of an entity, directly or indirectly, including any Director (whether executive or otherwise) of that entity. With AS - 18, the importance of KMP was duly recognised and it became necessary for the companies to make disclosures about the various transactions with the KMPs.

### **Role of KMP:**

The status of the KMP is like an '*officer*' of company as well as an '*officer in default*'. It is the responsibility of KMP to ensure that the provisions of the Companies Act are complied with. The responsibilities of various Key Managerial Personnel are specified in the act.

**Role of KMP as an agent of the company:** A KMP can enter into contracts on behalf of the company. He will be in a position to act on behalf of a company like a corporate agent. The capacity of the agent and his role will be determined by the general law of the agency and the specific rules of the company law.

### **Appointments and Removal of KMPs:**

The conditions for the appointments and removal of the KMPs are as below:

Subject to the provisions of the Act,

- (i) A Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer may be appointed by the Board for such a term, at such a remuneration and upon such conditions as it may think fit; and any Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer so appointed may be removed by means of a resolution of the Board;

- (ii) A Director may be appointed as Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer. (Regulation 77, of Table - F of Schedule I – Companies Act, 2013).

Though the Director can be appointed as KMP, he cannot sign or authorise anything in two different capacities. This fact is clear in Regulation 78 which states that, "A provision of the Act or these regulations requiring or authorising a thing to be done by or to the Director and Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer shall not be satisfied by it being done by or to the same person acting both as the Director and as, or in place of, the Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer".

In other words, a person who is not a Director can be appointed as the Chief Financial Officer (CFO) and Secretary or CEO and Secretary or CFO and CEO.

#### **Mandatory Appointment of MD/WTD/Manager/CEO and Secretary:**

Every company belonging to a certain class or classes of company should have the following whole time KMP:

1. MD or CEO or Manager and in their absence, WTD; and
2. Company Secretary;
3. CFO [Section 203(1)].

#### **2.1.1 Managing Director**

In a company form of organisation, it is the responsibility of the Board of Directors to direct, manage and control the affairs of the company. However, in reality it may not be feasible or practicable for the Board to conduct, manage and supervise each and every activity in day to day administration of a company due to various reasons, such as:

1. The Directors may not have sufficient time at their disposal for one company, because a concerned Director may be a Director of some other companies also. According to the Companies Act, 2013 a person can hold office as a Director to as many as 20 companies.
2. There is no statutory obligation upon the Directors to attend every company.
3. The Board Meetings are not conducted so frequently, however, the company's business is required to be monitored on a day-to-day basis.

Due to such reasons, it becomes necessary for the company to appoint professional Managerial personnel. Prior to April 3, 1970, the Managing Director, Managing Agent, Secretary's, Treasurer and Manager were recognised as the professional management personnel. However, after 1970, companies could also appoint a Managing Director or a Manager. According to Section 196 (1)-A of the Act, companies cannot appoint both a Managing Director and a Manager simultaneously. However, the company can appoint either a Managing Director or a Manager at a time.

**Definition [Section 2(54)]: "Managing Director"** means a Director who, by virtue of the Articles of a company or an agreement with the company or a resolution passed in its General Meeting, or by its Board of Directors, is entrusted with substantial powers of the management of the affairs of the company and includes a Director occupying the position of a Managing Director, by whatever name called.

**Explanation:** For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of the management.

The Managing Director is a person to whom substantial powers of the management have been delegated by the Board and hence, such powers can be withdrawn or otherwise altered by the Board at will.

### **2.1.2 Whole Time Director**

**Meaning:** The term '**Managing or whole time Director**' has been used in many sections of the Act. As per Section 2(94), 'whole time Director' includes a full time Director for the company. Hence, he is the person who devotes most of his time and attention in carrying out the affairs of the company as are assigned to him by the Board of Directors. A whole time employee, when appointed as a Director of the company, is in a position of a 'Whole time Director', provided he is vested with any of the Managerial powers. Therefore, a whole time Director is virtually a Managing Director, though not so designated. If a Director is appointed to act as a 'Technical Advisor' or 'Works Manager' or 'Legal Advisor' or 'Sales Manager' or 'Finance Manager' on a full time basis, he may be

treated as a whole time Director (*Inland Revenue Commission Vs. D. Devine and sons Ltd.* 1963 A.C. 557). However, a person who does not devote "substantially the whole of his time to the company" may not be termed as a whole time Director.

So far as appointment, re-appointment, remuneration, disqualifications of a whole time Director are concerned, the same provisions which are applicable to a Managing Director, are applicable to the whole time Directors too.

### 2.1.3 Manager

**Meaning:** Definition [Section 2 (53)]: "**Manager**" means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a Director or any other person occupying the position of a Manager, by whatever name called, whether under a contract of service or not;

Usually it is a practice to name a person in-charge of a section of an organisation as 'Manager', e.g. Shop Manager, Factory Manager, site Manager, etc. But, these persons are not 'Managers' as defined in the Act because they are not entrusted with the whole or substantially the whole powers of the management of the company.

### Appointment of Managing Director or Whole Time Director or Manager

According to Section 2(54), the appointment of a Managing Director may be made by any one of the following ways:

- (i) Articles of a company, or
- (ii) by an agreement with the company; or
- (iii) by a resolution passed by a company in the General Meeting or
- (iv) by a resolution passed by the Board of Directors of a company

### Requirement of Approval of the Central Government

Usually, the appointment of such Managing personnel must be approved by the Central Government. However, a company is empowered to appoint the Managerial personnel even without the approval of the Central Government, but in such a case a company has to fulfill the conditions laid down in Schedule V of the Act, and a return in the prescribed form shall be filed within 60 days from the date of such appointments with the registrar.

Conditions laid down in Schedule V are as under:

- (i) **Non-convicted:** The Managerial personnel (a Managing Director or whole time Director or a Manager) should not have been sentenced to imprisonment for any period or to fine exceeding ₹ 1,000, for the conviction of an offence under any of the fifteen Acts mentioned in this schedule (such as-The Indian Stamp Act, The Central Excise Act, The Essential Commodities Act, The Companies Act, The SEBI Act, the Income Tax Act, the Customs Act, The MRTP Act 1969, FEMA, 1999, The Prevention of Money Laundering Act, 2002 etc.).
- (ii) **Not detained under COFEPOSA:** He should not have been detained for any period under the Conservation of the Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
- (iii) **Age between 25 to 70:** The appointee must have completed the age of 25 years and has not yet attained the age of 70 years or the age of retirement specified by the company (whichever is earlier). However, a company can appoint such a Managerial person who is below 25 years (but above 18 years) and above 70 years if his appointment is approved by a special resolution passed by the company in a General Meeting.
- (iv) **If employed elsewhere:** If he is employed as a Managing or whole time Director or Manager in more than one company his remuneration should not exceed the limit provided in Section V of Part II of this Schedule.
- (v) **He should be a resident in India:** When all these conditions are fulfilled, the Central Government's approval for the appointment of a Managing Director is not required. However, if the above conditions are not complied with then it is necessary to make an application to the Central Government within 60 days of the appointment [Section 196 (4)].

#### **Restriction on the Appointment of the Managing Directors**

#### **Number of Companies of which one person maybe appointed Director (Section 203):**

A person cannot become a Managing Director in more than 2 companies. A public company or a private company which is the subsidiary of a public company shall not appoint any person as the Managing Director, if he is either the Managing Director or the Manager of any other company including a private company which is not a

subsidiary of a public company [Section 203 (3)]. But such an appointment can be made if the Board of Directors of such a company approves of the appointment by a unanimous resolution passed at the Meeting. In this case, a specific notice of the Meeting is necessary and the notice regarding the proposed resolution should have been given to all the Directors then in India [Section 203 (3) and its proviso].

The company may appoint or employ a person as its Managing Director, if he is the Managing Director or Manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a Meeting of the Board with the consent of all the Directors present at the Meeting and of which Meeting, and of the resolution to be moved thereat, specific notice has been given to all the Directors then in India. [Section 203 (3) and its proviso].

### **Disqualifications for the Appointment of Managing or Whole Time Director or Manager [Under Section 196]**

A company cannot appoint or employ, or continue the appointment or employment of any person as its Managing or whole-time Director or Manager who suffers from any of the following disqualifications:

- (a) If he is below the age of 21 years or has attained the age of 70 years. Provided that the appointment of a person who has attained the age of 70 years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such a motion shall indicate the justification for appointing such a person;
- (b) If he is an undercharged insolvent or has at any time been adjudged as an insolvent;
- (c) If he has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or
- (d) If he has at any time been convicted by a court of an offence and sentenced for a period of more than 6 months. The other disqualifications mentioned in Section 164 applicable to the Directors are also applicable to the Managing or whole-time Director.

### **Disqualifications of a Managing Director or Whole Time Director or Manager [Under Schedule V]**

The disqualifications of the Manager are similar to that of the Managing Director or the whole-time Director which are already

discussed herein above. Moreover, a person who does not satisfy the conditions of schedule V cannot be appointed as the Managing Director/ whole-time Director or Manager of a company.

The points are summarised below for the purpose of understanding the conditions required for the appointment of such Managerial persons, as given in Schedule V.

### Schedule V

#### **Conditions to be fulfilled for the appointment of a Managing or whole-time Director or a Manager (hereinafter referred to as Managerial person) without the approval of the Central Government**

### PART I

#### **Appointments:**

No person shall be eligible for appointment as a Managing or whole-time Director or a Manager.

(Hereinafter referred to as a Managerial person) of a company unless he satisfies the following conditions, namely:

- (a) He had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under any of the following Acts, namely:
  - (i) The Indian Stamp Act, 1899;
  - (ii) The Central Excise Act, 1944 (1 of 1944);
  - (iii) The Industries (Development and Regulation) Act, 1951;
  - (iv) The Prevention of Food Adulteration Act, 1954;
  - (v) The Essential Commodities Act, 1955;
  - (vi) The Companies Act, 2013;
  - (vii) The Securities Contracts (Regulation) Act, 1956;
  - (viii) The Wealth-tax Act, 1957;
  - (ix) The Income-tax Act, 1961;
  - (x) The Customs Act, 1962;
  - (xi) The Competition Act, 2002;
  - (xii) The Foreign Exchange Management Act, 1999;
  - (xiii) The Sick Industrial Companies (Special Provisions) Act, 1985;
  - (xiv) The Securities and Exchange Board of India Act, 1992;
  - (xv) The Foreign Trade (Development and Regulation) Act, 1922;
  - (xvi) The Prevention of Money-Laundering Act, 2002;

- (b) he had not been detained for any period under The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

Provided that, where the Central Government has given its approval to the appointment of a person convicted or detained under sub-paragraph (a) or subparagraph (b), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such an approval.

- (c) he has completed the age of twenty-one years and has not attained the age of seventy years: Provided that where he has attained the age of seventy years; and where his appointment is approved by a special resolution passed by the company in General Meeting, no further approval of the Central Government shall be necessary for such appointment.
- (d) where he is a Managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II.
- (e) he is resident of India.

**Explanation I:** For the purpose of this Schedule, a resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a Managerial person and who has come to stay in India:

- (i) for taking up employment in India; or
- (ii) for carrying on a business or vacation in India.

**Explanation II:** This condition shall not apply to the companies in Special Economic Zones as notified by the Department of Commerce from time to time:

Provided that a person, being a non-resident in India shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such a person shall be required to furnish, along with the visa application form, profile of the company, the principal employer and terms and conditions of such person's appointment.

**Compensation for loss of office (Section 202):** Compensation for loss of office or consideration for retirement from office may be given by a company to a Managing Director or whole-time Director or Manager.

No such compensation is payable to any other Director. Such compensation is not payable if the Director resigns from his office as a result of reconstruction, amalgamation of a company, and when the Director is proved to be guilty or fraud or breach of trust or of gross negligence while conducting the affairs of the company.

**Amount of compensation:** The amount of compensation shall not exceed the remuneration which the Managing Director or other Director would have earned if he had been in office (a) for the unexpired residue of his term; or (b) for 3 years, whichever is shorter [Section 202 (3)].

Section 318 of the Act, does not prohibit the payment to a Managing Director or whole-time Director or a Manager, of any remuneration for services rendered by him in any other capacity i.e. any capacity other than as Managing Director or whole-time Director or a Manager [Section 202 (4)].

### **Compensation for loss of office not payable in certain circumstances**

No compensation for loss of office is payable to a Managing Director or a whole-time Director or a Manager who is the Director in the following cases, namely:

- (a) where the Director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the Managing or whole-time Director, Manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;
- (b) where the Director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;
- (c) where the office of the Director is vacated under sub-section (1) of Section 167;
- (d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the Director;
- (e) where the Director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof; and
- (f) where the Director has instigated, or has taken part directly or indirectly in bringing about the termination of his office.

## Whether a Managing Director is an Employee of a Company:

The status of a Managing Director can be determined by the Articles and the agreement between the company and the Managing Director relating to his appointment. He is a Director and he derives his status as a Managing Director by his appointment by the Board of Directors. A Managing Director occupies the dual capacity of being a Director as well as an employee of the company. A Managing Director performs the duties over and above the duties of an ordinary Director and therefore can as well be treated as an employee. [E.S.I. Corporation Vs. Appex Engineering A Ltd.] (1998) 1. Comp. U, 10 (SC)].

## Tenure of Appointment of a Managing Director/Whole-time Director/Manager (Section 196)

**Term of Office:** A Managing Director or whole-time Director or Manager can be appointed for a period up to 5 years at a time. However re-appointment, re-employment or extension of the term of office of such a person for a further period, up to 5 years at a time is possible. But any such re-appointment, re-employment or extension shall not be sanctioned earlier than 1 year before the expiry of his term [Section 196 (2)].

## 2.2 DISTINCTION BETWEEN MANAGING DIRECTOR AND MANAGER

| Managing Director  | Manager  |
|--|--|
| 1. <b>Mode of appointment:</b> A person cannot be appointed as a Managing Director without being a Director.   | 1. Whereas a Manager may or may not be a Director.   |
| 2. <b>Powers of management:</b> A Managing Director is entrusted with substantial powers of the management.  | 2. A Manager is vested with the management of the whole or substantially the affairs of a company. |
| 3. <b>Number:</b> There can be two or more Managing Directors at a time in a company. Each will be in-charge of only a division or activity of the business. | 3. A company cannot have more than one Manager.  |

*contd. ...*

|  |   |
|--|---|
| <p><b>4. Appointment:</b> A Managing Director is appointed either under an agreement or by a resolution of the Board or General Meeting or under the provisions of the articles.</p> | <p>4. A Manager is generally appointed under a contract of service or by the Board of Directors though there can be a provision in the Articles with regard to his appointment.</p> |
| <p><b>5. Vacation of office:</b> A Managing Director ceases to hold this office the moment he ceases to be a Director.</p>   | <p>5. A Manager can continue to be a Manager even if he ceases to be a Director.</p>  |

### Distinction between Managing Director and Whole Time Director:

| Managing Director  | Whole time Director  |
|--|--|
| <p><b>1. Meaning:</b> A Managing Director means a Director who is entrusted with substantial powers of the management which would not otherwise be exercisable by him.</p> | <p>As per Section 2 (94) 'whole time Director' includes a Director who is whole time employed in the company. He may not be given substantial powers of the management such as to decide the policy matters.</p> |
| <p><b>2. Tenure:</b> A Managing Director can be appointed for a maximum period of 5 years at a time.</p>   | <p>There is no such provision which restricts the duration of appointment of a whole time Director.</p>  |
| <p><b>3. Directorship in one/more companies:</b> A person can be a Managing Director of two or more companies under certain circumstances.</p>                             | <p>A person cannot act as a whole time Director in more than one company.</p>  |
| <p><b>4. Combination of Managerial persons:</b> A Managing Director and a Manager cannot exist simultaneously in a company</p>   | <p>A whole time Director may be appointed along with a Managing Director or a Manager.</p>   |
| <p><b>5. Approval of the shareholders:</b> A Managing Director need not necessarily be appointed with the consent of the shareholders.</p>                                 | <p>The appointment of a whole time Director requires the approval of shareholders through the passing of a special resolution (Section 111).</p>   |

## **Powers/Functions of Key Managerial Personnel (KMP):**

The Key Managerial Personnel (KMP) such as:

- CEO or Managing Director or Manager,
- The Company Secretary,
- The Whole Time Director,
- The Chief Financial Officer and
- Such other Officer as may be prescribed are expected to work for a company.

Their basic function is to take control over day to day affairs of the company. The Managing Director / Manager are generally appointed to control the routine operations of the company. They have to work under the overall supervision and control of the Board of Directors. Such officers will have to exercise the authorities which are delegated to them by the Board of Directors or under article of association or by a resolution in the General Meeting. The Managing Directors acquires his powers either by an agreement with the company or through a resolution in the General Meeting or by resolution of the board or by virtue of Articles of the company. Section 2 (54) of the Act expects that the MD should have substantial powers of the management of affairs of the company. He has implied authority to bind the company. He has to exercise his powers subject to the superintendent, control and direction of the Board of Directors [Section 2 (26) of the old Act and Section 179 (1) of the New Act]. The Managing Director cannot exercise powers that are exercise only by a board or a General Meeting. Role of the Managing Director is in dual capacity. He is an agent of the company at the same time he can also work as an employee of the company.

## **2.3 COMPANY SECRETARY**

### **Meaning, Appointments and Disqualifications:**

**Meaning:** Secretary is considered as a person who normally assists his boss. With his efficient work he can relieve substantial burden of workload of his boss. He can look after the routine work of a business. He can save the time of his boss by reducing his work such as taking telephone calls, interacting with the visitors and screening and filtering the papers before putting them before the boss. This is a typical kind of a task to be performed by a Secretary. An efficient Secretary can increase the efficiency and performance of the boss. In the company form of business organisation, the Secretary plays a vital role. Initially, the Secretary to the Board of Directors was supposed to look after the

routine and procedural matters of the company. His duties include organising Meetings, keeping minutes of such Meetings and also keeping a record of the members, etc. It was observed in a British case;

**Barnett Hoares and Co. V. South London Tramways Co. Ltd., (1887)**

**18 QBD 815**, 'A Secretary is a mere servant; his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all.'

In an Indian case, *Laxmiratan Cotton Mills v. Aluminium Corporation* (AIR 1971 SC 1482) it was observed, 'Ordinarily, the functions of a Secretary would be ministerial and administrative and he would have no authority to bind the company by entering into contracts or other commitments on its behalf.'

In due course of time, the importance of a Secretary has increased. It has been observed in *panorama developments (Guild Ford) Ltd. v. Fidelis Furnishing Fabrics Ltd.* (1971) 3 All ER 16 that 'A Company Secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day- to- day running of the company's business. He is certainly entitled to sign contracts in the administrative sides of the company's affairs such as employing staff, etc. All such matters come within the ostensible authority of a 'Company Secretary'.

**Company Secretary in India:** The role of a Company Secretary in India is gaining importance with the emerging growth of the corporate sector.

**Definition:** Section 2(24) - "Company Secretary" or "Secretary" means a Company Secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a Company Secretary under this Act.

According to Section 2(25) "Company Secretary in practice" means a Company Secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980; As per Section 2(l)(c) of the Company Secretaries Act, 'Company Secretary' means a person who is a member of the Institute of Company Secretaries of India. [ICSI]

Section 2(51) of the Companies Act 2013 states that a Company Secretary is a "Key Managerial Personnel" in relation to a company.

This new Act specifically defines the functions of Company Secretary.

ICSI is a professional body constituted under the Company Secretaries Act, 1980. The function of this body is to regulate the profession of company secretaries in India. So as to become a company Secretary, the person has to pass the intermediate and final examinations. After completing the prescribed management training and practical training, he will be granted membership of the Institute.

The Company Secretary is an individual who:

- Is an approved member of **Institute of Company Secretaries of India** (ICSI) and;
- Performs functions defined by the Institution and follows rules and regulations defined under the Companies Act in operation.

**Appointment of the Company Secretary:** As per the new definition, CS is included in the definition of the KMPs. As per Section 203(1) (ii).

1. Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key Managerial personnel:
  - (i) Managing Director, or Chief Executive Officer or Manager and in their absence, a whole-time Director;
  - (ii) Company Secretary; and
  - (iii) Chief Financial Officer
2. Every whole-time Key Managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.
3. A whole-time Key Managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time:
  - (i) Provided that nothing contained in this sub-section shall disentitle a key Managerial personnel from being a Director of any company with the permission of the Board.
  - (ii) Provided further that whole-time key Managerial personnel holding office in more than one company at the same time on the date of commencement of this Act, shall, within a period of 6 months from such commencement, choose one company, in which he wishes to continue to hold the office of key Managerial personnel.
  - (iii) Provided also that a company may appoint or employ a person as its Managing Director, if he is the Managing

Director or Manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a Meeting of the Board with the consent of all the Directors present at the Meeting and of which Meeting, and of the resolution to be moved thereat, specific notice has been given to all the Directors then in India.

4. If the office of any whole-time Key Managerial Personnel is vacated, the resulting vacancy shall be filled-up by the Board at a Meeting of the Board within a period of 6 months from the date of such vacancy.
5. **Penalty:** If a company contravenes the provisions of this section, the company shall be punishable with a fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakhs and every Director and Key Managerial Personnel of the company who is in default shall be punishable with fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a further fine which may extend to ₹ 1,000 for every day after the first day.

**Appointment of CS mandatory:** As per recent amendment, a Company having paid up a share capital of ₹ 10 crores or more is required to compulsorily appoint a Secretary [Rule 2(1)]. He should be a whole-time Secretary. A person cannot become a whole-time Secretary of more than one company at a time.

Appointment of the Secretary is required to be made by a resolution of the Board of the Directors, containing the terms and conditions of the appointment including the remuneration. [Section 203(2)]. His salary is not considered for the purpose of computation of 'Managerial remuneration' under Section 197 of the Act, unless he is also a Director of a company.

It is possible for a Company Secretary to become a Director of any company with the permission of the Board. Appointment of the Director may be made as CEO or Manager or CS or CFO. He is generally considered as an employee of a company. Hence, rules regarding appointments, remunerations, etc. as applicable to MD/WTD/Manager are not applicable to him.

## **Appointment of CS: (New Amendment of 2020)**

Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2020 w.e.f. 1<sup>st</sup> April 2020)

**Rule 8A – Appointment of Company Secretaries in Companies Not Covered Under Rule 8**

The Amendment Act of 2020 states that every private company which has a paid-up share capital of ₹ 10 Crores or more shall have a whole-time Company Secretary.

The following companies are mandatorily required to appoint a whole-time Company Secretary:

1. Listed Company
2. Unlisted Public Company having paid-up share capital of ₹ 10 crore or more
3. Private Company having paid-up share capital of ₹ 10 crore or more

## **Rule 9 – Secretarial Audit Report**

Pursuant to Sec 204, every listed company and companies belonging to such other class shall annex a Secretarial Audit Report, given by a practicing Company Secretary, with its Board Report. Such other classes of companies which are required to comply with this provision are given in Rule 9 of the Rules.

As per this new amendment, the following companies are mandatorily required to conduct a Secretarial Audit:

- (a) Every public company having a paid-up share capital of ₹ 50 crore or more; or
- (b) Every public company having a turnover of ₹ 250 crore or more; or
- (c) Every company having outstanding loans or borrowings from banks or public financial institutions of ₹ 100 or more.

For this provision, the paid-up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of the latest audited financial statement shall be taken into account.

**Rule 8 – Appointment of Key Managerial Personnel:** Every listed company and every other public company having a paid-up share capital of ₹ 10 Crore or more shall have whole-time Key Managerial Personnel (which includes a Company Secretary).

**Secretarial Audit for bigger Companies (Section 204):**

1. Every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board's report made in terms of sub-section (3) of Section 134, a Secretarial Audit Report, given by a Company Secretary in practice, in such form as may be prescribed.
2. It shall be the duty of the company to give all assistance and facilities to the Company Secretary in practice, for auditing the secretarial and related records of the company.
3. The Board of Directors, in their report made in terms of sub-section (3) of Section 134, shall explain in full any qualification or observation or other remarks made by the company Secretary in practice in his report under sub-section (1).
4. If a company or any officer of the company or the Company Secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the Company Secretary in practice, who is in default, shall be liable to a penalty of two lakh rupees.

**Functions of Company Secretary (Section 205):**

1. The functions of the Company Secretary shall include:
  - (a) to report to the Board about the compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;
  - (b) to ensure that the company complies with the applicable secretarial standards;
  - (c) to discharge such other duties as may be prescribed.

**Explanation:** For the purpose of this section, the expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under Section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

2. The provisions contained in Section 204 and Section 205 shall not affect the duties and functions of the Board of Directors, Chairperson of the company, Managing Director or whole-time Director under this Act, or any other law for the time being in force.

A Secretary will have to maintain registers and keep records as expected under the Companies Act. He has to see that the returns and documents are filed with the Registrar of Companies (ROC) in time as it is expected under the Act.

He has to coordinate between the depository and stock exchange in case of DEMAT shares. The Company Secretary is supposed to work as a link between shareholders and the company. It is his duty to see that the shareholders are getting proper service. Transfer and transmission of share, payment of dividend, etc. are the transactions where the Company Secretary has to render his service to the shareholders. He has to solve the problems faced by shareholders and reply to their communications.

**His role in Audit Committee:** Company Secretary will be Secretary of Audit Committee. This Audit Committee is required to be formed by the listed companies as per the Corporate Governance Code prescribed by SEBI through the listing agreement. He has to work as the "Compliance Officer" for this task.

The Company Secretary is also responsible for performing duties like handling legal matters, personnel matters, finance and certain other matters relating to the general administration.

#### **Limitations on the Authority of a Company Secretary:**

Actually, no specific authority has been delegated to the Company Secretary under the provisions of the Companies Act. However, he can exercise the functions which are delegated to him by the Board of Directors. He has only 'Ostensible Authority' to act on behalf of the company. He cannot file a suit on behalf of the company without getting the specific authority from the Board of Directors through a resolution but he can sign and verify pleadings on behalf of the company (Order 29, Rule 1 of Civil Procedure Court).

#### **Liabilities of a Secretary:**

Company Secretary is defined as one of the 'Officers in default' hence, he will be held responsible and be punished in respect of offences under the Companies Act. Secretary is also held guilty under the other legislations like Food Act, Insecticides Act, etc. if he is responsible to the company for the conduct of its business.

#### **Duties and Authorities of a Company Secretary:**

In general, the duties of a Secretary include organising Meetings of the Board, keeping minutes of the Meeting, recording approved share transfers, maintaining correspondence with the Directors and

shareholders, filing various types of returns with the ROC, maintaining statutory record, etc. Besides this, the Companies Act has prescribed certain duties and authorities of the Company Secretary which are enumerated as under:

- 1. Compliance regarding Registration:** Company Secretary has to sign a declaration that all the requirements of the Act and Rules have been complied with regard to the registration of the company. Such declaration can be signed by the Secretary in his whole time practice, Advocate, Chartered Accountant (CA) in whole time practice and by a person named as Director/ Manager/ Secretary in the Articles of the company [Section 7 (1) (b)].
- 2. Signing Share Certificate:** Share Certificate is required to be signed by two Directors (out of which one should be Managing Director or whole time Director, if appointed) and the Secretary or any other person authorised by the Board.
- 3. Signing Annual Returns:** The Director and the Company Secretary have to sign the Annual Returns which are required to be filed with the ROC. If the company has not appointed a Company Secretary, in such a case the returns can be signed by the Company Secretary in practice [Section 92 (1)].
- 4. Authentication of the Financial Statement:** As per Section 134 (1) of the Act, the financial statement has to be signed by the chair person or by two Directors, one of which should be a Managing Director, CEO (if he is Director), CFO and Company Secretary wherever they are appointed.
- 5. Compliance relating to MD / WTD:** Certificate under Section 196 (4) of the Act, that provisions relating to MD / WTD have been complied with.
- 6. Representing the Company:** A Company Secretary can represent and appear before the National Company Law Tribunal (NCLT) on behalf of the company (Section 432). Secretary can also sign pleadings on behalf of the company in a suit filed by or against a company.
- 7. Authentication of document:** As per Section 21 of the Act, Authentication of a document on behalf of the Company, or contract made by or on behalf of the company can be signed by KMP or other authorised officer of the company.

**8. Summons to the Company Secretary:** In case of suit against the corporation, summons can be served on the Secretary. (Rule 2, order 9 of Civil Procedure Court).

**Duties as per The Income Tax Act:**

- (i) To verify and submit attested returns & forms;
- (ii) To oversee authentication and filing procedure of **TDS (Tax Deducted at Source);**
- (iii) Ensuring that proper TDS is being deducted from the salary of employees;
- (iv) Ensuring that TDS reports are well maintained and submission of TDS to government is duly done.

**Duties as per other Acts:** Obtaining government approvals; complying with regulatory procedures of Industrial disputes; **FEMA Act**; State Insurance Act; Depositories Act 1996; Foreign Exchange Management Act; monitoring and complying with various legal laws like Labour laws; Competition Laws; Environmental laws, etc.

**Other General Duties of a Company Secretary:** Advising authorities and BOD (Board of Directors) in risk management; business policies and strategies; corporate social responsibilities; brand equity and image building; Managing intellectual rights of the company; ensuring healthy communication between stakeholders; authorities and government.

**Term of Office/Tenure of Appointments, Remuneration of a Company Secretary:** Model Article in Table-F in Schedule I specifies that subject to the provisions of the Act, a CEO, Manager, CS or CFO may be appointed by the Board for such term, at such remuneration and upon such conditions as it may think fit. Any Company Secretary may be removed by the resolution of the Board.

**Resignation or removal of a Company Secretary:** Like any other employee, CS can also resign from his post. In such a case, he can derive usual benefits and allowances as applicable to the any other employee. His removal can be done by the Board. Principles of natural justice are required to be followed in case of his removal. A Secretary, who is appointed for a fixed period, can also be removed. In case of a resignation or removal, change is required to be filed with the Registrar of Companies (ROC).

### **Roles and responsibilities of a Company Secretary:**

The new Companies Act retained the position of a Company Secretary in both private and public companies. The nature of responsibility of a Company Secretary in modern days has been substantially changed and his role in a company administration is not like mere a "note taker" at Board Meetings or "administrative employee of the Board" but now he has to play a role of "Board advisor" and he is now considered as responsible for the organisation's corporate governance. His position is emerged as one of the key governance professionals within the organisation. The Company Secretary is a strategic position of considerable influence at the heart of governance operations within an organisation. A Company Secretary is a principally an employee even though he holds very high rank. He is consulted to determine the lawful suggestions of policy decisions. Therefore, he is the only outsider who is present at the Board Meetings. Company Secretaries have a broad skill set – corporate law, finance, governance, strategy and corporate secretarial practice – and they advise a company's Board in these key areas, providing support to the Chair, CEO and non-executive Directors.

A certified Company Secretary is hired to handle the legal aspects of a company. He is responsible for the proper functioning of the company and to ensure that the company acts in accordance with all the compliances laid down by the law. CS's advice is taken forward and is used to carry out prominent functions and framing policies of the company. Therefore, he is the only outsider who is allowed to be present in the Board Meeting.

The appointed CS is entitled to become the Director of the company by taking prior consent from the Board. However, it is not allowed to hold office in more than one company or organization.

The Company Secretary must perform his duties with reasonable care. He must ensure all business procedures to be matching with all legal provisions; if not complied he may be held responsible for misconduct and may be dismissed on grounds of dishonesty or infringement of legal rights of the company. Company Secretary has to see smooth functioning of the administration process in a business environment of the company. The three main areas, a Company Secretary, has the role to play viz. to the Board, to the Company and to the Shareholder.

Following are the roles and responsibilities of a Secretary or CS as per Section 205 of Companies Act, 2013;

- To inform the Board about the compliance of the provisions of the Act.
- To ensure that the entity complies with all the applicable secretarial standards and
- To deliver other duties which are prescribed by the Act.

CS will have to work in various capacities such as Legal Advisor to the Board and to act as Link between Inter and Intra Company works where he plays a role of connectors between the investors, Board of Directors and authorities who work in the direction of the company's functioning and regulation. **The Company Secretary of India** maintains the information regarding investors, shares, Directors and members in a record. It is the Company Secretary who advises the Board of Directors on Corporate Governance and Director's duties. It is the necessity of companies to maintain certain statutory registers which include: register of Directors; register of charges; register of allotments; register of transfers; register of members; minutes of Meetings and resolutions; etc

**Statutory restrictions and powers of a Company Secretary:** The CS is not entitled to perform the following tasks in a company:

- Cannot sign or agree to a contract on behalf of the company, unless backed by the Board of Directors
- Borrow or ask for money in the name of the company
- Call Meetings of third parties
- Acknowledge any debt against the suit filed against the firm
- Transfer or register shares without taking prior consent of the Board of Companies

#### **Penalty for not appointing a CS in a company:**

In case a company fails to appoint a Company Secretary or any other KMP, it is liable for a fine which is not less than ₹ 1 Lakh but not exceeding ₹ 5 Lakhs. Additionally, a fine of ₹ 1,000 would be levied as fine on each Director of the company in the defaulting company.

#### **OFFENCES & PENALTIES (Section 203)**

If any company makes any default, such company shall be liable to a penalty of ₹ 5 lakh and every Director and Key Managerial Personnel of the company who is in default shall be liable to a penalty of ₹ 50,000 and where the default is a continuing one, with a further penalty of ₹ 1,000 for each day after the first during which such default continues but not exceeding ₹ 5 Lakh.

### **Disqualification of Company Secretary:**

In case the Board of Directors is not satisfied with the performance of the CS, the company officials can remove him by providing written notice in advance. Additionally, a Secretary is a general employee of a company, so all the rules of the company, including the resignation of an employee also applies to the CS.

### **Services expected to be rendered by CS:**

A Company Secretary being multidisciplinary professional renders services in following areas:

- 1. Corporate Governance Services:** Advising on good governance practices and compliance of Corporate Governance norms as prescribed under various Corporate, Securities and other Business Laws and regulations and guidelines made thereunder. CS is the custodian of corporate records, statutory books and registers of a company.
- 2. Compliance Audit and Certification Services:** CS is responsible for issuing Compliance Certificate for companies not required to employ a whole-time Company Secretary. He has to sign the Annual Returns, other declarations, attestations and certifications under The Companies Act, 2013.
- 3. Corporate Laws related Advisory Services:** CS will have advise companies on compliance of legal and procedural aspects, particularly under – SEBI Act, Securities Contracts (Regulation) Act and rules and regulations made thereunder, Foreign Exchange Management Act, Consumer Protection Act, Depositories Act, Environment and Pollution Control Laws, Labour and Industrial Laws, Co-operative Societies Act, Mergers and Amalgamations and Strategic Alliances, Foreign Collaborations and Joint Ventures, setting up subsidiaries abroad, Competition Policy and Competition Law Compliances, IPR Protection, Management, Valuation and Audit, Drafting of Legal Documents, etc.
- 4. Representation before various bodies:** CS will have to represent a company and other persons before – Company Law Board, National Company Law Tribunal, Competition Commission of India, Securities Appellate Tribunal, Registrar of Companies, Consumer Forums, Telecom Disputes Settlement and Appellate Tribunal, Tax Tribunals and other quasi-judicial bodies and Tribunals.

5. **Arbitration and Conciliation Services:** Advising on arbitration, negotiation and conciliation in commercial disputes between the parties. Acting as arbitrator/conciliator in domestic and international commercial disputes, drafting Arbitration/ Conciliation Agreement/Clause.
6. **Financial market services (Public Issue, Listing and Securities Management):** CS has to play a role of Advisor/Consultant in issue of shares and other securities in India and abroad. His task is to draft Prospectus/offer for sale/ letter of offer/other documents related to issue of Securities and obtaining various approvals in association with lead Managers, listing / delisting of securities, private placement of securities, buy-back of shares, raising of funds from international markets, acting as compliance officer under listing agreement, Compliance officer for various capital market Intermediaries.
7. **Takeover and SEBI Compliance:** Ensuring compliance of the Takeover Regulations and any other laws or rules as may be applicable in this regard and ensuring compliance with SEBI is also required to be done by CS.
8. **Securities compliance and Certification Services:** CS has to see Compliance of rules and regulations in the securities Market such as Internal Audit of Depository Participants, Internal Audit of Stock Brokers/Trading Members/Clearing Members, Certifications under SEBI (DIP) Guidelines, Audit in relation to Reconciliation of shares and Concurrent Audit, etc.
9. **Banking services:** CS will have to help a company in the loan documentation processes, registration of charges and status and Search Report of properties whenever required.
10. **Finance and accounting services:** CS has to look into following accounts related services such as: Accounting and compilation of financial statements, working capital and liquidity management, determination of an appropriate capital structure, analysis of capital investment proposals, business valuations prior to mergers and/or acquisitions, budgetary controls, preparation of Project Reports and feasibility studies, Internal Audit, Secretary to Audit Committee, etc.
11. **Tax related Matters:** This very important area is also required to be monitored by CS. Such as Advisory services to companies on

tax management and tax planning under Income Tax, Excise and Customs laws, Service Tax and VAT, etc. preparing/reviewing various returns and reports required for compliance with the tax laws and regulations, representing companies and other persons before the tax authorities and tribunals.

**12. International trade and WTO services:** CS is also under obligation to advise on all matters related to IPRs and TRIPs Agreement of WTO, antidumping, safeguard duties, International Commercial Arbitration, issuing certificates on Foreign Trade Policy and Procedures, Intellectual Property licensing and drafting of Agreement and acting as registered Trade Mark Agent.

**13. IT enabled services:** CS will have to make compliance with cyber laws, conducting Board Meetings through video-conferencing and teleconferencing on IT related IPR, maintaining statutory records in electronic form, E-filing of forms/documents under MCA-21 and other statutory authorities.

**14. Management related services:** CS has to advise on corporate social responsibility, participating in formulation of Business Policy, strategy and planning, formulation of the organizational structure, Acting as management representative to obtain ISO Certification, advising on sustainability accounting and reporting.

**15. Corporate Communications and Public Relations:** CS is responsible to have communication with various stakeholders like Shareholders, Government, Regulators, and Authorities etc. He has to render advisory services for Brand equity and image building.

**16. Human Resources Management:** HRM play vital role on Company Administration where CS has to advise company on various matters relating to industrial and labour laws, manpower planning and development, Performance appraisal, motivation and remuneration strategies.

Audit of the HR function, Office management, work studies and performance standards.

Maintaining Industrial relations so that human resources are properly managed and utilized.

In short, CS is an important Managerial and administrative part of a company. He as one of the legal representatives of a company performs and manages various regulatory functions like carrying incorporation of the firm; making preparation and audit of business reports; filing annual returns; dealing with amended regulations, etc. He also plays an important role as a Business Adviser to the Board of Directors of the company on matters such as corporate governance; strategic management; project planning; capital markets & securities laws. In short; a Company Secretary works as an in-house legal expert and compliance officer with the company.

## 2.4 CORPORATE SOCIAL RESPONSIBILITY (CSR)

The phrase 'Corporate Social Responsibility' was coined in the year 1953 with the publication of Bowen's Social Responsibility of businessmen. The adoption of CSR policies is the voluntary efforts of a company to go the extra mile beyond what the law requires. The CSR is not a new concept in India. The Indian Corporate Sector is known for various activities which are conducted for the purpose of giving back to the society. An example of CSR in a company would be the Tata group that has included CSR as an operational business objective.

Though the Company is a business organisation, it is a trend these days that the business entity has certain obligations or responsibilities towards the society. It was observed by the Supreme Court of India in a case of *National Textile workers Union vs. P. R. Ramkrishnan* (AIR 1983 SC 75) that, the Company is not a "property" of shareholders. They provide only capital but there are other factors of production like labour, financial institution, depositors, consumers and the rest of the members of the community. The Company is a social institution having duties and responsibilities towards the community in which it functions. Its objective is to bring about the maximisation of social welfare and common good.

The Ministry of Corporate Affairs has issued the Corporate Social Responsibility voluntary guidelines [(2010) 97 SCL 117(St.)]. In accordance with these guidelines, it is expected that each company should have its own Corporate Social Responsibility (CSR) policy. By virtue of this policy the company will be in a position to make strategic planning in consonance with the companies' business policy. It is necessary to have physical targets, assessment, budget, sharing experience and sharing information of the Corporate Social Responsibility (CSR) policy is very much required for its effective implementation.

The following elements would be helpful to frame Corporate Social Responsibility (CSR) Policy:

- Care for all stakeholders
- Following ethical norms
- Giving importance to rights and welfare of workers
- Respecting human rights and human values
- To respect environment and protecting environment and
- Conducting activities which are useful for social and inclusive development

Corporate Social Responsibility is not only extended to India but it is a worldwide accepted concept. There are other countries that also follow the concept of Corporate Social Responsibility in their countries in their own way, such as countries like Singapore, Malaysia, South Africa, UK, etc.

**Corporate Social Responsibility (CSR) [Under Section 135 of Companies Act, 2013]:** The concept of CSR expects companies to decide voluntarily to contribute to a better society and a cleaner environment. Under this concept, the companies voluntarily integrate social and other useful concerns in their business operations for the betterment of their stakeholders and society in general.

The Companies Act, 2013 has introduced the provision for Corporate Social Responsibility (CSR). The concept of CSR is based on the principle of give and take. Companies utilize various resources in the form of raw materials, manpower of the society. Through CSR activities, the companies are expected to give something back to the society.

Corporate Social Responsibility (CSR) is a self-regulating business model that helps a company be socially accountable—to itself, its stakeholders, and the public. By practising corporate social responsibility, also called corporate citizenship, companies can be conscious of the kind of impact they are having on all aspects of society, including economic, social and environmental.

CSR activities have the potential to enhance society and the environment. CSR is a broad concept that can take many forms depending on the company and industry. Through CSR programs, philanthropy, and volunteer efforts, businesses can benefit society while boosting their brands.

CSR is valuable for the community as well as for a company. CSR activities can create a stronger bond between employees and corporations, boost morale and help both employees and employers in the long run.

## **Reason for introduction of CSR for Companies:**

In the changing dynamic world life of human being and business is becoming more and more complex. Global scale environment, social, cultural and economic issues have now become part of our everyday life. Increasing profits is no longer the sole business performance indicator for the corporate and they have to play the role of responsible corporate citizens as they owe a duty towards the society.

The concept of Corporate Social Responsibility (CSR), introduced through **Companies Act, 2013** puts a greater responsibility on companies in India to set out clear CSR framework.

Many corporate houses like TATA and Birla have been doing CSR activities in the past voluntarily. The Act introduces the culture of Corporate Social Responsibility (CSR) in Indian corporate world requiring companies to formulate a CSR policy and spend on social upliftment activities.

CSR is all about corporate giving back to society. The Company Secretaries are expected to know about the legal and technical requirements with respect to CSR in order to guide the management and Board.

Corporate responsibility programs would help to raise morale in the workplace.

For a company to be socially responsible, it first needs to be accountable to itself and its shareholders.

### **Government Scheme:**

CSR should not be considered as a source of financing the resource gaps in the Government schemes. Use of corporate innovations and Managerial skills in the delivery of "public goods" is at the core of CRR implementation by the companies. CSR funds of companies should not be used as a source of funding Government projects.

One has to keep in mind that the Government has no role to play in the approving and implementing of CSR projects.

MCA will provide the broad area within which eligible companies will formulate their CSR policies, including activities to be undertaken and implement the same in the right way.

### **Area within which CSR activities to be implemented:**

For the purpose of spending the amount earmarked for Corporate Social Responsibility activities, the company shall not limit itself to local area or areas around it where it operates but shall select areas across the country.

Company may also choose to associate with 2 or more companies for fulfilling the CSR activities provided that they are able to report individually.

Ministry of Corporate Affairs (MCA) has notified Section 135 and Schedule VII of the Companies Act as well as the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CSR Rules). These provisions are effective from 1 April 2014. Certain amendments are also made from time to time.

**Definition of CSR:** The European Union, made an attempt to define the term CSR in a Green Paper published in 2001 on Corporate Social Responsibility as:

*"The voluntary integration of companies' social and ecological concerns into their business activities and their relationships with their stakeholders. Being socially responsible means not only fully satisfying the applicable legal obligations but also going beyond and investing 'more' in human capital, the environment and stakeholder relations."*

The Companies Act does not define the term CSR. As per rule 2(c) of the CSR Rules "Corporate Social Responsibility means and includes but is not limited to:

- (i) projects or programs relating to activities specified in Schedule VII of the Act; or
- (ii) projects or programs relating to activities undertaken by the Board of Directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover the subjects enumerated in Schedule VII of the Act."

Flexibility is also permitted to the companies by allowing them to choose their preferred CSR engagements that are in conformity with the CSR policy.

The Board of a company may decide to undertake its CSR activities approved by the CSR Committee, through a registered society or trust or section 8 company with established track record of three years.

**Who is accountable?** **(Applicability of CSR rules) [Sec.135 (1)]:** CSR rules will be applicable to a company (its Holding Company/Subsidiary Company/ Foreign Company) if its:

- (a) net worth is ₹ 500 crore or more; or
- (b) turnover is ₹ 1000 crore or more; or
- (c) net profit of the company is ₹ 5 crore or more.

Further as per the CSR Rules, the provisions of CSR are not only applicable to Indian companies but also applicable to the branch and project offices of a foreign company in India.

Expenditure on CSR is not considered as a part of business expenditure.

**CSR Policy:**

Every company (to whom CSR rules are applicable) is under obligation to spend at least 2% of its average net profit (Profit before taxes) for the immediately preceding 3 financial years on CSR activities in India. [Sec.135(1)]

This amount is expected to be spent in accordance with the Company's Corporate Social Responsibility Policy. Such a company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.

Proviso to this Section states that if the company fails to spend such amount, the Board shall, in its report made under section 134(3)(o), specify the reasons for not spending the said amount. (For the purposes of this section "average net profit" shall be calculated in accordance with the provisions of Section 198).

CSR Policy elaborates the activities to be undertaken by the Company as named in Schedule VII to the Act. The activities should not be the same which are done by the company in its normal course of business:

1. Contents of CSR Policy should be placed on the company's website by the Board.
2. The activities mentioned in the policy must be undertaken by the Company.
3. The Company can join hands with other Companies for undertaking projects or programs or CSR activities and report separately on such programs or projects.
4. The CSR policy shall monitor the projects or programs.

Further, such Company will be required to constitute a committee (CSR Committee) of the Board of Directors (Board) consisting of 3 or more Directors.

The CSR Committee shall:

1. Formulate and recommend to the Board, a policy which shall indicate the activities to be undertaken (CSR Policy) by the Company as specified in Schedule VII.

2. Recommend the amount of expenditure to be incurred on the activities referred in clause 1 and monitor the CSR Policy of the Company from time to time. [Sec. 135 (3)]
3. The Board's report under sub-section (3) of **Section 134** shall disclose the composition of the Corporate Social Responsibility Committee.

The Board shall take into account the recommendations made by the CSR Committee and approve the CSR Policy of the Company. [Sec. 134 (4)]

### **Constitution and Composition of the CSR Committee [Sec. 135(1)]**

1. Every Company to which CSR rules are applicable, shall constitute a Corporate Social Responsibility Committee of the Board (i.e. CSR Committee).
2. Minimum 3 or more Directors are required to form CSR Committee:
3. Among those 3 Directors, at least 1 Director should be an independent Director.
4. However, where a company is not required to appoint an independent Director (under Sub-section (4) of Section 149), it shall have in its Corporate Social Responsibility Committee two or more Directors.
5. An unlisted public company or a private company shall have its CSR Committee without any independent Director if an independent Director is not required.
6. In case of a foreign Company, the CSR Committee shall comprise of at least 2 persons of which one person shall be a person resident in India authorized to accept on behalf of the foreign company – the services of notices and other documents. Also, the other person shall be nominated by the foreign company.

### **Duties of the CSR Committee:**

1. The CSR Committee shall formulate and recommend a CSR policy to the Board. CSR policy shall contain the projects and programmes to be undertaken, prepare a list of projects and programmes which a company plans to undertake during the implementation year. The activities to be undertaken by the company are enumerated in Schedule VII. The Committee can integrate business models with social and environmental priorities and process it.

2. The CSR Committee shall recommend the amount of expenditure to be incurred on the CSR activities to be undertaken by the Company.
3. CSR Committee shall monitor the CSR policy of the Company from time to time.
4. The committee shall establish a transparent controlling mechanism for the implementation of the CSR projects or programs or activities undertaken by the company.

The Company can also make the Annual Report of CSR activities in which they mention the average net profit for the 3 financial years and also prescribed CSR expenditure but if the company is unable to spend the minimum required expenditure the Company has to give the reasons in the Board Report for non-compliance so that there are no penal provisions are attracted by it.

#### **CSR Reporting:**

With respect to CSR Reporting, the provisions are as follows:

1. The Board's Report referring to any financial year initiating on or after the 1<sup>st</sup> day of April 2014 shall include an Annual Report on CSR.
2. In case of a foreign company, the Balance Sheet filed shall contain an annexure regarding report on CSR.

**Contents of the Board's Report [Sec. 134 (3), 135(2)]:** The Report of the Board should contain the following details:

1. CSR Committee's composition.
2. The contents of CSR Policy.
3. In case CSR spending does not meet 2% as per CSR Policy, the reasons for the unspent amount, and details of the transfer of unspent amount relating to ongoing project to a specified fund (transfer within a period of six months from the expiry of the financial year).

#### **Role and Responsibility of the Board regarding CSR:**

The role and responsibility of the Board of Directors of a Company is as under:

1. To approve the CSR policy for the Company after considering the recommendations made by the CSR Committee
2. To ensure that only those activities are undertaken which are mentioned in the CSR Policy for the Company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be

**prescribed;** and ensure that the **activities** as are included in Corporate Social Responsibility Policy of the company are undertaken by the company. [Sec. 135 (4)]

3. To make sure that the Company spends in every financial year, minimum 2% of the average net profits made during the 3 immediately preceding financial years as per CSR policy.

In case a Company has not completed 3 financial years since its incorporation, the average net profits shall be calculated for the financial years since its incorporation.

If the Company fails to spend such amount, the Board shall, in its report specify the reasons for not spending the amount and, unless the unspent amount relates to any ongoing project referred to in Section 135(6), Board has to transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial year. [Sec. 135 (5)]

Proviso to this section states that if the Company spends an amount in excess of the requirements, such Company may set off such excess amount against the requirement to spend for such number of succeeding financial years and in the prescribed manner.

#### **Transfer and Use of Unspent Amount:**

The specified funds for transfer of unspent amount are:

1. **Prime Minister's National Relief Fund:** A contribution made to the Prime Minister's National Relief Fund.
2. **Fund of Central Government for socio-economic development:** Any other fund which is initiated by the Central Government concerning socio-economic development, relief and welfare of the scheduled caste, minorities, tribes, women and other backward classes.
3. **Contribution to Incubator:** A contribution made to an incubator which is funded either by the Central Government, the State government, public sector undertaking of State or Central Government, or any other agency.
4. **Contributions to public-funded universities, etc.:** Contributions made to public-funded universities, National Laboratories and Autonomous Bodies (established under the auspices of Indian Council of Agricultural Research (ICAR), Council of Scientific and Industrial Research (CSIR), Department of Atomic Energy (DAE), Indian Institute of Technology (IITs), Indian Council of Medical Research (ICMR), Defense Research and Development

Organisation (DRDO), Ministry of Electronics and Information Technology), and Department of Science and Technology (DST) engaged in conducting research in technology, science, medicine, and engineering aimed at encouraging Sustainable Development Goals (SDGs).

**Unspent amount relating to an ongoing project:** In case of the unspent amount relating to an ongoing project under the company's CSR policy, the amount shall be transferred by the firm in less than 30 days from the end of the financial year to an exclusive account to be opened by a firm in any scheduled bank. The account shall be designated 'Unspent Corporate Social Responsibility Account', and the funds shall be used towards its obligations under the CSR policy within a period of three financial years from the date of the transfer. In a case where the company fails to utilise the funds at the end of the three financial years, the funds should be transferred to the specified fund mentioned above within a period of thirty days upon completion of the third financial year. [Sec. 135 (6)]

### Fines and Penalties for Non-Compliance of CSR Provisions

**[Sec. 135 (7)]:**

If a Company is in default in complying with the above provisions [i.e. Sec. 135 (5) and (6)], the Company shall be liable to a penalty of twice the amount required to be transferred by the Company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or ₹ 1 Crore, whichever is less, and every officer of the Company who is in default shall be liable to a Penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or ₹ 2 lakhs, whichever is less. [Sec. 135 (7)]

**Directions for compliance:** The Central Government may give such general or special directions to a Company or class of Companies as it considers necessary to ensure compliance of provisions of this section and such company or class of Companies shall comply with such directions. [Sec. 135 (8)]

**Exemption from forming CSR Committee:** Where the amount to be spent by a Company under section 135(5) does not exceed ₹ 50 lakh, the requirement under section 135(1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such Company. [Sec. 135(9)]

**List of Activities under CSR:****(Schedule VII of Companies Act 2013)**

The Board shall ensure that the activities included by a Company in its CSR Policy fall within the purview of the activities included in schedule VII. Some activities are specified in Schedule VII as the activities which may be included by companies in their Corporate Social Responsibility Policies. The activities (in areas or subject, specified in Schedule VII of the Companies act 2013) that can be done by the Company to achieve its CSR obligations are related to:

- (i) **Eradication of hunger and poverty:** Eradicating hunger, poverty and malnutrition, promoting health care including preventive health-care and sanitation including contribution to the 'Swachh Bharat Kosh' set up by the Central Government for the promotion of sanitation and making available safe drinking water.
- (ii) **Promotion of Education:** Promoting education, including special education and employment enhancing vocation skills specially among children, women, elderly and the differently abled and livelihood enhancement projects.
- (iii) **Gender Equality and Women empowerment:** Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.
- (iv) **Environmental sustainability:** Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the 'Clean Ganga fund' set up by the Central Government for rejuvenation of river Ganga.
- (v) **Protection of national heritage:** Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts.
- (vi) **Welfare of Armed Forces and their families** and measures for the benefit of armed forces veterans, war widows and their dependents.

- (vii) **Training to promote rural sport:** Nationally recognised sports, paralympic sports and Olympic sports.
- (viii) **Contribution to the Prime Minister's National Relief Fund:** Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women.
- (ix) **Contributions to technology incubators:** Funds provided to technology incubators located within academic institutions which are approved by the Central Government.
- (x) **Rural development projects.**
- (xi) **Slum area development** where 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

Contribution to Corpus of a Trust/ society/ section 8 companies etc. will qualify as CSR expenditure as long as (a) the Trust/Society/Section 8 companies, etc. is created exclusively for undertaking CSR activities or (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act. (General circular no. 21/2014)

**In the background of Covid-pandemic on 28<sup>th</sup> March 2020 it has been decided that the PM-CARES FUND contribution can be considered as a CSR expenditure under the Companies Act, 2013.**

**In March 2020**, MCA has added that any spending towards curbing COVID-19 spread in India will come under the list of eligible CSR (Corporate Social Responsibilities) activities. The activities include the following:

- Promotion of health care
- Expenses towards preventive health care and sanitation and
- Disaster management.

#### **Disclosure in Annual Report:**

The Boards Financial Report under Section 134 (3) shall disclose the composition of CSR committee, CSR Policy and initiatives.

The amount of expenditure incurred on CSR activities should also be included in this report.

The report must contain valid reasons in case of failure to spend the earmarked CSR budget in line with the 'comply – or – explain' policy.

## QUESTIONS FOR DISCUSSION

1. Explain in brief the various types of Directors and their mode of appointment.
2. Explain the term 'Managing Director' as used in the Companies Act. What are the restrictions imposed on the appointment and remuneration of a Managing Director?
3. What are the qualifications and disqualifications of a Managing Director?
4. Explain in brief the term 'whole time Director'. State the provisions regarding his appointment and remuneration. Explain clearly the meaning of 'majority rule' as applied in Managing a Company registered under the Companies Act, 1956. Are there any exceptions to this rule? If so, explain.
5. Explain the provisions of the Companies Act, 2013 for the prevention of oppression of minority shareholders and mismanagement of a company.
6. What is the maximum number of Companies of which a person can act as a Director at a time?
7. Who is a Managing Director?
8. How is the Managing Director of a Company appointed?
9. What are the disqualifications of a Managing Director?
10. Distinguish between a Managing Director and a whole time Director.
11. Is the Managing Director an employee of a Company?
12. Distinguish between 'Managing Director' and 'Manager'.
13. What do you mean by Corporate Social Responsibility?
14. State the activities that can be carried out under CSR as per the Companies Act, 2013.
15. State and explain the role of a Company Secretary in the corporate world.
16. Write short notes on:
  - (i) Disqualifications for the appointment of Managing or whole time Director
  - (ii) Compensations for the loss of office of a Managing Director.
  - (iii) Types of Directors
  - (iv) Loans to the Directors
  - (v) CSR Committee
  - (vi) Services to be rendered by Company Secretary



# Chapter 3...

## Company Meetings

### Contents ...

- 3.1 Introduction - Company Meetings
- 3.2 Board Meetings: Meaning and Kinds
- 3.3 Conduct of Meeting
- 3.4 Meetings of Shareholders: (General Body Meetings)
  - 3.4.1 Annual General Meeting (AGM)
  - 3.4.2 Extraordinary General Meeting (Section 169) (EOGM)
- 3.5 Provisions Regarding Convening, Constituting, Conducting of General Meetings of Companies (Sections 101 to 114)
  - Questions for Discussions

### Learning Objectives ...

- To examine the meaning and kinds of Board Meetings
- To discuss the conduct and formalities of a valid meeting
- To study meetings of shareholders, general body meetings, annual general meetings and extraordinary general meetings
- To learn about the provisions regarding convening, constitution and conduct of general meetings

### 3.1 INTRODUCTION – COMPANY MEETINGS

#### Company Meetings: An Introduction

Being an artificial entity, a company has to function through its directors, and the directors express the will of the company through the resolutions passed by the majority of members at a duly convened meeting. Practically speaking, these members are the real owners of a company. Therefore, these members/shareholders are more interested in the activities which are taking place in a company. However, it is not practically possible for the shareholders to have a direct involvement in the functioning of the Company. Therefore, they have the right to send

their representative on the Board and also to influence the decision making process in the company up to some extent. This is possible through general meetings. In a general meeting, all the members of a company have the right to participate. There are some other meetings, which are required to be conducted in the company form of organisations.

### **Meaning of 'Meeting'**

*"A meeting may be defined as coming together or gathering or assembly of more than two or more persons for transacting any lawful business".*

Company meetings play a vital role in the administration of the company affairs. In a company, there are instances, where members are supposed to come together periodically for the purpose of discussing major issues relating to the company and arrive at a conclusion with the consensus of each other.

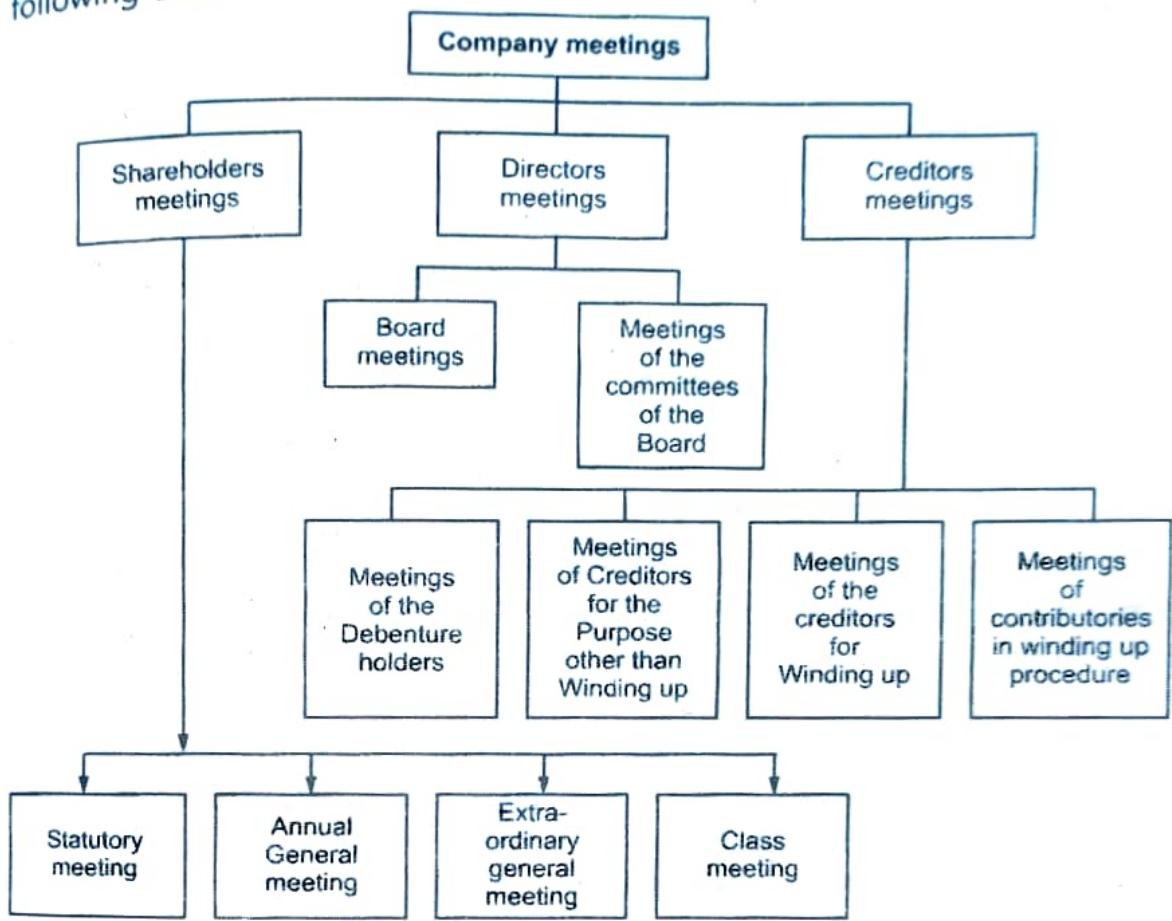
Company meetings are required to be convened and conducted in accordance with the provisions of the Companies Act and rules and regulations made thereunder.

### **Importance of Meetings**

The members of the Company are expected to act collectively at a meeting of the company and take decisions by way of majority. Even directors of the company will have to act collectively through the Board meetings. In other words, the consent of any member obtained privately or individually will not be useful for passing valid resolution. However, in exceptional cases individual member's or director's consent in writing may be used for holding meeting. Through meetings, various policies, strategies or programmes may be discussed and decisions regarding their implementation may be taken. Moreover, statutory requirements will be fulfilled by such meetings. It has been observed in various decisions of the Supreme Court that – it is not practicable for a company to exercise all powers of the company in the general meeting and modern practice is to confer on the directors the right to exercise all the company's powers except those which are required by law to be exercised in the general meeting. In short, we can say that the meeting is the forum through which Board or members take various decisions for better administration of the company.

## Kinds of Meetings

Company meetings may be classified in the manner shown in the following chart.



### (I) Meetings of Shareholders:

The different types of meetings of the shareholders are as follows:

1. The Statutory Meeting,
2. The Annual General Meeting,
3. The Extraordinary General Meeting,
4. Class Meetings.

### (II) Board Meetings.

### (III) Meetings of the Committee of the Board.

### (IV) Meetings of Debenture holders.

### (V) Meetings of Creditors

- (a) For purposes other than winding up,
- (b) For winding up.

### (VI) Meetings of contributories in winding-up.

### 3.2 BOARD MEETINGS - MEANING AND KINDS

**Meaning:** Board meeting may be defined as a formal meeting of the board of directors of an organisation, held usually at definite intervals to consider policy issues and major problems, presided over by a chairperson of the organisation or his or her representative, it must meet the quorum requirements and deliberations must be recorded in minutes. Under the doctrine of collective responsibility, all directors are bound by its resolutions.

The management of the company is vested in the Board of directors and, the directors have to act at Board meetings. The Board of directors will have to function by taking decisions collectively through passing resolutions made in the meetings of the Board. In certain exceptional situations as provided by the Act, the resolutions may be passed by circulation among the directors. A company, therefore, has to function through its Board of Directors, and all such acts and functions to be exercised by the Board must be in consonance with the Act, provisions of the articles and the resolutions passed by the company in the general meeting. The above mentioned arrangement ensures that the collective wisdom of the Board is available to the company on important decisions and it further ensures that the decisions are taken after due deliberations and discussions among the directors. Hence, Board meetings are very important for running the company.

So as to constitute valid decisions of a Board meeting, it is necessary that such meeting must have been convened by proper authority, by proper notice with proper quorum and under the Chairmanship of a proper person. The Act and the articles provide rules and regulations for holding and conducting Board meetings.

**Frequency of Board Meetings [Section 173(1)]:** Every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation and thereafter hold minimum four meetings of its Board of Directors every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board.

However, the Central Government has power to exempt any class of companies from this provision. The Central Government may also direct that this provision should be made applicable to certain companies subject to such exceptions, modification or conditions.

1 BM - 30 days of incorporation

Min. 4 BM

Interval max 120 days

**A One Person Company [Section 173(5)]:** A One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days:

Provided that nothing contained in this sub-section and in Section 174 shall apply to One Person Company in which there is only one director on its Board of Directors.

**Virtual Meeting [Section 173(2)]:** The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time:

Provided that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.

Provided further that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso.

**Notice of Meetings [Section 173(3)]:** A meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means:

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting:

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

**Failure to give Notice:** Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of ₹ 25,000.

It has been held in certain cases that notice sent by 'Fax' is sufficient but notice over telephone cannot be considered as valid. It has been also suggested by the Institute of Company Secretaries of India through its

**Secretarial Standards-1 (SS-1)** (made effective from 13-12-2001) that the Notice may be sent by e-mail or any other electronic mode. But besides this if a particular mode of service has been specified by a director, then the notice is required to be sent by that mode only.

The **Secretarial Standard-1** suggests that the notice must contain the day, date, time, full address of the venue of the meeting, and meeting may be held at any time, on any day, including a public holiday and at any place.

Though Section 173 has not specified the period of notice, a week's notice has been considered as reasonable. Besides this, if articles provide for any fixed day of every month, it will be within the purview of the Act.

**Appropriate Authority to Convene Board Meeting:** As per Regulation 67 (ii) of Table-F of Schedule I of the Act, a director or the manager or secretary on the requisition of the director, are entitled to <sup>(Co)(1)</sup> summon a meeting of the Board. If a secretary has convened any meeting, without authority, the directors can ratify the same at a Board Meeting. <sup>out of authority</sup>

As per **Secretarial Standard-1 (SS-1)**, it is necessary to give notice of the reconvened adjourned meetings to those directors who did not attend the meeting which had been adjourned. (It is to be noted that suggestions of SS-1 are not mandatory in nature, but they are recommendatory).

### 3.3 CONDUCT OF MEETING

#### Formalities of a Valid Meeting

A company is a legal establishment consisting of a group of individuals engaged in operating a business. Management of a company requires efforts undertaken by a lot of individuals who discuss and deliberate upon issues before taking a decision. The decisions are generally taken in meetings which is a formal dialogue between administration of the company (generally the directors and in some cases members too) who discuss the affairs and business of the company.

Decisions taken at a valid meeting are binding on the members of any organization or a company as the case may be whether present at the meeting or not or whether agree or disagree with the decisions.

Actions have to be taken according to the decisions and the decisions can be imposed on the members. In case of a wrong or unlawful decisions, the decision-makers cannot escape the punishment for which they are liable. However, a decision-making member, disagreeing with the majority may escape personal liability if he has recorded a note of dissent.

Decisions taken at an invalid meeting are not binding even though a substantial majority or all the members have agreed with such decisions. For example, even if all the members of a company have ratified an act by the company which is not permitted by the object clause in the Memorandum of Association of the company, the act cannot be valid.

### **Requisites of a Valid Meeting**

So as to make a meeting valid, it is necessary to see that all the following requisites of a valid meeting are present:

1. A meeting must be **properly convened or called**,
2. The meeting must be **properly constituted**, and
3. A meeting shall be **properly conducted**.

That means the date, time and place of the meeting and the agenda to be discussed at the meeting must be properly communicated to the concerned persons. Necessary additional information, enclosures about AGM must be duly communicated to the concerned members. The notice for any members' meeting of a company must be sent on proper address well in advance at stipulated time and in the prescribed way. The norms of quorum and election of a chairman are required to be followed. The rules and regulations for conducting the meeting are required to be followed. Minutes are also required to be prepared for evidence and further reference. When such formalities are followed then the meeting will be considered as valid.

### **Agenda of Board Meeting**

There is no provision in law, which requires an agenda for the meeting of the Directors. However, in Section 173, it is mentioned that the notice of every meeting of the Board of Directors of a company shall be given in writing to every director and such notice shall be sent by hand delivery or by post or by electronic means. Hence, any business can be transacted at a Board meeting.

The agenda is nothing but the list of things to be done or a summary of points and questions to be considered at a meeting. It may be written on a loose sheet paper or there may be a special 'Agenda Book'. The order in which the items appear in the agenda, is generally the order in which the business is to be taken at the meeting and general practice is to place the routine business first and then the special business. As mentioned herein above, the law does not insist for having any kind of agenda for a board meeting, but in case of some matters, prior notice is a practical necessity. Section 201 (appointment of Key Managerial

personnel) and Section 186 [loan and investments by company] state that notice of the resolution to be passed thereat is required to be given to every director in India.

It means that in such cases it would be obligatory on the company to circulate the agenda along with a copy of the proposed resolutions in respect of every such item. Besides this, taking into consideration the enormity and importance of the coming up before the Board, if details of the items for discussion in the Board meeting are not circulated in advance, no meaningful discussion can take place in the Board meeting, for none of the outside directors will be aware of the matters to be discussed in the Board meeting. Hence, good companies are expected to follow the practice of circulating an agenda, with the notice at least one week before the date of meeting, containing business to be transacted with short notes on each item. Most of the times, a good part of the Board agenda contains routine items. The agenda also consists important items such as reports on the working of the company, approval of the capital projects, matters calling for major policy decisions, appointment of first auditor, appointment of additional directors etc.

It would be more appropriate to circulate along with the notes on agenda, the proposed resolutions to be moved at the meeting and to be passed by the directors. For convenience, the agenda of the Board meeting should be grouped and divided so that minimum time and energy of the directors are consumed on less important items. Generally, routine items are placed in the beginning and items which require detailed consideration are taken up thereafter. Even if no specific agenda exists under the miscellaneous items, with the permission of the chairman, any other business may be transacted.

With respect to agenda of the Board meeting, SS-1 of ICSI provides as under:

1. The Agenda, setting out the business to be transacted at the meeting, and notes on Agenda should be given at least seven days before the date of the meeting.
2. Each item of business should be supported by a note setting out the details of the proposal and, where approval by means of a resolution is required, the draft of such resolution should be set out in the note.
3. The notice, agenda and notes on agenda may be given at shorter periods of time than those respectively stated above, if the majority of members of the Board or of the Committee, as the

- case may be, agree. The proposal to hold the meeting at a shorter notice should be stated in the notice and the fact that consent thereto was obtained should be recorded in the minutes.
4. Notice, agenda and notes on agenda should be given to all directors or to all members of the Committee, as the case may be, at the address provided by them, whether in India or abroad, and also be given to the Original Director even when the Notice, Agenda and notes on agenda have been given to the Alternate Director.
  5. Any supplementary item not originally included in the agenda may be taken up for consideration with the permission of the Chairman and with the consent of the majority of the directors present in the meeting. However, no supplementary item which is of significance or is in the nature of unpublished price sensitive information should be taken up by the Board without prior written notice.
  6. The items of business to be transacted should be arranged in order of those items that are of a routine or general nature or which merely require to be noted by the Directors, and those items which require discussions and specific approval.

### **Time and Place of Board Meeting**

The date, time and place of the meeting must be mentioned in the notice. The Act provides that the annual general meeting must be held at the registered office of the company during business hours and on a day, which is not a public holiday. But there is no such provision in respect of Board meetings. Therefore, Board meetings may be held at any place and outside business hours as per the convenience of the directors.

### **Place of Meeting**

The Register of contracts must be kept at the registered office of the company [Section 189]. This register shall be availed at the Board meeting also. But if a Board meeting is held at a place other than the registered office then the register of contracts will have to be removed outside the registered office, which will violate the provision of Section 189(1).

However, The Department of Company Affairs, has clarified that it would be sufficient compliance with the provisions of Section 189(5) of the Act, even if the company gives adequate notice to its shareholders, either once for all or from time to time indicating the precise periods

during business hours and the days on which they may inspect the register kept under Section 189(1) at the registered office. This clarification reveals that now legally there is no problem to hold Board meetings at any place if the necessary notice to shareholders has been given.

### **Board Meetings on Public Holidays**

As per Section 174(1), an adjourned Board meeting cannot be held on a public holiday. On this provision, The Company Law Board stated that, Section 288 does not prohibit a company from holding its original Board meeting on public holidays unless its Articles of Association provide otherwise. That means the Company Law Board may not have any objection, if a company holds the original Board meeting on public holidays.

### **Chairman of the Board Meeting**

Every company should have a chairman who would be the chairman for meeting of the Board (SS - 1). It is the duty of the chairman to see that the meeting is duly convened and constituted as per the provisions of the Act or any other applicable guidelines, rules and regulations before it proceeds to transact business. The chairman should conduct the proceedings of the meeting and see to it that only those items of business which are mentioned in the agenda are transacted and generally in the order in which the items appear on the Agenda. The task of the chairman is to encourage deliberations and debate and assess the sense of the meeting. The chairman should ensure that the proceedings of the meeting are correctly recorded and while doing so, he may exercise his discretion to include or exclude any matter.

So far as public company is concerned, if the chairman himself is interested in any items of business, he should entrust the conduct of the proceedings in respect of such item to any other disinterested director and resume the chair after that time of business has been transacted.

### **Quorum for Meeting (Section 174)**

1. Quorum means the minimum number of directors which must be present so as to constitute the meeting valid. The quorum for a meeting of the Board of directors of a company shall be one-third of the total strength (any fraction contained in that one-third being rounded off as one), or two directors, whichever is higher, and participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

2. The continuing directors may act notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.
3. Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time. For the purpose of this section, 'Interested directors' means any director who is personally interested in matters before the Board meeting. He should not take any part in the discussion or vote on any contract or arrangement entered into by or on behalf of the company. Moreover his presence in the meeting cannot be counted for the purpose of forming a quorum (Section 184). In the above section, 'Total strength' means the total strength of the Board of Directors of a company after deducting therefrom the number of the directors, if any, whose places may be vacant at the time.
4. **Adjournment of Meeting for want of Quorum:** Where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

A quorum must be a disinterested quorum. That means, it must be comprised of directors who are entitled to vote on the particular resolution before the Board.

It should be noted that the quorum must be present throughout the meeting. Hence, the quorum present only at the commencement of the meeting is not sufficient, it should be present at every stage of the meeting. If the quorum is not present, the business transacted at such meeting becomes void.

Where a meeting is called but could not be held for want of quorum, it shall not be treated as a contravention of Section 173 of the Act which requires at least one meeting in every 3 months and at least 4 such meetings in a year to be held by a company.

### **Passing of Resolution by Circulation (Section 175)**

1. No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution:

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

2. A resolution under sub-section (1) shall be noted at a subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting.

Many times, it becomes difficult or impracticable to hold a Board's or Committee of the Board's meeting to discuss a matter upon which an urgent decision is required or to save the expenses required for conducting such a meeting and in order to enable the Board to consider any such matter without being required to assemble together for such a meeting, the resolution can be passed by circulating the same among the directors or members of the committee. However, so as to make this resolution valid, it must comply with the provisions of Section 175 of the Act, as mentioned in the earlier paragraph.

In this way directors can exercise their powers by resolutions at Board or by circulation. As per regulation 75 of Table F of Schedule I, a resolution in writing signed by all the members of the Board or of a committee thereof, for the time being entitled to receive notice of a meeting, shall be as valid and effectual as if had been passed at a meeting of the Board or committee, duly convened and held.

#### **In case of a One Person Company :**

- (i) where the company has only one director, all the businesses to be transacted at the meeting of the Board shall be entered into the minutes book maintained under Section 118;
- (ii) such a minutes book shall be signed and dated by the director;

- (iii) the resolution shall become effective from the date of signing such minutes by the director (Regulation 76 of Table F of Schedule I of the Companies Act, 2013).

### **Certain Powers to be exercised by Board only at Meeting (Section 179)**

The Board of Directors of a company shall exercise the following powers on behalf of a company, and such powers can be exercised only by means of resolutions at meetings of the Board:

- 1 (a) to make calls on shareholders in respect of money unpaid on their shares;
- 2 (b) to authorise buy-back of securities under Section 68;
- 3 (c) to issue securities, including debentures, whether in or outside India;
- 4 (d) to borrow monies;
- 5 (e) to invest the funds of the company;
- 6 (f) to grant loans or give guarantee or provide security in respect of loans;
- 7 (g) to approve financial statement and the Board's report;
- 8 (h) to diversify the business of the company;
- 9 (i) to approve amalgamation, merger or reconstruction;
- 10 (j) to take over a company or acquire a controlling or substantial stake in another company;
- 11 (k) any other matter which may be prescribed.

However, such powers of the Board, may be delegated to any committee of directors, the managing director, the manager etc. by passing resolution to the effect at a meeting.

### **Minutes of the Board Meeting (Section 118)**

Every company shall cause minutes of all proceedings of every meeting of its Board of directors or of any committee of the Board, to be kept by making within 30 days of the conclusion of every such meeting, entries thereof in books kept for that purpose with their pages consecutively numbered. Each page of such book should be initialed or signed and the last page of the record of such proceedings of each such meeting should be dated and signed by the chairman of the said meeting or the chairman of the next succeeding meeting. But in no case the minutes or proceedings of a meeting shall be attached to any such book as aforesaid by pasting or otherwise. The minutes of each such

meeting shall contain a fair and correct summary of the proceedings thereat. All appointments of officers made at any such meeting aforesaid must be included in the minutes of the meeting.

### **Penalty**

If a person is found guilty of tampering with the minutes of the proceedings of the meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1 lakh.

It is to be noted that certain rules regarding 'Minutes' have been provided by Secretarial Standard -1. It is to be further noted that SS-1 is only recommendatory and not mandatory.

### **Committee of the Board**

Resolutions in the meetings of the committee of Board may also be passed by circulating the same among the members of the committee of the Board. Most of the rules as to passing of resolution by circulation is also applicable to the committee of the Board.

### **Meetings of Committees**

Secretarial Standard - 1, has prescribed the following guidelines in respect of meetings of committees:

1. Committee should meet at least as often as stipulated by the Board or as prescribed by any other authority.
2. The presence of all members of any committee constituted by the Board is necessary to form the quorum for meeting of such committee unless otherwise stipulated by the Board while constituting the committee.
3. Any provisions as to the quorum of committee stipulated in any guidelines, rules and regulations framed under the Act or by any statutory authority must be followed.
4. The Board, while constituting any committee, should also appoint the chairman of the committee, unless such appointment is to be made in accordance with any other applicable guidelines, rules and regulations.
5. It may be noted here that the Secretarial Standard-1 (SS-1) issued by ICSI suggests that draft of the resolution and the necessary paper be circulated by hand, or by post, or by facsimile, or by e-mail or by any other electronic mode.

## **Requisites of a Valid Meeting and Applicability**

**[General Laws Relating to Meeting (Sections : 101 - 107, 109, 98.112, and 113)]**

Various kinds of meetings are held in the company form of organisations. It is clear that certain meetings are required to be convened and held in accordance with the provisions of the Act and the Articles of Association of the company. If the provisions of the Act and Articles are not followed while conducting such company meetings, then such meetings and the proceedings therein would become invalid and then the whole exercise of holding meetings will be futile and it will not lead to any fruitful results. Hence, meetings of a company would be valid only when they are duly called, legally constituted and conducted with proper procedure. In this context, it becomes imperative to know the requisites of a valid meeting.

Private companies can frame their own rules for the purpose of holding their general meetings. However, public companies are under obligation to follow rules laid down in the Act.

Hence, before a meeting can validly transact any business the following requirements should be fulfilled:

- (a) The meeting must be duly convened by a proper authority,
- (b) A proper notice must be given to the proper persons,
- (c) It should be a legally constituted meeting,
- (d) It must be properly conducted.

Let us discuss these requisites in detail as under:

### **(a) The Meeting Duly Convened by a Proper Authority:**

A meeting of a company must be duly convened by a proper authority.

- (i) **Proper Authority:** The authority to convene a general meeting lies with the Board of Directors. However, under certain circumstances, meetings can also be called by the members or the Central Government or Tribunal. The members of a company have the right to call an extra ordinary meeting. If for some reasons the annual general meeting is not held, the Tribunal, may direct the calling of an annual general meeting or call, hold and conduct the same (Sections 97).

**(b) A Proper Notice must be given to the Proper Person:**

(i) **Proper Notice:** The notice of a meeting must be in accordance with the general rules in relation to notice and articles as well as the provision of the Act. The notice must contain date, place, time of the meeting and the business to be transacted. It must be in a written form or through electronic mode in such a manner as may be prescribed and it should be given to every member of the company, 21 days before the date of the meeting. A shorter notice (less than 21 days) is possible, if all the members entitled to vote, have consented to it before or after the meeting. However, in the case of any other meeting, the consent of the members holding 95% of paid-up share capital or 95% of the voting power in the case of a company without share capital, shall be sufficient to validate a shorter notice. It should also contain a statement of the business to be transacted at the meeting. However, a mere statement saying that some 'special business' is to be transacted would not be sufficient to validate the notice [*Wills Vs. Murray (1850)*, 4 Ex. Kept. 843]. But the details of the ordinary business to be transacted need not be specifically mentioned in the notice. At the annual general meeting, business of considering accounts and director's report, the declaration of dividends, the appointment of directors and auditors and fixation of their remunerations are considered as ordinary or general business (*Ramjilal Basiwala Vs. BaitonCables Ltd.* I.L.R. 1964 Raj, 135, at 157). Any other business at the annual meeting and all business at extraordinary meetings are considered as special business.

**Explanatory Statement (Section 102):** Where special business is to be transacted at an annual general meeting, a statement to that effect is required to be annexed to the notice calling the meeting. The statement must contain all material facts concerning each item of the special business and should also disclose the interest of any director or other managerial personnel or any relative of director or managerial personnel in the matter [Section 102(1)]. The explanatory statement would be useful to keep members properly informed about the special business to be transacted at the meeting.

**Omission to Give Notice [Section 101(4)]:** If notice is not sent to one or more members deliberately, the meeting would become invalid. But the accidental omission to give notice to any member to whom it should be given shall not invalidate the proceedings.

- (ii) **Whom to Send Notice [Section 172(2)]:** Notice of every meeting must be served to:
1. Every member of a company,
  2. Legal representatives of the deceased member,
  3. The official assignee of the insolvent member,
  4. The auditors of a company,
  5. Every director of the company.

(c) **Legally Constituted Meetings:** A meeting is said to be legally constituted, when there is proper quorum and proper chairman.

(i) **Proper Quorum (Section 103)**

1. Previously five members personally present in case of a public company constituted a quorum. Section 103 stipulates graded requirements of quorum depending upon the number of shareholders.
  - (i) five members personally present if the number of members as on the date of meeting is not more than one thousand constitute a quorum;
  - (ii) fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand constitute a quorum;
  - (iii) thirty members personally present if the number of members as on the date of the meeting exceeds five thousand constitute a quorum;
2. In the case of a private company, two members personally present, shall be the quorum for a meeting of the company.
3. If the Articles of a company do not provide otherwise, the following provisions shall apply with respect to the meeting of a public or private company:
  - (i) If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present, the meeting, if called upon the requisition of members, shall stand dissolved;

- (ii) In any other case, the meeting shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place as the Board may determine;
- (iii) If at the adjourned meeting also, a quorum is not present within half an hour from the time appointed for holding a meeting, the members present shall be a quorum.

It should be noted that, the Articles may provide for a larger quorum, but it cannot provide for a smaller quorum. But, a representative of a company is treated as a member personally present and not as a proxy and his presence is counted for the purposes of quorum (Section 113). Joint holders are treated as one member for the purposes of quorum.

Preference shareholders present at the meeting and equity shares without voting cannot be counted for the purpose of quorum.

It is always presumed that there was a proper quorum for the meeting unless it is questioned at the meeting or the record shows that a quorum was not actually present.

**Whether One person can constitute a Valid Meeting?** : As a general rule, one person cannot constitute a meeting, even if he holds proxies for several other persons. The very word 'meeting' suggests coming together by more than one person. Even Section 103 suggests that a valid meeting cannot be constituted with only one person. However in the following exceptional situations, the presence of one member can form a valid quorum required for the meeting:

- (i) If the AGM or EOGM (Extraordinary General Meeting) has been called under Sections 97 and 98 by the Central Government or Tribunal respectively, the concerned authority (Govt. / Tribunal) may issue directions that one person, present in person or by proxy shall constitute a quorum.
- (ii) In the case of 'class meeting' of shareholders (e.g. preference shareholders) when all shares of that class are held by one person [**East Vs. Bennet Bros. Ltd. (1911) 1. Ch. 163**].
- (iii) The Tribunal may call a meeting of the company other than an annual general meeting and may direct that even one member of a company present in person or by proxy shall be deemed to constitute a meeting (Section 98).
- (iv) In case the number of directors falls below the statutory minimum, say, due to death of a director, the remaining director

even one, is entitled to hold a meeting, increase the number on the Board or call a general meeting of the company (Regulation 69 of Table F).

- (v) If the Board of directors is empowered by Articles to delegate some of their powers to a committee of one person (Regulation 71 of Table F).

However, one person cannot by himself constitute a quorum for an adjourned meeting.

#### **(ii) Chairman of Meetings (Section 104)**

The Chairman is required for the proper conduct of business at a meeting. He has been either designated or elected and his task is to preside over and conduct the proceedings of a meeting. He has to ensure that the business of a meeting is conducted in a proper and smooth manner. In case of a company meeting, the appointment of chairman is usually regulated by the Articles of the company.

#### **Section 104 of the Act provides as follows:**

1. Unless the Articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the chairman thereof on a show of hands.
2. If a poll is demanded on the election of the chairman, it shall be taken forthwith in accordance with the provisions of this Act, the chairman elected on a show of hands exercising all the powers of the chairman under the said provision.
3. If some other person is elected as chairman as a result of the poll, he shall be chairman for the rest of the meeting.

If the Articles provide for the appointment of a chairman, then the above Section 104 will not apply. The Articles usually provide the rules with regard to the 'chairman on meeting,' which are similar to Regulations 45 to 47 of Table F of Schedule I of the Act. These regulations are relating to an appointment of a chairman, which are as under:

- (i) The chairman, if any, of the Board shall preside as chairman at every general meeting of the company (Regulation 50),
- (ii) If there is no such chairman, or if he is not present within 15 minutes after the time appointed for holding the meeting, or is unwilling to act as chairman of the meeting, the directors present shall elect one of their members to be a chairman of the meeting (Regulation 46).

- (iii) If at any meeting, no director is willing to act as a chairman or if no director is present within 15 minutes after the time appointed for holding the meeting, the members present shall choose one of their members to be the chairman of the meeting (Regulation 47).

### (iii) Powers of Chairman

The chairman has to preside over the company meetings. While conducting the business of the meetings, the following are held to be the powers of a chairman:

1. He has *prima-facie authority to decide all questions* which arise at a meeting.
2. To **maintain order and decorum** at a meeting and prevent the use of improper language and behaviour of the members.
3. He has the **power to give a ruling** on the interpretation of the rules and regulations and once he gives a particular ruling, it is binding on all the members.
4. He has the power to **decide the priority** in which the members will be allowed to speak.
5. He has to **maintain relevancy and order in debate**, hence he can disallow debate which is irrelevant or outside the agenda.
6. He has the power to **adjourn the meeting**. However, this power cannot be exercised arbitrarily. The power of adjournment vests in the majority. If majority of the members are against the adjournment, then a chairman can adjourn only if it is so authorised under the Articles or on the ground of absence of quorum.
7. The chairman **can exercise casting vote** if the Articles confer such right on him.
8. He has power to declare a consensus of the meeting or **the result of the voting**.
9. He has the power to expel a member from the meeting if he seriously interferes with the conduct to the meeting. Before such expulsion order, the concerned member must have been warned of his conduct and consequences. If possible, the approval of majority can be obtained for such expulsion.

### (iv) Duties of the Chairman

1. To take care that the proceedings of the meeting are conducted in a proper manner.

2. To ascertain the presence of a quorum and the members prescribed as competent to transact business.
3. Not to adjourn or dissolve a meeting arbitrarily and exercise the power of adjournment judicially.
4. To see that the meeting has been duly convened and legally constituted.
5. To see that no discussion is allowed unless there is a specific motion before the meeting, properly moved and seconded and that the motion is within the scope of the meeting.
6. To maintain order and decorum in the meeting.
7. To see that due and sufficient opportunity has been availed to those who want to speak to express their views. He has to fix the time limit for speakers.
8. To give his ruling over points of order and all other emergent questions.
9. To see that on each matter discussed, a sense of the meeting is ascertained through consensus. If it is not feasible, then he has to put the matter for voting.
10. To exercise his casting vote *bonafide* in the interest of the company.

#### **(d) Meeting to be Properly Conducted**

Meetings are required to be conducted by following the proper rules and regulations of debate and with regard to ascertaining the sense of the meeting; moreover the proceedings should be recorded properly. The sense of meeting may be ascertained either by way of consensus or unanimity or by voting on the matter. So as to ascertain the wishes of the members on a particular matter, the chairman can put such matter to vote. This can be done : (1) by acclamation i.e. approval / disapproval is indicated by clapping of hands or applause etc. (2) by voice vote, (3) by division, (4) by show of hands, (5) by ballot, or (6) by poll.

However, the Companies Act has provided rules regarding voting which are enumerated in the following topic.

#### **Methods of Voting**

#### **Rules relating to Voting**

1. **Voting to be by Show of Hands in first instance [Section 107(1)]:** At any general meeting, a resolution put to vote in the meeting shall, unless a poll is demanded under Section 109, be decided on a show of hands.

- 2. Chairman's declaration of result of voting by show of hands to be conclusive [Section 107(2)]:** A declaration by the chairman in pursuance of Section 107 that on a show of hands, a resolution has or has not been carried either unanimously or by a particular majority, and an entry to that effect in the books containing the minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes cast in favour of or against such resolution.
- 3. Demand for Poll (Section 109)** (i) Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf,--
- (a) in the case a company having a share capital, by the members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power or holding shares on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up; and
  - (b) in the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power.
    - (i) The demand for a poll may be withdrawn at any time by the persons who made the demand.
    - (ii) A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.
    - (iii) A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than forty-eight hours from the time when the demand was made, as the Chairman of the meeting may direct.
    - (iv) Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.

4. **Restriction on Exercise of Voting Right of Member who have not Paid Calls etc. (Section 106):** Notwithstanding anything contained in this Act, the Articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which a company has and has exercised any right of lien.
5. **Right of Members to Use his Votes Differently [Section 106(3)]:** On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.
6. **Scrutineers at Poll (Section 109):** Where a poll is to be taken, the chairman of the meeting shall appoint two scrutineers to scrutinise the votes given on the poll and to report thereon to him [Section 109(5)].
7. **Manner of Taking Poll and Result Thereof (Section 109):**
  - (a) The chairman shall have power to regulate the manner in which poll shall be taken [Section 109 (6)].
  - (b) The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken [Section 109 (7)].

#### **Passing of Resolution by Postal Ballot (Section 110)**

1. Notwithstanding anything contained in this Act, a company-
    - (a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and
    - (b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed instead of transacting such business at a general meeting.
  2. If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf:
- Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a

general meeting by a company which is required to provide the facility to members to vote by electronic means under Section 108, in the manner provided in that section.

### Proxies (Section 105):

**Meaning:** A member, who has right to attend and vote at a meeting may vote either in person or proxy. The dictionary meanings of the term 'proxy' is:

1. 'Proxy' means a person who is given the authority to act on behalf of another.
2. 'Proxy' means a person deputed to vote in the place of the party so deputing him.

Proxy is a personal representative of the shareholder who may be described as his agent to carry out a course which the shareholder himself has decided upon. It is also considered as an 'instrument' by which a person is appointed to act for another at a meeting of the company. The word 'Proxy' is also used indiscriminately to describe both the agent and the instrument appointing him (by L.C.B. Grower).

The relation between the member appointing a proxy and a proxy is that of Principal and agent and therefore may be governed by the relevant provisions of Indian Contract Act - relating to agency. However, there are certain rules relating to 'proxies' which are laid down in Section 105 of the Companies Act, 2013.

### Section 105

1. Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf:

Provided that a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll:

Provided further that, unless the Articles of a company otherwise provide, this sub-section shall not apply in the case of a company not having a share capital:

Provided also that the Central Government may prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy:

Provided also that a person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and such number of shares as may be prescribed.

2. In every notice calling a meeting of a company which has a share capital, or the Articles of which provide for voting by proxy at the meeting, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy, or where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.
3. If default is made in complying with sub-section (2), every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.
4. Any provision contained in the Articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit.
5. If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who issues the invitation as aforesaid or authorises or permits their issue, shall be liable to a penalty of fifty thousand rupees.  
(Amendment Act, 2020):

Provided that an officer shall not be liable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on the request in writing to every member entitled to vote at the meeting by proxy.

6. The instrument appointing a proxy shall--
  - (a) be in writing; and

- (b) be signed by the appointer or his attorney duly authorised in writing, or if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.
- 7. An instrument appointing a proxy, if in the form as may be prescribed, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the Articles of a company.
- 8. Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

### **Restriction on Voting Rights (Section 106)**

1. Notwithstanding anything contained in this Act, the Articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.
2. A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.
3. On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

### **Motion, Amendments and Point of Order**

#### **Motion**

A motion is a formal proposal to be discussed and voted on at a meeting. It is a proposal on any item of business put before a meeting for its consideration and adoption. It may be called as a proposed resolution before the meeting. It may be put for consideration at a meeting by any member or members. It becomes a resolution when it is duly approved in a meeting. A resolution is on the other hand, a formal decision settled by votes of the persons present having the right to vote

at the meeting. The person who moves a motion is known as the mover. He has to sign the motion. Generally, the Articles of a company contain the provision for notice of a motion. Subject to the Articles, a motion requires a prior notice. It is usually included in the agenda. But certain formal motions such as motion for adjournment of the meeting, motion for appointment of a chairman etc. may be moved without prior notice. It is usually required to be seconded but seconding is not necessary if it is moved by the Chairman. Without seconding, a motion cannot be discussed in the meeting.

**Procedure at Meeting:** Any member can put in a 'motion' before the meeting. It has to be seconded by another member. If it does not secure a seconder, it cannot be discussed in the meeting because of lack of support. Once the motion is approved by the chairman, it is 'before the house' for the discussion. The Chairman asks the members to share their views on the 'motion'. Members are allowed to speak only once but the mover gets right to speak twice on his motion. Once when he puts the 'motion' before the House and secondly when he wants to reply to the debate which has taken place during the discussion on the 'motion'. During the discussion, if the mover thinks that the motion was ill-advised, he may be allowed to withdraw his motion provided the seconder agrees to it and the meeting gives its assent. After a thorough discussion on the motion, the Chairman puts it to vote if the House does not accept or approve it unanimously. If it is found that majority votes are cast in favour of the motion, the Chairman declares "The motion is carried" and upon such declaration, the motion becomes a resolution.

**Interruptions of Debate:** During the discussion on the motion, the debate on the original motion may be diverted or interrupted by various ways. These interruptions take place with a view to modify the motion or to stop the discussion or for getting the whole proposal shelved through certain formal devices such as:

- (a) Amendments;
- (b) Formal or Dilatory motions; and
- (c) Points of order.

**(a) Amendments:** An amendment may be defined as an alteration proposed to be made in the text of the original motion before it has been put to vote. Amendments are generally moved to alter the original motion by:

- (i) Striking out words;

- (ii) Inserting or adding words;
- (iii) Striking out certain words and substituting other words;
- (iv) Altering the position or place of the words.

The amendment should be relevant to the main motion and it must not alter the original motion entirely so as to become altogether a new motion. It is required to be moved by a member who has not already spoken on the original motion by any way. No prior notice is necessary to move an amendment, moreover, it need not be in writing. It is to be noted that once the amendment is moved, it cannot be withdrawn without the consent of the meeting.

#### **Illustration:**

Let us presume that the following motion has been moved by a member:

"That Adv. Ravi Patil of Pune, be and he is hereby appointed 'Legal Advisor' of the company for the ensuing year at a remuneration to be fixed by the Managing Director".

**Amendment No. 1:** 'That the words 'to be fixed by the Managing Director' be replaced by the words of '₹ 1 lakh a year'.

**Amendment No. 2:** That the words 'for ensuing year' be substituted by the words 'for the year 2020-2021'.

**(b) Formal motions:** Formal motions are also called as "Procedural" or "Dilatory" motion. They are meant for the purpose of interrupting the debates. They constitute the legitimate means of interruption of debate. The purpose of moving formal motions is to prevent or delay or speed-up the discussion on a motion. No prior notice is necessary for a formal motion. They need not be in writing. Any member can move formal motions. Formal motions have to be seconded.

**Types of Formal Motions:** The following are the types of formal motions:

1. The closure motion;
2. Previous question;
3. Next business; and
4. Adjournment.

Let us discuss these types of motion one by one:

**1. The Closure Motion:** When a member is convinced that already sufficient time has been spent on the discussion of a particular motion, he may propose that the question be now put to vote. This is called as

'closure'. The object of moving a 'closure motion' is not to solve the main question, but to avoid waste of time and to arrive at a quick decision. If this motion is put to vote and if majority favours the same, no further discussion is permitted.

**2. Previous Question:** This motion is moved mainly with an object to prevent a vote being taken on the main motion under discussion. When some members (other than the mover and seconder of the original motion) come to the conclusion that it is unwise or inconvenient to discuss the main motion, they may move the previous question. Any member who has not moved, seconded or spoken on the original motion may move this motion which is worded as "the question be not put to vote". The previous question is required to be properly seconded. The formal motion is then put to vote and if it is carried, the discussion on the main motion ceases to take place and the same may now be discussed at the next meeting. In case this previous question motion is lost, the original motion is put to vote immediately without any further discussion.

**3. Next Business:** The purpose of this motion is similar to the 'Previous Question'. It is put in the form "That the meeting proceed to the next business". Such motions are generally moved when a member is of the opinion that the main motion under discussion is of little importance and certain important items of business are not yet transacted. In such a case, the motion is put to vote and if it is carried, the original motion is dropped at once. However, if it is a lost discussion, debate on the main motion continues.

**4. Adjournment:** A motion of adjournment or postponement of the debate may be moved basically to adjourn the debate on the motion and/or to adjourn the meeting. The main purpose of this motion is to suspend entirely or partially the proceedings of the meeting either for a particular period or indefinitely (i.e. *sine-die*). By this motion, discussion on the motion can be postponed. Any member can move this motion. Once it is seconded, the motion is put to vote. If the motion is carried the debate is postponed and the date, time and place at which the adjourned meeting is to be held are generally fixed at the same meeting unless it is adjourned for indefinite period.

An adjourned meeting is regarded in law as a continuation of the original meeting, hence a new notice is not necessary except when the original meeting is adjourned *sine-die*. The chairman can adjourn the meeting if some member behaves in a disorderly manner.

An adjourned meeting is the same meeting, hence the same business which remained unfinished at the meeting shall be transacted at any adjourned meeting.

The meeting, adjourned for want of quorum will be held in the next week on the same day at the same time and place (Section 103).

**(c) Point of Order:** A point of order can be raised by any member if he came to know that the meeting is not properly convened and constituted. He can put forth the fact that the quorum is not present or that the notice of the meeting was not properly served. A 'Point of Order' can also be raised in case of use of improper language or indecent behaviour or for breach of standing orders, misbehaviour, loud private conversations, speaking for longer than the time allowed, proposing an incorrect amendment, giving irrelevant speech, making derogatory remarks in speeches, indulging in personal abuse etc.

The moment a point of order is raised, discussion on the main motion will stop. On raising a point of order, the person addressing the meeting may stop speaking for some time. A short discussion may take place on a point of order and the Chairman will have to give his ruling or decision on a point of order at once. The Chairman's decision on any procedural aspect is final and binding whether it be right or wrong. The Chairman is at liberty to consult his officials or other influential members in case of difficulty before giving his decision. If the Chairman rules out the point of order, debate on the main motion will be resumed.

### **Resolution**

#### **Meaning**

The term 'resolution' refers to a formal statement of opinion agreed to by the committee or assembly, especially by means of vote. The decisions of the company are made by resolutions of its members, passed at meetings of the members. The term 'resolution' has not been specifically defined in the Act. Resolution may be considered as the formal decision of a meeting on any motion before it. When a motion or proposal has been put to vote and it is accepted by a majority of the members, it is termed as a 'resolution'.

#### **Kinds of Resolutions**

There are three kinds of resolutions recognised by the Companies Act.

1. Ordinary resolutions,
2. Special resolutions,
3. Resolutions requiring special notice.

**1. Ordinary Resolution [Section 114 (1)]:** A resolution passed by the simple majority of the members present and voting may be called 'an ordinary resolution'. An ordinary resolution is said to be passed if the votes cast in favour of the resolution are more than the votes cast against it. This has been specified in Section 114 (1) of the Act as follows:

A resolution shall be an ordinary resolution when at a general meeting of which the notice required under this Act has been duly given, the votes cast (whether on a show of hands, or on a poll, as the case may be) in favour of the resolution (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the resolution by members so entitled and voting.

All those resolutions, which are not special or which do not require any special notice may be termed as 'ordinary resolutions'. An ordinary resolution need not be filed with the Registrar of Companies. The usual notice of 21 days is necessary for passing an ordinary resolution. There are certain items of business which may be transacted with ordinary resolutions such as:

- (i) Passing of the annual accounts,
- (ii) Approval of statutory report,
- (iii) Election of directors,
- (iv) Alteration of capital resulting in increase, sub-division, consolidation,
- (v) Issue of shares at a discount etc.

**2. Special Resolution [Section 114 (2)]:** A resolution shall be a special resolution when:

- (i) The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
- (ii) The notice required under this Act has been duly given of the general meeting; and
- (iii) The votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, are not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

In short, a resolution passed by *three-fourth majority* is called a special resolution. The Articles may specify the matters on which a special resolution of the meeting shall be required.

The Companies Act has provided certain matters on which company **is required to pass a special resolution**. These matters are as under:

- (i) Alteration of Memorandum and the Articles of the company (Section 14);
- (ii) Change the name of the company (Section 13);
- (iii) Shifting of registered office of the company from one State to another (Section 12).

The executive and administrative decisions or the decisions required to protect the company's interest and affecting the majority of shareholders are to be taken by passing a special resolutions.

Within 30 days of the passing of a special resolution, it should be registered with the Registrar of Companies along with a copy of an explanatory statement. The objective of special resolutions is to see that every decision on the important matter is taken only after due deliberation and discussion and with the approval of the majority of shareholders of the company.

**3. Resolutions requiring Special Notice (Section 115):** Where, by any provision contained in this Act or in the Articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent of total voting power or holding shares on which such aggregate sum not exceeding ₹ 5 lakhs, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

The company shall, immediately after the notice of the intention to move any such resolution has been received by it, give its members a notice of the resolution in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the Articles, not less than seven days before the meeting.

This type of resolution requires a special notice to be given in respect of them.

According to the Act, special notice is required in the following types of matters:

- (i) Appointment as auditor or a person other than a retiring auditor (Section 140);
- (ii) Resolution providing expressly that a retiring auditor shall not be reappointed (Section 140);
- (iii) Removal of directors before the expiry of their term (Section 169)
- (iv) Appointment of a person as a director in place of the director removed(Section 169).

### Circulation of Member's Resolution (Section 111)

In certain situations, the members wish to propose a resolution in the next annual general meeting or circulate a statement among the members to express their views on the matter to be taken up in the meeting. For this purposes, a company has to provide its machinery to such members in accordance with Section 111 of the Act.

### Section 111

**1. Notice of Resolution:** A company shall, on requisition in writing of such number of members, as required in Section 100-

- (a) give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and
- (b) circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.

**2. Circumstances, when a Company is not Bound to Give Notice:** A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless-

- (a) a copy of the requisition signed by the requisitionists (or two or more copies which, between them, contain the signatures of all the requisitionists) is deposited at the registered office of the company,--
  - (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting;
  - (ii) in the case of any other requisition, not less than two weeks before the meeting; and
  - (iii) there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

Provided that if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called on a date within six weeks after the copy has been deposited, the copy, although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.

- 3. Effect of Misuse of Right to Circulate Statement:** The company shall not be bound to circulate any statement as required by clause (b) of sub-section (1), if on the application either of the company or of any other person who claims to be aggrieved, the Central Government, by order, declares that the rights conferred by this section are being abused to secure needless publicity for defamatory matter.
- 4.** An order made under sub-section (3) may also direct that the cost incurred by the company by virtue of this section shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.
- 5. Penalty for Default:** If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of ₹ 25,000/-.

### Resolutions and Agreements to be Filed (Section 117)

1. A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under Section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed:

Provided that the copy of every resolution which has the effect of altering the Articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or annexed to every copy of the Articles issued after passing of the resolution or making of the agreement.

2. If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, such company shall be liable to a **penalty of ten thousand**

rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of fifty thousand rupees."; (Amendment Act,2020)

3. Copies of certain resolutions and agreements have to be registered with the Registrar of companies such as:
  - (a) special resolutions;
  - (b) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
  - (c) any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
  - (d) resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;
  - (e) (deleted-Amendment Act,2017);
  - (f) resolutions requiring a company to be wound up voluntarily passed in pursuance of Section 304:  
Provided further that nothing contained in this clause shall apply to a banking company in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business; and
  - (g) resolutions passed in pursuance of sub-section (3) of Section 179:

Provided further that nothing contained in this clause shall apply in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business by,—

- (i) a banking company;
- (ii) any class of non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934, as may be prescribed in consultation with the Reserve Bank of India;
- (iii) any class of housing finance company registered under the National Housing Bank Act, 1987, as may be prescribed in consultation with the National Housing Bank; and
- (h) any other resolution or agreement as may be prescribed and placed in the public domain.

### **Minutes of the Meetings (Sections 118)**

**[Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot (Section 118)]**

1. Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.
2. The minutes of each meeting shall contain a fair and correct summary of the proceedings thereof.
3. All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.
4. In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain—
  - (a) the names of the directors present at the meeting; and
  - (b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

5. There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,--
  - (a) is or could reasonably be regarded as defamatory of any person; or
  - (b) is irrelevant or immaterial to the proceedings; or
  - (c) is detrimental to the interests of the company.
6. The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5).
7. The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.
8. Where the minutes have been kept in accordance with sub-section (1) then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.
9. No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.
10. Every company shall observe secretarial standards with respect to General and Board meetings specified by the Institute of Company Secretaries of India constituted under Section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.
11. If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of ₹ 25,000/- and every officer of the company who is in default shall be liable to a penalty of ₹ 5,000/-
12. If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than ₹ 25,000/- but which may extend to ₹ 1 lakh.

## Inspection of Minutes (Section 119)

1. The books containing the minutes of the proceedings of any general meeting of a company or of a resolution passed by postal ballot, shall--
  - (a) be kept at the registered office of the company; and
  - (b) be open, during business hours, to the inspection by any member without charge, subject to such reasonable restrictions as the company may, by its Articles or in general meeting, impose so, however, that not less than two hours in each business day are allowed for inspection.
2. Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes referred to in sub-section (1).
3. If any inspection under sub-section (1) is refused, or if any copy required under sub-section is not furnished within the time specified therein, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each such refusal or default, as the case may be.
4. In the case of any such refusal or default, the Tribunal may, without prejudice to any action being taken under sub-section (3), by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

### 3.4 MEETINGS OF SHAREHOLDERS (GENERAL BODY MEETINGS)

#### Need for Meetings

Unlike a natural person, a company is unable to think and express its will or make a decision except through resolutions passed at properly convened meetings of its members. They must act collectively. The affairs of a company are conducted by two main organs, members or shareholders in General meeting and directors acting as board. Nowadays, it is common practice to confer on the directors the right to exercise all the company's powers subject to certain exceptions in relation to holding of general meeting. Section 179 empowers the Board of Directors to manage the affairs of the company. In such circumstances, holding of meetings of members and of directors become indispensable.

### **3.4.1 Annual General Meeting (AGM)**

In the annual general meeting, shareholders get the opportunity to exercise their powers of control. Holding of an annual general meeting is mandatory. Such meeting should be held in every 'calendar year'. This is the statutory requirement. 'Calendar year' is to be calculated from 1st January to 31st December and not 12 months from the date of incorporation of the company.

#### **Object and Importance of Annual General Meeting**

One of the objects of an annual general meeting is to protect the interests of the shareholders. This is an opportunity for shareholders to exercise their control over the affairs of the company. Hence, it would be better if these members meet at least once every year to review the working of the company. Appointments of auditors are made at the annual general meeting. Annual accounts are required to be presented before the shareholders at the annual general meeting. Dividends are also declared at such a meeting. Retirement and re-election of the directors take place at the annual general meeting. This meeting is the forum where shareholders can express their views before the management and even ask for certain clarifications about the matters which may not have convinced them.

#### **Annual General Meeting (Section 96)**

1. Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that in case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company and in any other case, within a period of six months, from the date of closing of the financial year:

Provided further that if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation:

Provided also that the Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

2. Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate:

Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance:

Provided further that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

**Explanation.** For the purposes of this sub-section, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

### **Power of Tribunal to Call Annual General Meeting (Section 97)**

1. If any default is made in holding the annual general meeting of a company under Section 96, the Tribunal may, notwithstanding anything contained in this Act or the Articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

2. A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.

### **Power of Tribunal to Call Meetings of Members, etc. (Section 98)**

1. If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the Articles of the company, the Tribunal may, either *suo motu* or on the application of any director or member of the company who would be entitled to vote at the meeting-

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or Articles of the company:

Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

2. Any meeting called, held and conducted in accordance with any order made under sub-section(1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

### **Penalty for Default in holding AGM under Sections 96 and 97:**

### **Punishment for Default in complying with provisions of Sections 96 to 98 (Section 99)**

If any default is made in holding a meeting of the company in accordance with Section 96 or Section 97 or Section 98 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to ₹ 1 lakh and in the case of a continuing default, with a further fine which may extend to ₹ 5,000/- for every day during which such default continues.

### **Cancelling or Postponing of Convened Meeting**

In a case **Rajpal Singh Vs. State of U.P. (1968) 1 comp. L. J. 21**, Justice Satish Chandra observed that, the Board of Directors has the power to postpone or cancel a meeting, notice of which has already been given. However, even power cannot be exercised except for bonafide and proper reasons.

### **Is it possible to cancel a general meeting properly convened?**

There is no specific provision on this issue in the Act. However, Secretarial Standard (SS)-4 issued by Institute of Company Secretaries of India (ICSI) contains a view on this issue. The Standard States that, if for reasons beyond the control of the Board, a meeting cannot be held on the date originally fixed, the Board may defer the meeting. In such a case, the meeting should be reconvened after giving not less than seven days fresh notice published in a newspaper having a wide circulation within such State/States of India where more than one thousand members reside. This statement makes it clear that a meeting duly convened

cannot be cancelled but can be deferred for overriding reasons. In such a case, it would be advisable for the Board to fix a fresh date not far from the date originally fixed and issues to the members and others eligible to receive notice, a fresh notice for holding the meeting. This notice should contain information that the originally fixed meeting had to be deferred for reason(s) beyond the control of the Board. It is necessary for a listed company to inform SEBI about the deferment and the fresh date of meeting.

In the above provision, it is stated that, the directors may hold meeting at any place (other than registered office) within the town, city or village in which the registered office of the company is situated. However, such discretionary power must be exercised bona fide in the interest of the shareholders and not to create any kind of inconvenience to them for attending the meeting.

**If Annual Accounts are not Ready:** If Annual accounts are not ready at the annual general meeting, the company may adjourn the said AGM at any suitable date on which the said annual accounts are expected to be ready as the consideration of annual accounts is only one of the matters to be dealt with at an AGM, there is statutory obligation on the directors to hold the meeting. The proper course shall be to hold the meeting and then adjourn it to a suitable date for considering the accounts [Dept. of Company affairs communique dated 2nd Feb 1974].

#### **Business to be Transacted at the AGM [Section 102 (1)]**

The Business to be transacted at an annual general meeting may be either special or ordinary.

**Ordinary Business:** The Business relating to the following may be called as ordinary business:

- (i) the consideration of the accounts, balance-sheets and the reports of the Board of directors and auditors,
- (ii) the declaration of a dividend,
- (iii) the appointment of directors in the place of those retiring, and the appointment of auditors and fixation of their remuneration.

**Special Business:** All other business scheduled to be transacted at the annual general meeting shall be deemed to be special. Besides this in the case of any other meeting, all business shall be deemed special.

Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice

of the meeting a statement setting out all material facts concerning each such item of business, including in particular the nature of the concern or interest if any, therein, of every director and the manager, if any [Section 102 (2)].

**Explanatory Statement (Section 102):** The Act provides for additional disclosures to be provided to the shareholders. E.g. in case of non-cash transactions, valuation from registered valuer is required to be provided.

Hence, In addition to Section 102, the companies will have to refer to other relevant provisions for determining the disclosures in explanatory statement.

**Statement to be annexed to Notice:** (1) A statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:

- (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of:
  - (i) every director and the manager, if any;
  - (ii) every other Key Managerial Personnel; and
  - (iii) relatives of the directors or KMPs.
- (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

## Section 20 - Service of Documents

1. 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:

Provided that 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. Save as provided in this Act or the rules made 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:

Provided that 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.

### **3.4.2 Extraordinary General Meeting (Section 169) (EOGM)**

**Meaning:** The Annual General Meeting of a company may be called as an ordinary meeting. Therefore any other general meeting except annual general meeting is called Extra-ordinary General Meeting (EOGM). Regulation 42 of Table-F provides, "All general meetings other than annual general meetings shall be called extraordinary general meetings."

It has been already discussed that an Annual general meeting is required to be conducted once in every year. However, so far as an extraordinary meeting is concerned, it can be called at any time when the matter to be discussed is urgent and cannot wait till the next annual general meeting. In short, it is a general meeting of a company which is held between two consecutive annual general meetings for transacting special or urgent business (e.g. shifting of registered office of the company or removal of directors etc.).

#### **Business to be Transacted**

'Ordinary business' and 'Special Business' can be transacted at the annual general meetings. But in extraordinary meetings, whatever business is to be transacted is called special business. It may include an alteration in Memorandum or Articles, removal of a director, re-organisation of share capital, issue of debentures, issue of rights shares, increase in the remuneration of managing director, whole time director etc.

#### **Who may call the Extraordinary General meeting?**

The extraordinary general meeting (EOGM) may be called by any one of the following :

1. The Board of directors,
2. The requisitionists,
3. The Tribunal.

## 1. Extraordinary General Meeting called by the Board of Directors

(i) **On its Own:** The Board of Directors has the right to call an extraordinary general meeting (EOGM) by giving not less than 21 days' notice.(Section 101). A meeting may be called by giving shorter notice as discussed in the context of annual general meeting in Section 101. However, such shorter notice (i.e. less than 21 days) may be valid if the consent of the members of the company holding 95% or more of the voting rights has been accorded (Section 101). According to Regulation 43 (i) of Table-F, the Board may, whenever it thinks fit, call an extraordinary general meeting.

If at any time majority of directors are not within India and the quorum at the Board could not be formed, any director or any two members of the company may call an extraordinary general meeting in the same manner, as nearly as possible, as that in which such a meeting may be called by the Board [Regulation 43 (ii) of Table-F of Schedule I].

(ii) **On the Requisition of Members (Section 100):** The Board of directors is under obligation to call an extraordinary general meeting of the company if the number of members specified as under makes the requisition:

Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India [Section 100 (1)].

The number of members entitled to requisition a meeting shall be –

- (a) in the case of a company having a share capital, holders of at least 10% of the paid- capital of the company as at that carries the right of voting in regard to that matter [Section 100 (2) (a)].
- (b) in the case of a company not having a share capital, members having at least 10% of the total voting power at the said date a right to vote in regard to that matter [Section 100 (2)(b)].

The requisition shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists, and shall be deposited at the registered office of the company [Section 100 (3)].

The requisition may consist of several documents in like form, each signed by the requisitionists [Section 169(3)].

The business to be transacted by the EOGM is a 'special business' and hence every item mentioned in the agenda should be accompanied by an 'Explanatory Statement' (Statement to be annexed to notice) as contemplated under Section 102 of the Act.

However, the requisitionists are not bound to attach the explanatory statement to the requisition. Here, on receipt of the requisition, the Board of Directors will have to include in the notice convening the meeting the necessary explanatory statement [*L. I. C. of India Vs. Escorts Ltd. AIR 1986 SC 1370*]. Where two or more distinct matters are specified in the requisition, the validity of each such matter will be determined independently before calling the meeting [Section 169 (5)].

## **2. Extraordinary Meeting called by the Requisitionists themselves**

Once a valid requisition has been received, the Board of directors should within 21 days of the receipt of the requisition call the meeting giving at least 21 days notice fixing the meeting within 45 days of the receipt of the requisition.

However, if the Board of Directors fails to call the meeting mentioned herein above, the meeting may be called -

- (i) by the requisitionists themselves,
- (ii) in case of a company having a share capital, by such of the requisitionists as represent either
  - (a) a majority in value of the paid-up share capital held by all the requisitionists; or
  - (b) at least 10% of such of the paid-up share capital of the company carrying voting rights, whichever is less, or
  - (c) in the case of a company not having share capital, by such of the requisitionists as represent at least 10% of the total voting power of all the members of the company with regard to the matter of requisition.

A meeting called by the requisitionists as mentioned above must be held within 3 months from the date of the deposit of the requisition [Section 100 (4)]. However, such a duly convened meeting can be adjourned.

### **Re-imbursement of Expenses**

Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board duly to call a meeting shall be repaid to the

requisitionists by the company; and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default [Section 100 (6)].

### **3. Extraordinary General Meeting called by the Tribunal (Section 98)**

- (i) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the Articles, the Tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting –
  - (a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and
  - (b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's Articles.

**Explanation:** The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

- (ii) Any meeting called, held and conducted in accordance with any such order shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

The term 'impracticable' used in the above section means impracticable from the reasonable point of view. Conducting of such a meeting is impracticable where, for example, the registered office of a company is not made available [*Ruttonji and Co. Lt., Re, AIR (1969) Cal. 550*]. The finding that it is impracticable to convene a meeting is a condition precedent for the purpose of exercising the jurisdiction conferred by Section 186 [*Edward Ganj Public Welfare Association, Re (1977) 47 Com. Cases 283 (P and H)*]. The power under this section is discretionary and hence it is required to be exercised only when

the normal machinery of management fails and the Court finds (a) that to call a meeting is impracticable, and (b) that to leave the parties to follow their own remedies will put the company in jeopardy [*Bengal and Assam Investors Ltd Vs. J. K. Eastern Industries Pvt. Ltd.* AIR 1956 Cal. 658].

Before the Court (now tribunal) exercises its jurisdiction under Section 186, the Court (now tribunal) must be satisfied when a director or a member moves an application, that it has been made *bonafide* in the larger interests of the company for removing deadlock otherwise irremovable [*Ruttonjee and Co. Ltd. Re* (1970)].

### **Class Meetings (Sections 48):**

The class meetings are ordinarily conducted to pass resolutions which would bind only the members of the class concerned. Such meetings will be attended by only the members of that class. E.g. Members of preference shareholders. A company calls such meetings when it is proposed to vary the rights of a particular class of shares and it is not possible to get the consent in writing, of the 3/4th of the issued shares of that class. This meeting is ordinarily called 'a class meeting'. The resolutions to be passed in this meeting must be passed as special resolutions. In case of any class of shareholders' where curtailment of rights is to take place, the consent of such class or classes is necessary. Holders of 10% or more shares of that class can approach the Tribunal for setting aside the variation. The decision of the Tribunal shall be final.

### **3.5 PROVISIONS REGARDING CONVENING, CONSTITUTING, CONDUCTING OF GENERAL MEETINGS OF COMPANIES (SECTIONS 101 TO 114)**

#### **Notice of Meeting (Section 101)**

1. A general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed:

Provided that a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

- (i) in the case of an annual general meeting, by not less than ninety-five per cent of the members entitled to vote thereat; and

- (ii) in the case of any other general meeting, by members of the company—
  - (a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than ninety-five per cent of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
  - (b) having, if the company has no share capital, not less than ninety-five per cent of the total voting power exercisable at that meeting:

Provided further that where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter.

2. Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.
3. The notice of every meeting of the company shall be given to—
  - (i) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;
  - (ii) the auditor or auditors of the company; and
  - (iii) every director of the company.
4. Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

#### **Statement to be annexed to Notice (Section 102):**

1. A statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:
  - (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—

- (i) every director and the manager, if any;
  - (ii) every other Key Managerial Personnel; and
  - (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);
- (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

2. For the purposes of sub-section (1),--

- (a) in the case of an annual general meeting, all business to be transacted thereat shall be deemed special, other than--
  - (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
  - (ii) the declaration of any dividend;
  - (iii) the appointment of directors in place of those retiring;
  - (iv) the appointment of, and the fixing of the remuneration of the auditors; and
- (b) in the case of any other meeting, all business shall be deemed to be special:

Provided that where any item of special business to be transacted at a meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every promoter, director, manager, if any, and of every other Key Managerial Personnel of the first mentioned company shall, if the extent of such shareholding is not less than two per cent of the paid-up share capital of that company, also be set out in the statement.

- 3. Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the statement under sub-section (1).
- 4. Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a Promoter, Director, Manager, if any, or other Key Managerial personnel, any benefit which accrues to such Promoter, Director, Manager or other Key Managerial Personnel or their relatives, either directly or indirectly, the Promoter, Director, Manager or other Key Managerial Personnel, as the case may be, shall hold

such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

5. Without prejudice to the provisions of sub-section (4), if any default is made in complying with the provisions of this section, every Promoter, Director, Manager or other Key Managerial Personnel of the company who is in default shall be liable to a penalty of ₹ 50,000 or five times the amount of benefit accruing to the Promoter, Director, Manager or other Key Managerial Personnel or any of his relatives, whichever is higher.

### **Quorum for Meetings (Section 103)**

1. Unless the Articles of the company provide for a larger number,--
  - (a) in case of a public company,--
    - (i) five members personally present if the number of members as on the date of meeting is not more than one thousand;
    - (ii) fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand;
    - (iii) thirty members personally present if the number of members as on the date of the meeting exceeds five thousand;
  - (b) in the case of a private company, two members personally present, shall be the quorum for a meeting of the company.
2. If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company--
  - (a) the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or
  - (b) the meeting, if called by requisitionists under Section 100, shall stand cancelled:

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (a), the company shall give not less than three days notice to the members either

individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated.

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

### **Chairman of Meetings (Section 104)**

1. Unless the Articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.
2. If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act and the Chairman elected on a show of hands under sub-section (1) shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the meeting.

### **Proxies (Section 105)**

1. Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf:  
 Provided that a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll:  
 Provided further that, unless the Articles of a company otherwise provide, this sub-section shall not apply in the case of a company not having a share capital:  
 Provided also that the Central Government may prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy:  
 Provided also that a person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and such number of shares as may be prescribed.
2. In every notice calling a meeting of a company which has a share capital, or the Articles of which provide for voting by proxy at the meeting, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled

to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

3. If default is made in complying with sub-section (2), every officer of the company who is in default shall be liable to a penalty of five thousand rupees.
4. Any provision contained in the Articles of a company which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit.
5. If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or willfully authorises or permits their issue shall be punishable with fine which may extend to one lakh rupees:

Provided that an officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

6. The instrument appointing a proxy shall--
  - (a) be in writing; and
  - (b) be signed by the appointer or his attorney duly authorised in writing, or if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

7. An instrument appointing a proxy, if in the form as may be prescribed, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the Articles of a company.
8. Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

### **Restriction on Voting Rights (Section 106)**

1. Notwithstanding anything contained in this Act, the Articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.
2. A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.
3. On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

### **Voting by Show of Hands (Section 107)**

1. At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under Section 109 or the voting is carried out electronically, be decided on a show of hands.
2. A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands under sub-section (1) and an entry to that effect in the books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise.

## Voting through Electronic Means (Section 108)

The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means.

## Demand for Poll (Section 109)

1. Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf,

(a) in the case of a company having a share capital, by the members present in person or by proxy, where allowed, and holding shares on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up; and

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

2. The demand for a poll may be withdrawn at any time by the persons who made the demand.
3. A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.
4. A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than forty-eight hours from the time when the demand was made, as the Chairman of the meeting may direct.
5. Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.
6. Subject to the provisions of this section, the Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken.
7. The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

**Postal Ballot (Section 110)**

1. Notwithstanding anything contained in this Act, a company--
  - (a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and
  - (b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot, in such manner as may be prescribed, instead of transacting such business at a general meeting: Provided that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.
2. If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

**Circulation of Members' Resolution (Section 111)**

1. A company shall, on requisition in writing of such number of members, as required in Section 100,--
  - (a) give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and
  - (b) circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.
2. A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless--
  - (a) a copy of the requisition signed by the requisitionists (or two or more copies which, between them, contain the signatures of all the requisitionists) is deposited at the registered office of the company,--
    - (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting;
    - (ii) in the case of any other requisition, not less than two weeks before the meeting; and

- (b) there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

Provided that if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called on a date within six weeks after the copy has been deposited, the copy, although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.

3. The company shall not be bound to circulate any statement as required by clause (b) of sub-section (1), if on the application either of the company or of any other person who claims to be aggrieved, the Central Government, by order, declares that the rights conferred by this section are being abused to secure needless publicity for defamatory matter.
4. An order made under sub-section (3) may also direct that the cost incurred by the company by virtue of this section shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.
5. If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees.

#### **Representation of President and Governors in Meetings (Section 112)**

1. The President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting of the company or at any meeting of any class of members of the company.
2. A person appointed to act under sub-section (1) shall, for the purposes of this Act, be deemed to be a member of such a company and shall be entitled to exercise the same rights and powers, including the right to vote by proxy and postal ballot, as the President, or as the case may be, the Governor could exercise as a member of the company.

## Representation of Corporations at Meeting of Companies and of Creditors (Section 113)

1. A body corporate, whether a company within the meaning of this Act or not, may,—
  - (a) if it is a member of a company within the meaning of this Act, by resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;
  - (b) if it is a creditor, including a holder of debentures, of a company within the meaning of this Act, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.
2. A person authorised by resolution under sub-section (1) shall be entitled to exercise the same rights and powers, including the right to vote by proxy and by postal ballot, on behalf of the body corporate which he represents as that body could exercise if it were an individual member, creditor or holder of debentures of the company.

## Ordinary and Special Resolutions (Section 114)

1. A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.
- (2) A resolution shall be a special resolution when—
  - (a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

- (b) the notice required under this Act has been duly given, and  
 (c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

### **QUESTIONS FOR DISCUSSION**

1. Explain in brief different kinds of meetings of the shareholders of a company.
2. Explain the provisions of the Companies Act in respect of annual general meeting.
3. What is an 'extraordinary general meeting'? When can it be called? By whom can an extraordinary general meeting be called?
4. Describe the various types of resolutions that may be passed in the meetings of the members. Under what circumstances is each of them required?
5. Explain in brief the business to be transacted at the various meetings of shareholders.
6. Explain the role of powers of the Chairman in the conduct of the general meeting.
7. Who is the Chairman of a meeting? How is the Chairman of a general meeting of a company usually appointed? Explain the powers and duties of a Chairman.
8. What do you understand by a proxy? What are the statutory provisions regarding proxies?
9. What is Agenda of a meeting? How is it prepared?
10. Why is Agenda necessary? Can we put routine items of the agenda first in order? Why?
11. Explain the term 'Motion'. State the principles which govern the amendment of a motion at a meeting.
12. What are the requisites of a Valid meeting?
13. What do you mean by a proxy?
14. What are the objects of holding a meeting?
15. What is a notice of meeting?

16. What is 'certification of statutory report'?
17. Is it possible to cancel a general meeting properly convened? Justify your answer.
18. What is the role of a chairman in conducting the Board meeting?
19. State day, time and place of annual general meeting.
20. What are the class meetings?
21. Write a note on 'Board meeting'.
22. Who can convene an extraordinary general meeting?
23. What is meant by 'quorum'?
24. Should a quorum be present throughout the meeting?
25. What is a special resolution?
26. What is special business in an annual general meeting of a company?
27. Whether one person can constitute valid meeting?
28. Write Short Notes On:
  - (i) Passing of resolution by circulation.
  - (ii) Adjournment of meeting for want of quorum.
  - (iii) Minutes of the Board Meeting.
  - (iv) Power of chairman.
  - (v) Rules relating to voting at meeting.
  - (vi) Passing of resolution by postal- ballot.
  - (vii) Inspection of minute books of general meetings.
  - (viii) Certification of calling meeting.
  - (ix) Time and place of Annual General meeting.
  - (x) Time and place of Board meeting.
  - (xi) Minutes of the meeting.



# E-Governance and Winding-up of a Company

## Contents ...

- 4.1 E-Governance: Meaning and Importance of E-Governance
- 4.2 E-Filing: Basic Understanding of MCA Portal and E-filing
- 4.3 Winding-Up: Meaning of Winding-up, Conceptual Understanding of Winding-up, Dissolution of a Company by the Tribunal
  - Questions for Discussions

## Learning Objectives ...

- To understand the concept of E-governance
- To be aware of the advantages and disadvantages of E-governance
- To have a basic knowledge of MCA portal and the process of E-filing
- To understand the provisions relating to Winding-up and dissolution of company

## 4.1 E-GOVERNANCE : MEANING AND IMPORTANCE OF E-GOVERNANCE

### Introduction and Meaning of E-Governance

The Companies Act, 2013 has introduced Section 398 which empowers the Central Government to introduce E-Governance and facilitate electronic filing of forms, returns and documents with the Registrar of Companies.

In the changing competitive environment, information is the heart of all activities and the role of information is extremely important not only for the companies but also in governing a country or a state. The internet has brought many changes in the society and has become an indispensable part of many activities. It has brought the new methods of communication, work study, education, interaction, entertainment, health, trade and commerce. This unit highlights the importance of the information technology enabled form of governance in the administration of the companies.

## Definitions of E-Governance:

Some widely used definitions are listed below:

1. According to the World Bank, "E-Governance refers to the use by government agencies of information technologies (such as Wide Area Networks, the Internet, and mobile computing) that have the ability to transform relations with citizens, businesses, and other arms of government. These technologies can serve a variety of different ends: better delivery of government services to citizens, improved interactions with business and industry, citizen empowerment through access to information, or more efficient government management. The resulting benefits can be less corruption, increased transparency, greater convenience, revenue growth, and/or cost reductions."

2. UNESCO defines E-Governance as: "Governance refers to the exercise of political, economic and administrative authority in the management of a country's affairs, including citizens' articulation of their interests and exercise of their legal rights and obligations. E-Governance may be understood as the performance of this governance via the electronic medium in order to facilitate an efficient, speedy and transparent process of disseminating information to the public, and other agencies, and for performing government administration activities."

3. Dr. APJ Abdul Kalam, former President of India, has visualised e-Governance in the Indian context to mean: "A transparent smart e-Governance with seamless access, secure and authentic flow of information crossing the interdepartmental barrier and providing a fair and unbiased service to the citizen"

**Meaning of E-Governance:** The word "electronic" in the term e-governance implies technology driven governance. E-governance is the application of information and communication technology (ICT) for delivering government services. Electronic Governance refers to the online delivery of information and services related to the activities and processes involved in governing a country or state through internet or other digital means.

Electronic Governance is the application of information technology to government functioning in order to bring about Simple, Moral, Accountable, Responsive and Transparent (SMART) Governance. E-Governance involves processes like online delivery of information and services related activities governing a country or state through the internet or other digital means. In short, e-Governance refers to the use of information technologies like local area network, wide area network,

the internet and mobile computing etc. by the government agencies. Such use of information technologies will be beneficial to give better delivery of government services to citizens, improved interactions with business and industry, citizen empowerment through access to information, or more efficient government management. Increased transparency, less corruption, greater convenience, cost reduction, revenue growth etc. are the resulting benefits of e-governance. E-commerce helps businesses to transact with each other more efficiently (B2B) and brings the customers closer to business (B2C). On the similar lines, e-governance aims to make interaction between government and citizens (G2C), government and business enterprise (G2B) and inter-agencies relationships (G2G) more friendly, convenient, transparent and inexpensive. Information Technology should be used strategically to radically improve organisational effectiveness.

Traditionally, the interaction between citizens or business and government agencies used to take place in a government office. Now, it has been observed that e-governance enhances the citizens and businesses access to government information and services and provides new ways to increase citizen participation in democratic functioning of the Government. Effective change management is necessary for the success of e-governance. Along with proper telecom infrastructure, technology and software, a successful transition from a manual to electronic process requires change in various established procedures.

E-governance therefore means the application of ICT to transform the efficiency, effectiveness, transparency and accountability of exchange of information and transaction.

1. Between Governments,
2. Between Government agencies,
3. Between Government and citizens,
4. Between Government and businesses.

#### **Advantages of E-filing /Importance of E-Governance:**

Various advantages of E-filing/E-Governance may be identified as under:

1. **Quick Statutory Compliances:** Business organisations will be enabled to register a company and file statutory documents quickly and easily.
2. **Easy Access:** Public can have easy access to relevant records and get their grievances redressed more effectively.

3. **Efficient Services:** Professionals like Chartered Accountants, Company Secretaries etc. will be in a position to avail better and efficient services to their client companies.
4. **Verifications:** Financial institutions will be able to find registration and verification of charges easily.
5. **Effective Governance:** Government is able to become pro-active and can ensure effective compliance of relevant legal provisions and corporate governance.
6. **Save Money and Time:** The main advantage while implementing electronic governance will be to improve the efficiency of the current system (Paper based system). That would in return save money and time.
7. **Allows Government Transparency:** E-governance allows for government transparency because it allows the public to be informed about what the government is working on as well as the policies they are trying to implement.
8. **Better Services by the Ministry of Company Affairs (MCA):** MCA employees shall be equipped to deliver the best of services.

#### **Disadvantages of E-Governance:**

1. **Inaccessibility:** An e-government site that provides web based access and support often does not offer the potential to reach many users including those who live in the remote areas, have low literacy levels and exist on poverty line incomes.
2. **Hyper-surveillance:** Once the government begins to develop and become more sophisticated, the citizens will be forced to interact electronically with the government on a larger scale. This could potentially lead to a lack of privacy for civilians as the government can obtain more and more information about them.
3. **Cost:** Although large amount of money is spent on the development and implementation of e-government, the outcomes and effects of trial internet-based governments are often difficult to gauge or unsatisfactory.
4. **Lack of Personal Interaction:** The disadvantage of an electronic government is to move the government services into an electronic based system. This system loses the person to person interaction which is valued by a lot of people.

The Central government is empowered to make rules for electronic filing of various returns, documents etc. Such rules can provide authentication of such returns in the prescribed manner. Electronic inspection of such documents is also possible and permissible. Fees can also be paid through electronic means. [Sec.398 (1)]

Under Section 398(2) the Central government is also empowered to frame scheme for carrying out the provisions as specified by electronic means.

The Information Technology Act, 2000 is applicable to the electronic records to the extent the provisions are not inconsistent with the Companies Act. (Sec.402)

Companies (Electronic Filing and Authentication of the documents) Rules, 2006 (w.e.f. 19-06-2006) are made for the purpose of e-filing of documents and its authentication. Similar provisions may be made under the Companies Act, 2013.

## 4.2 E-FILING: BASIC UNDERSTANDING OF MCA PORTAL AND E-FILING

A major e-governance initiative (MCA - 21) has been taken by the Ministry of Corporate Affairs (MCA). It envisages e-filing of all documents relating to company matters on the MCA portal. All physical filing of forms has been discontinued and process of E-filing has been started. It is almost a paperless working of MCA subject to certain exceptions where paper work is unavoidable due to legal or statutory requirements. At present Winding-up procedure has not been covered under the said programme. The project is termed as 'MCA-21' and was implemented with the help of Tata Consultancy Services in 2006. Now Infosys is managing the programme. This project is fully operational from 15-09-2006. The user has to access <http://www.mca.gov.in> to upload the form, inspect the documents get other relevant information and details.

### What is a 'Portal'?

A portal is a single website giving structured access to other websites of all government departments. Through a portal, one can easily find out government information and services from one place, without the need to understand how government is structured and which sites you need to use. Portals are generally grouped by industry or sector type such as education, health, construction industry. Sometimes they are organised on the basis of services, for example, licensing, registration, or purchasing.

The portal shall be a website providing search capability for and links into the on-line and off-line information and services using a consistent classification system. As a result of this, an integrated catalogue of information can be searched through the internet. So, if one searches for 'licence', he would be given a choice of, for example, dog, driver, gun licenses.

Many times, it has been observed that the way government describes something and what a person calls it are two different names. The government has to make sure that if one is looking for a particular government service or a piece of public information one should find it. In short, a 'government portal' should be provided with a single internet address through which one can search on-line and off-line government information and services without having to go to individual government agency websites and also provide a complimentary alternative to across the counter and telephone contact with government.

**MCA Portal:** For the purpose of implementing e-governance strategy, the Ministry of Corporate Affairs (MCA) has launched an MCA portal (MCA-21). MCA21 project is designed to fully automate all processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act. With this initiative, e-filing of all documents relating to company matters is possible. Now MCA is taking steps to move from traditional paper based operations to paperless transactions. As a result, various conventional forms prescribed for certain transactions have been adopted for use through the electronic medium. These forms have been simplified and standardised for electronic filing.

**MCA21 and its objective :** MCA21 is an e-Governance initiative of Ministry of Corporate Affairs (MCA), Government of India that enables an easy and secure access of the MCA services to the corporate entities, professionals and citizens of India. The MCA21 application is designed to fully automate enforcement and compliance of the legal requirements Companies Act, 2013 and Limited Liability Partnership community to meet their statutory obligations and all processes related under the Companies Act. The MCA21 application is available through the single point of contact for all MCA related services, which can be easily accessed over the Internet by corporate entities and professionals, and citizens of India. The MCA21 application offers the following:

- Enables the business community to register a company and file statutory documents quickly and easily.

- Provides easy access of public documents.
- Helps faster and effective resolution of public grievances.
- Helps registration and verification of charges easily.
- Ensures proactive and effective compliance with relevant laws and corporate governance.
- Enables the MCA employees to deliver best of breed services.

### **Important Features of the MCA-Portal**

- 1. No Need to Visit ROC:** Companies, professionals and public at large need not visit the Registrar of Companies (ROC) offices as it would be possible for them to interact with the ministry using the MCA-21 portal from their offices or home or by going to the facilitation centres, established for this purpose.
- 2. Multiple Options to Make Payments:** The users will have multiple options to make payments in the online mode either through credit cards or the internet banking facility. Besides this, the traditional payment through demand draft would be accepted against a system-generated *Challan* to more than 200 bank branches across the country.
- 3. DIN Introduced:** The programme also introduces the concept of Director Identification Number (DIN), which is a unique and lifetime identification number , issued to all current and prospective directors. It is mandatory for all directors who wish to interact with the Ministry in future to acquire a DIN.
- 4. Service Request Number (SRN):** With the help of this system, the stakeholders are established to track the service request through a Service Request Number (SRN).
- 5. Manual Filing of Documents Discontinued:** MCA has vide Notification No. GSR 56 (E) dated 10<sup>th</sup> February, 2006, issued the Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2006 and notified new e-forms. The statutory filing of forms and returns in the offices of ROCs is now on the basis of new e-forms only from 15-9-2006; all manual filing of documents has been discontinued.

At present, permanent documents of existing companies such as Memorandum of Associations, Current Charge Documents etc. are maintained in the paper form by various Registrar of Companies offices. Most of these documents have been converted into the electronic format. It is to be noted that the scope of e-filing covers only the offices

of ROCs, Regional Directors and the Headquarters at New Delhi and it does not include Official Liquidators, Company Law Board/Tribunal and Courts upto now. The MCA-21 covers services provided by the secretariat at New Delhi, the four Regional Directorates (RDs) and the 20 offices of the Registrar of Companies situated throughout the country.

### E-Filing:

The e-filing facility includes:

1. Incorporation and registration of new companies.
2. Filing of Annual Returns and Balance sheets.
3. Registration and verification of charges.
4. Filing of forms for change of names/address/director's details.
5. Inspection of documents.
6. Applications for various statutory services from MCA.
7. Investor grievances redressal.

In e-filing system, the ROC office will have to function as the back office of the ministry. Facilitation centres (i.e. Physical Front Offices) have been established to provide necessary assistance to these companies who find it difficult to adopt e-filing in the initial stages. The digital signatures of various office bearers of the companies are necessary for submission of e-forms. Even the digital signatures of third parties are also necessary in certain cases.

**Classification of E-forms:** So as to standardise and for the better understanding, e-forms have been classified into the following categories:

1. **Registration** of new companies. *Sec 7 Incop. company*
2. **Compliance Related Filing:** It includes Balance Sheet and Profit and Loss Account, Annual Return, Return of deposits, statutory reports, cost audit reports etc.
3. **Change Services:** It covers matters relating to the change in the capital structure, change in the registered office etc.
4. **Charge Creation:** Registration of charge created/modified is required to be filed with ROC.
5. **Investor's Complaints:** As a part of investor's services, complaints can be filed by investors through the e-filing system.
6. **Making Application for Approval of ROCs:** ROC is empowered to give direction in respect of the matters relating to the change of name of an existing company and the conversion of a public

company to a private company. Approval of ROC is also necessary for extension of time period for holding an AGM, holding an AGM at a place other than the registered address, amalgamation of companies, extension of the period of annual accounts, declaring a company as defunct etc. A few new e-forms have also been prescribed by the MCA.

7. **Information Services:** Few forms are required to be filed for information purposes as per the Companies Act; such as Form – 23 for filing resolutions and agreements, Form – 35A to transfer shares of company to another company etc.
8. **Search Facility:** The system of e-filing provides the search facility for viewing public documents, getting certified copies, finding Corporate Identity Number (CIN), checking names of the companies, funding name availability etc.

**The E-filing Process:** For the purpose of e-filing on MCA21, one has to download the e-form and fill it in an offline mode. Every form has the facility to pre-fill the data available in MCA21 system. Once the e-form is filled one has to validate the e-form using Pre-scrutiny button. Then, affix the relevant digital signatures and save the form. Thereafter you have to connect to the internet to carry out the pre-fill and pre-scrutiny functions. The step by step process is given below. The filled up e-form is required to be uploaded on the MCA21 portal. On successful upload, the Service Request Number (SRN) would be generated and then you have to make payment of the statutory fees. Once the payment has been made the status of your payment and filing status can be tracked on the MCA21 portal by using the 'Track Your Payment Status' and 'Track Your Transaction Status' link respectively.

With a personal computer of reasonable configuration, a printer/scanner, or internet connection and the digital certificate, one can carry out e-filing through the following five steps:

#### **Step 1: Registration of User:**

1. E-filing will be allowed only for registered users.
2. One can register with the guidance available on MCA-21 portal to create his personalised login ID.
3. If the user wants to sign an e-form as an authorised signatory, then he has to register his Digital Signature Certificate (DSC), if the user procures a new DSC he has to register his new DSC again.

**Step 2: Downloading of e-form:**

1. E-forms are in the 'PDF' format. They are freely downloadable. With Adobe Reader V 7.0.5 through link available on MCA-21 portal downloading can be done.
2. One has to familiarise himself with the new set of e-forms available on MCA-21.
3. At any time, one can read the related instruction kit to get himself familiar with the procedure. (In case of difficulty view 'Help' menu).

**Step 3: Completing an e-form:**

1. One can avail the option to fill in an e-form off-line. As per user's convenience, one can complete these formalities without staying connected to the internet.
2. E-forms are to be filled in and signed digitally.
3. By selecting the "pre-fill" option, one can avail the system of filling certain information on the e-form automatically, which is already available in the database of MCA.
4. One can do "automated pre-scrutiny" to ensure that the e-form is complete in all respect.
5. Supporting documents can be attached, provided they are in PDF format. In the MCA-21 portal, there is provision for conversion of popular formats such as Microsoft Office into 'PDF' format.
6. It is advisable to keep the size of attachments as minimum as possible.
7. If it is necessary to sign the e-form by more than one person, then such an e-form should be sent either on suitable media or as an e-mail attachment or the file should be transferred over the network to another person who has to sign it digitally.
8. While obtaining such multiple signatures, care has to be taken that contents of the e-form are not altered after it has been signed. If at any stage, the contents of an e-form are altered, the document will become invalid and it will be rejected during the process of e-filing.
9. Once the digital signatures have been made, the e-form is ready for submission.

**Step 4: Submission of e-form:**

1. For e-filing one has to connect himself to the internet.
2. Submission is required to be made at the MCA-21 portal using specialised functionality which has been provided.
3. Sending the e-form through e-mail should be avoided because it does not constitute 'e-filing'.
4. Submission takes a couple of minutes depending upon the size of the form and quality of internet.
5. A defective e-form will be rejected by the MCA system and returned to the user with clear details of the nature of the defect.
6. If an e-form is correct in all respects, one can proceed to the next step.
7. It is always better to save a copy of the document before submission for applicant's ready reference.

**Step 5: Making payment:**

1. The system automatically calculates the fee, including late payment fees, as applicable under the rules and regulations.
2. Payments have to be made through appropriate methods such as credit card, internet banking or by traditional way at the bank counter through challan.
3. Electronic payments can be made at the Virtual Front Office (VFO). However, if the user wants to pay through the traditional way, the system will generate a pre-filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated challan. There are five banks with estimated 200 branches authorised for accepting challan payments. These five banks are SBI, Punjab National Bank, Indian Bank, ICICI Bank, HDFC Bank.
4. MCA-21 provides a unique transaction number, which can be used by the user for enquiring status of a transaction.
5. Filing is complete only when the necessary payments are made
6. Making off-line payment: If you do not have a credit card or Internet banking facility, you can make payment at the counter of an authorized bank through the pre-filled challan generated by the system after e-filing. Payments of value above ₹ 50,000, stakeholders would have the option either to make the payment in electronic mode, or paper challan. However such payments can be made in electronic mode w.e.f from 1<sup>st</sup> October' 2011.

7. In case of a rejection of the e-forms, helpful remedial tips are provided to the user/applicant.

The user will also receive an acknowledgement through e-mail or alternately user can check the MCA-portal. After successful e-filing and payment you can see the status of your transaction using the "Track your transaction status" link and you have to enter the SRN no. Once the form has been approved by the concerned official of the Ministry, you will receive an email regarding the same and the status of the form will get changed to Approved.

### **Assistance of the Facilitation Centre**

The process of e-filing is quite simple. Without much prior knowledge of computers also, one can file an e-form. However, if a person is not familiar with the process of e-filing or has no access to necessary computing infrastructure, he can avail the services of facilitation centres. The list of such facilitation centres is given on the 'Facilitation Centres' link on the MCA portal. These centres have been working on behalf of the Ministry of Corporate Affairs to provide assistance in e-filing. At such centres one can download and fill in the form. This can be done even on a personal computer or at a cyber cafe.

At such centres one can get assistance to sign the e-form digitally for submitting the same. For this the Digital Signature Certificate of the concerned person is required. In addition to that, scanning facility for attachment is also provided. One can avail the Challan copy generated by the system and take the same to any authorised bank branch to make the necessary payment. The facilitation centre assists the person for completing his transaction and formalities as explained in Step - 5 mentioned earlier. E-filing is said to be complete once the necessary payment is made either through electronic mode or through Challan. There is a facility at the MCA-21 portal to check if the e-filing has been completed successfully. The Challan number of the computer generated receipt useful for future reference in case of any service request.

**Pre-requisites for E-filing:** In order to get ready for e-filing, the following things are necessary:

- 1. Registration of Directors for DIN:** All directors are required to register themselves online for obtaining the Director Identification Number (DIN). Details of DIN are available on the MCA-21 portal.

- 2. Obtaining the Digital Signature Certificate (DSC):** A director or authorised representative of a company who is supposed to sign documents and professionals who wish to attest documents for e-filing, will have to obtain DSC from any authorised agencies of the Government (List available on the website [www.cca.gov.in.](http://www.cca.gov.in.)).
- 3. Registration of DSC:** Once a DSC is obtained, one has to register his DSC with the MCA-21 portal using his personalised login.
- 4. Learn basics:** It is advisable to familiarise oneself with new e-forms and, as and when required take the help of facilitation centres, which is convenient.

### **Director's Identification Number Requirement (DIN)**

Director Identification Number (DIN) is a unique identification number for an existing director or a person intending to become the director of a company. Requirement of DIN is a pre-requisite for filing of certain company related documents. An application for obtaining DIN may be made by any individual who is a director or intends to be a director of a company.

### **Procedure to apply for DIN**

As an individual who wants to apply for a DIN, you should:

1. Visit the MCA portal and fill the application online which is available on the link 'Apply for DIN'.
2. After submitting this form, a 'Provisional DIN' is generated by the system and is displayed on screen, save and take print of the filled form; Affix your photograph and send the same by normal post, along with photocopies of proofs of identity and residence, duly assisted by Notary/certified professionals like CA, CS, ICWA to the address :

MCA DIN Cell,  
P.O. Box No. 3, Noida – 201301,  
Uttar Pradesh, India

Or to the Regional Director.

In case of any difficulty, one can approach one of the facilitation centre. After processing, the MCA DIN cell will approve the DIN and send letter of confirmation and activation to the applicant. Such confirmation will also be sent to the applicant on the e-mail ID provided in the DIN application.

Provisional DIN can be used for e-filing until the DIN is approved and activated by the MCA DIN cell. Duly attested photocopies of the prescribed identity proof (PAN card/Driving license/Passport/Voter ID card) and Residence proof (Driving license/Passport/Ration card/Electricity bill etc.). There are no charges payable for applying for a DIN. DIN is mandatory for directors of Indian Companies who are not citizens of India. However, DIN is not mandatory for directors of a foreign company having a branch office in India. A single DIN is sufficient for an individual holding multiple directorship.

**Circular of the Department of Corporate Affairs Government of India in respect of Role Check procedure to be followed in any e-filing in MCA-21 Portal.**

Role check means checking that the document being filed bears signature (s) of persons who are authorised to file and their digital signature certificates are already registered with the portal.

The copy of this circular is given as under:

**Register Digital Signature Certificate**

Role check for Indian companies is to be implemented in the MCA application. Role check can be performed only after the authorised signatories have registered their Digital Signature Certificates (DCS) with MCA.

Once the role check is implemented, system shall verify whether the signature on the e-form filed, is of an authorised signatory of the company.

**Notice for Practicing Members of ICSI and ICWAI**

- Practising members of ICSI may encounter problems in registering their DSC because the numeric part of the membership number is common for Fellow and Associate members. The system is being updated to cater to these cases and the issue would be resolved soon.
- Practicing members of ICWAI will not be able to register their DSC as the database of members has not been received from ICWAI.

**Step by step process for DSC registration by Director, Manager/Secretary and by Practicing Professional.**

**Step by step process for Director**

Step by step process to be followed for DSC registration of Director's DSC is as under:

1. Click on the 'Register DSC' link available on the MCA portal homepage.

2. On the next screen, click on the 'Director' link on the left hand panel and fill-up your DIN. Please ensure that the DIN is approved and typed correctly.
3. System shall verify that the DIN is valid and approved. If the DIN is filed incorrectly or DIN filled is not approved, system will show an error message to that effect.
4. Fill-up the rest of the particulars and ensure that details filled are as per DIN-I. If the applicant has filed DIN-4, then fill the details as submitted in DIN-4 form.
5. Click on the 'Next' button. The system would verify the details.
6. If the details filed do not match with DIN-1/DIN-4, as the case may be, for the reason that you do not have your DIN application details, you can retrieve DIN-1 form from 'Get DIN application' link on the MCA portal or in the case of DIN-4, you can get the details from the company in which you are a director.
7. If the details are correct, the system would prompt you to select the DSC.
8. Click on the 'Select Certificate' button to browse and select the certificate. Please ensure that the selected DSC belongs to the applicant, whose particulars are being registered.
9. System shall validate the DSC. If the selected DSC is already registered against the given DIN, system will give an informative message. If a different DSC is already registered against the given DIN, system will ask if the user wants to update his/her DSC.
10. Type the displayed system generated text for verification in the box provided.
11. Click on the 'I agree' button to agree to the declaration that the details furnished are correct.
12. Click on the 'Submit' button to register your DSC.
13. Acknowledgement message is displayed to the user.
14. User can take a print-out of the acknowledgement.
15. The applicant can click on the 'Reset' function to clear the data in the fields.

### Step by step process for Manager/Secretary

Step by step process to be followed for DSC registration of Manager/Secretary's DSC is as under:

1. Click on the 'Register DSC' link available on the MCA portal homepage.
2. On the next screen, click on the 'Manager/Secretary' link on the left hand panel and fill up the particulars. Please ensure that the Income-tax PAN and other details are as per the information filed in DIN-3 Form.
3. Click on the 'Next' button. The system would verify the details.
4. If PAN details do not exist in the system due to non-filing of DIN-3 form or details filed do not match with details submitted in DIN-3 Form, system will show an error message to that effect.
5. If the details do not match with DIN-3 filing for the reason that you do not have the details filed in DIN-3 Form, you can get the details from the company in which you are Manager/Secretary.
6. If the details are correct, the system would prompt you to select the DSC.
7. Click on the 'Select Certificate' button to browse and select the certificate. Please ensure that the selected DSC belongs to the applicant, whose particulars are registered.
8. System shall validate the DSC. If the selected DSC is already registered against the given PAN, system will give an informative message. If a different DSC is already registered against the given PAN, system will ask if the user wants to update his/her DSC.
9. Type the displayed system generated text for verification in the box provided.
10. Click on the 'I agree' button to agree to the declaration that the details furnished are correct.
11. Click on the 'Submit' button to register your DSC.
12. Acknowledgement message is displayed to the user.
13. User can take a print-out of the acknowledgement.
14. The applicant can click on the 'Reset' function to clear the data in the fields.

## Step by step process for Practising Professional

Step by step process to be followed for registration of Practising professional's DSC is as under:

1. Click on the 'Register DSC' link available on the MCA portal homepage.
2. On the next screen, click on the 'Practising Professional' link on the left hand panel and fill-up the particulars. Please ensure that the details filed are as per the records of your professional institute.
3. Click on the 'Next' button. The system would verify the details from the records provided by the concerned professional institute.
4. If the membership or enrolment number is wrong or details filled do not match with the records provided by the professional institute, system will throw an error message to that effect. If you do not have the details recorded by your institute, you can get the details from your institute.
5. If the details are correct, the system would prompt you to select the income tax PAN.
6. The applicant is asked to verify and confirm the PAN. On confirmation, the system would prompt to select the DCS.
7. Click on the 'Select Certificate' button to browse and select the certificate. Please ensure that the selected DSC belongs to the applicant, whose particulars are being registered.
8. Type the displayed system generated text for verification in the box provided.
9. Click on the 'I agree' button to agree to the declaration that details furnished are correct.
10. Click on the 'Submit' button to register your DSC.
11. Acknowledgement message is displayed to the user.
12. User can take a print-out of the acknowledgement.
13. The applicant can click on the 'Reset' function to clear the data in the fields.

## **Provisions of Companies Act, 2013 relating to DIN and E-filing of Forms:**

So far as DIN is concerned, Sections 153 to 157 and 159 are provided with necessary provisions and in respect of e-filing of forms, Sections 398, 401 and 402 are provided.

They are enumerated as under;

### **DIN-Director Identification Number:**

#### **Section 153 - Application for allotment of Director Identification Number:**

**Number:** Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form and manner and along with such fees as may be prescribed.

Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed.

#### **Section 154 - Allotment of Director Identification Number:**

The Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number to an applicant in such manner as may be prescribed.

#### **Section 155 - Prohibition to obtain more than one Director Identification Number:**

No individual, who has already been allotted a Director Identification Number under Section 154, shall apply for, obtain or possess another Director Identification Number.

#### **Section 156 - Director to intimate Director Identification Number:**

**Number:** Every existing director shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director.

#### **Section 157 - Company to inform Director Identification Number to Registrar:**

1. Every company shall, within fifteen days of the receipt of intimation under section 156, furnish the Director Identification Number of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed and every such intimation shall be furnished in such form and manner as may be prescribed.

2. If a company fails to furnish Director Identification Number under sub-section (1), before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

#### **Section 158 - Obligation to indicate Director Identification Number:**

Every person or company, while furnishing any return, information or particulars as required to be furnished under this Act, shall mention the Director Identification Number in such return, information or particulars, in case such return, information or particulars relate to the director or contain any reference of any director.

#### **Section 159 - Punishment for Contravention:**

If any individual or director of a company, contravenes any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day during which the contravention continues.

#### **Section 397- Electronic form of Documents Admissible as Evidence:**

Any document reproduced or derived from returns and documents filed by a company with the Registrar on paper or in electronic form or stored on any electronic data storage device or computer readable media by the Registrar, and authenticated by the Registrar or any other officer empowered by the Central Government in the prescribed manner, shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible.

#### **Section 398 - Provisions relating to filing of applications, documents, inspection, etc., in electronic form:**

1. Notwithstanding anything to the contrary contained in this Act, and without prejudice to the provisions contained in section 6 of the Information Technology Act, 2000, the Central Government

may make rules so as to require from such date as may be prescribed in the rules that:

- (a) such applications, balance sheet, prospectus, return, declaration, memorandum, articles, particulars of charges, or any other particulars or document as may be required to be filed or delivered under this Act or the rules made thereunder, shall be filed in the electronic form and authenticated in such manner as may be prescribed;
- (b) such document, notice, any communication or intimation, as may be required to be served or delivered under this Act, in the electronic form and authenticated in such manner as may be prescribed;
- (c) such applications, balance sheet, prospectus, return, register, memorandum, articles, particulars of charges, or any other particulars or document and return filed under this Act or rules made thereunder shall be maintained by the Registrar in the electronic form and registered or authenticated, as the case may be, in such manner as may be prescribed;
- (d) such inspection of the memorandum, articles, register, index, balance sheet, return or any other particulars or document maintained in the electronic form, as is otherwise available for inspection under this Act or the rules made thereunder, may be made by any person through the electronic form in such manner as may be prescribed;
- (e) such fees, charges or other sums payable under this Act or the rules made thereunder shall be paid through the electronic form and in such manner as may be prescribed; and
- (f) the Registrar shall register change of registered office, alteration of memorandum or articles, issue certificate of incorporation, register such document, issue such certificate, record the notice, receive such communication as may be required to be registered or issued or recorded or received, as the case may be, under this Act or the rules made thereunder or perform duties or discharge functions or exercise powers under this Act or the rules made thereunder or do any act which is by this Act directed to be performed or discharged or exercised or done by the Registrar in the electronic form in such manner as may be prescribed.

**Explanation:** For the removal of doubts, it is hereby clarified that the rules made under this section shall not relate to imposition of fines or other the provisions of this Act or punishment therefore.

2. The Central Government may, by notification, frame a scheme to carry out the provisions of sub-section (1) through the electronic form.

**Section 399 - Inspection, production and evidence of documents kept by Registrar**

1. Save as otherwise provided elsewhere in this Act, any person may:

- (a) inspect by electronic means any documents kept by the Registrar in accordance with the rules made, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of such fees as may be prescribed;
- (b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment in advance of such fees as may be prescribed: Provided that the rights conferred by this sub-section shall be exercisable--
  - (i) in relation to documents delivered to the Registrar with a prospectus in pursuance of section 26, only during the fourteen days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and
  - (ii) in relation to documents so delivered in pursuance of clause (b) of sub-section (1) of section 388, only during the fourteen days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.

2. No process for compelling the production of any document kept by the Registrar shall issue from any court or the Tribunal except with the leave of that court or the Tribunal and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court or the Tribunal.

3. A copy of, or extract from, any document kept and registered at any of the offices for the registration of companies under this Act, certified to be a true copy by the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document.

### **Section 400 - Electronic form to be exclusive, alternative or in addition to physical form:**

The Central Government may also provide in the rules made under section 398 and section 399 that the electronic form for the purposes specified in these sections shall be exclusive, or in the alternative or in addition to the physical form, therefore.

### **Section 401 - Provision of value added services through electronic form**

The Central Government may provide such value added services through the electronic form and levy such fee thereon as may be prescribed.

### **Section 402 - Application of provisions of Information Technology Act, 2000**

All the provisions of the Information Technology Act, 2000 relating to the electronic records, including the manner and format in which the electronic records shall be filed in so far as they are not inconsistent with this Act, shall apply in relation to the records in electronic form specified under section 398.

### **4.3 WINDING-UP : MEANING OF WINDING-UP, CONCEPTUAL UNDERSTANDING OF WINDING-UP, DISSOLUTION OF A COMPANY BY THE TRIBUNAL**

**Introduction:** A company comes into existence by an artificial process and it comes to an end by an artificial process. The very existence of a company comes to end on its dissolution. The dissolution of a company may take place in the following manner:

1. By striking off the company's name from the register of companies when such a company becomes defunct.
2. By order of the Court without resorting to Winding-up (e.g. where a scheme of reconstruction or amalgamation is sanctioned under Sections 230 to 232 of the Act).
3. By resorting to winding-up proceedings.

A company is considered to be defunct when it is not carrying on business or when it is not in operation and no steps are taken to revive the functioning of it. If a company has ceased to carry on business the Registrar may strike it off the Register as a defunct company.

In short the most common way of dissolution of a company is through the process of winding-up.

## Winding-up: Meaning

According to Sir Palmer, "A company incorporated under the Companies Act cannot be put to an end except by winding-up or by removal from the register as a defunct company."

In the words of **Prof Gower**: "Winding-up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. An administrator, called a liquidator, is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights." It is to be noted that during the process of winding-up the company, the company still exists and has corporate powers until dissolution. The property of the company remains vested in the company till dissolution.

According to **Pennington**, "winding-up or liquidation is the process by which the management of a company's affairs is taken out of its directors' hands, its assets are realised by a liquidator and its debts and liabilities are discharged out of the proceeds of realisation and any surplus of assets remaining is returned to its members or shareholders." It should be noted that at the end of the winding-up, no assets or liabilities will remain with the company. It is a formal step by which a company gets dissolved, and the legal personality of a company comes to an end.

## Winding-up Vs. Dissolution

The company does not get dissolved immediately on the commencement of the winding-up proceedings. In fact, the winding-up of a company precedes its dissolution. That means, winding-up is the first step followed by the next step which is of dissolution. Once the company is dissolved, it ceases to exist, and its name is struck off by the Registrar from the register of the companies. That means, during the winding-up proceedings, but before the dissolution of a company, the legal status of a company continues. During the process of winding-up, the liquidator represents the company, however, in the dissolution process, a company cannot be represented by the liquidator. It is to be noted that a company cannot be declared as insolvent even if it is unable to pay its debts, because the insolvency laws are not applicable to the company. The insolvency laws are applicable to individuals only, hence the individual can be declared insolvent when he is unable to pay his debts. Therefore, when a company is unable to pay its debts, it can only be wound up and winding-up can be done even when the company is solvent. In this regard the terms 'winding-up' and 'liquidation' are used interchangeably.

### Dissolution of Company:

The court has extensive powers to pass an order of dissolution without winding-up. According to Section 481, if the company had no assets left and where there was no point in winding-up, the court is empowered to direct dissolution, when the affairs of the company have been completely wound up or when, for want of funds, the liquidator cannot proceed with the winding-up or if it is just and reasonable to do so, the court shall make an order that the company be dissolved from the date of the order, and the company shall stand dissolved. Within thirty days, the liquidator should file a copy of the order with the Registrar.

### Modes of Winding-up:

As per the Companies Act, 2013 a company may be wound up only in the following modes:

- (I) By the Tribunal (i.e. National Company Law Tribunal - NCLT) [i.e. compulsory winding-up].
- (II) Voluntary winding-up by Members.
- (III) Winding-up by the Tribunal if Scheme or arrangement not working.
- (IV) Winding-up by the Central government.
- (V) Removal of name of a company from register.
- (VI) Winding-up of unregistered companies.
- (VII) Creditor's Voluntary winding-up.

#### **(I) Winding-up by the Tribunal (NCLT) (Compulsory Winding-up):**

Compulsory winding-up is nothing but the winding-up by the 'Tribunal'.

#### **Grounds for Compulsory Winding-up [Section 271]**

A company may be wound up by the Tribunal in the following circumstances:

- 1. Special Resolution:** A company may be wound up if the company has by special resolution, resolved that the company be wound up by the Tribunal. This ground is not that popular because the members' voluntary winding-up may be more economical and speedier than this. Here the tribunal has to exercise its discretionary powers *bonafide*. While deciding the case of a winding-up, public interest must be taken into consideration [Section 271(b)].
- 2. Default in Filing Financial Statement or Annual Reports:** A company may be wound up if default is made in filing financial statement or annual returns with the Registrar for immediately preceding 5 consecutive financial years [Section 271(f)].

**3. If the Company is Unable to Pay its Debts [Section 271 (a)]:** According to Section 271(2) of the Act, a company shall be deemed to be unable to pay its debts:

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor; or
- (b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

The Court will have to consider the company's contingent and prospective liabilities while determining a company's inability to pay debts. Hence, sometimes, it may happen that a particular company which has till date paid all its debts as they fell due, may still be ordered to be wound up if a consideration of its assets and liabilities shows that it may not be in a position to pay its debts after some time.

*In Navjivan Trading Finance Private Limited, In re,* (1978) 48 Comp. Cas. 402 (Guj) it was observed that a company buried under heavy losses was ordered to be wound up though the payment was not immediately due as it was felt that to wind up such a company would be an act of social service by preventing directors enriching themselves at the expense of petty shareholders.

**4. Just and Equitable [Section 271 (g)]:** A company may be wound up if the Tribunal is of the opinion that it is just and equitable that the company should be wound up. This clause has granted the Court (Tribunal) very wide power whereby it can order winding-up wherever it considers it just and equitable to do. While exercising this

power, the Court (Tribunal) has to take into consideration not only the interests of the shareholders and creditors but also public interests of the employees etc. [*Balchandra Dharmja vs. Alcock Ashdown and Co. Ltd.* (1981) 63 Com. Cases 190].

### **Instances of Just and Equitable Grounds:**

There are certain instances of just and equitable grounds on the basis of which the courts have dissolved the companies. They are as follows:

**(a) Loss of Substratum:** It has been held that it would be just and equitable to wind up a company where the substratum or main object is gone. The substratum is held to be gone when the main object for which the company was formed has become impracticable. [*Re Suburban Hotel Co.* (1867) 2 Ch. App. 737].

In the various court cases it has been held that the substratum of a company is deemed to be gone when it reveals that: (i) the company was formed for the purpose of fraud; (ii) there was a complete deadlock; (iii) the articles provided for a winding-up in the event which had happened; (iv) the existing and the possible assets are insufficient to meet the existing liabilities of the company; etc.

In short, if a company cannot achieve any of its main objects, its substratum is gone and such a company will be wound up. Sometimes it becomes very clear that a company has lost its ability to achieve its main objects. (e.g. if it fails to obtain a patent for an invention which, it was formed to exploit on the assumption that the patent would be granted).

**(b) Deadlock in Management:** When there is deadlock of a permanent nature in the management of a company, the court is justified to wind up a company on the ground of just and equitable clause.

A deadlock is said to have occurred where the company has two directors who are its only shareholders and who hold an equal number of voting shares, if they disagree on major questions in respect of the management of the company.

**(c) Formation of a Company for Illegal or Fraudulent Objects :** If a particular company's objects are illegal, are fraudulent or if they become illegal by a change in law, the court would order the company to be wound up under the just and equitable clause.

Where the company was formed with a view to conduct a lottery, the court ordered for the winding-up for the object of the company was illegal [*Universal Mutual Aids Ass. Vs. Thappa Naidu, A.I.R. (1933) Mad. 16*].

It should be noted that, for winding-up on this ground, fraud in the prospectus or in the manner of conducting company's business is not sufficient. It must be proved that the original object of creating the company was illegal or fraudulent. [*Re T. E. Brismead and Sons Ltd. (1987) 1, Ch. 45, 406 (C.A.)*].

- (d) **Oppression of Minority:** Where the majority shareholders have adopted an aggressive or oppressive policy towards the minority, it will be just and equitable ground for the court to order the winding-up of a company [*Baird Vs. Lees (1924) S.C. 83*].
- (e) **Bubble Company:** A company which has no real business is called a 'bubble company'. Such companies are also termed as 'fly-by-night' companies. Such a 'bubble' company, not having any resources to commence business, may be ordered to be wound up. [*Re London and County Coal Co. (1867) L.R. 3 E.Q. 355*].
- (f) **Private Company Analogous to Partnership:** A private company which is constituted by one or more families or friends is in reality like a partnership. Though legally it has a corporate form, the court can order its winding-up in the similar circumstances as it would order the dissolution of partnership (e.g. misconduct of one or more partners) on the ground that it is just and equitable to do so.
- (g) **Public Interest:** The Court may order winding-up of a company in public interest. Section 241 of the Act (i.e. Prevention of Oppression and Mismanagement) reveal that while winding-up of a company by the Tribunal, the Tribunal has to take into consideration not only the interest of the shareholders and creditors but also public interest in the shape of need of the community, interest of the employees etc.

## 5. Acts against Sovereignty and Integrity of India [Section 271 (c)]

: Tribunal can pass an order of winding-up if the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.

**6. Business of Sick Industrial Company not Viable in Future [Section 264(4)] :**

Where it is difficult to implement the scheme for revival and rehabilitation due to any reason or the scheme fails due to non-implementation of obligations under the scheme by the parties concerned, the company administrator authorised to implement the scheme and where there is no such administrator, the company, the secured creditors, or the transferee company in a case of amalgamation, may make an application before the Tribunal for modification of the scheme or to declare the scheme as failed and that the company may be wound up.

**7. Conduct of Company Affairs in Fraudulent Manner [Section 271(e)] :**

If on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up.

**(II) Voluntary Winding-up by Members (Section 304):**

By passing special resolution by members themselves, company may be wound up voluntarily. Voluntary winding-up may also be done in this way if the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved.

**(III) Winding-up by the Tribunal if Scheme of Compromise or Arrangements not Working:**

If scheme of compromise or arrangements sanctioned by the tribunal under Section 230 (6) of the Act is not working satisfactorily with or without modifications and the company is unable to pay its debt, in such circumstances, the tribunal is empowered to pass an order of winding-up under Section 231 (2) of the Act. Such order shall be deemed to be order of winding-up under Section 273 of the Act.

**(IV) Winding-up by Central Government:**

Winding-up by central government under summary procedure is provided under the new Act. Small companies with assets of book value less than ₹ 1 crore and belonging to a specified class of companies can be wound up by order of central government by following summary procedure specified under Sections 361 to 365 of the new Act of 2013. In this case, the National Company Law Tribunal (NCLT) comes into picture if fraud is committed or if the central government takes decision to refer the matter to NCLT.

**(V) Removal of Name of a Company from Register:**

Registrar of companies is empowered to remove the name of a non-functioning company from the register under Section 248 of the Act. This can be done if:

- a company failed to commence its business within one year of its incorporation;
- the subscribers to the memorandum have not paid the subscription which they were supposed to pay within 180 days from the date of incorporation of a company;
- a company is not carrying on any business or operation for a period of two preceding financial years and has not made any application within such period for obtaining the status of a dormant company under Section 455.

**(VI) Winding-up of Unregistered Companies: (Section 375 to 378):**

An unregistered company or a foreign company can also be wound up under the provisions of Companies Act, 2013. No unregistered company shall be wound up voluntarily. An unregistered company may be wound up under the following circumstances:

- the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;
- if the company is unable to pay its debts;
- if the Tribunal is of opinion that it is just and equitable that the company should be wound up.

**Power to Wind-up foreign Companies, although dissolved (Section 376):** A body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, may be wound-up as an unregistered company whether the body corporate has been dissolved or otherwise ceased to exist as per the law under which it was incorporated.

### (VII) Creditor's Voluntary Winding-up:

A Creditor's Voluntary Winding-up is a formal insolvency procedure which involves the directors of an insolvent company voluntarily choosing to bring their business to an end, and wind the company-up.

A Creditor's Voluntary Winding-up is the Winding-up of a company by a special resolution of the shareholders under the scrutiny of the company creditors. This occurs when the company is insolvent. If the directors of a company are unable to provide a declaration of solvency, the company can proceed with the creditor's winding-up.

#### Petition for Winding-up (Section 272):

1. An application to the court for the winding-up of a company shall be by petition presented,

- ( ) by the company; or
- ( ) by any creditors, or creditors including any contingent or prospective creditor or creditors; or
- ( ) by any contributory or contributories; or
- ( ) by any combination of creditors, company or contributories acting jointly or separately; or
- ( ) by the Registrar; or
- ( ) any-person authorised by the Central Government, as per Section 243 [especially when the business is being conducted with intention to defraud its creditors, members or for unlawful purpose or the persons involved in the management of a company are guilty of fraud or misfeasance or misconduct towards – as contemplated under Section 237 (b) (i) and (ii)], or
- ( ) by the Central Government or State Government (when the company acts against sovereignty and integrity of India),

2. A secured creditor, the holder of any debentures, whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures shall be deemed to be creditors within the meaning of section 272(1)(b)

3. A contributory shall be entitled to present a petition for the winding-up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months

immediately before the commencement of the winding-up or have devolved on him through the death of a former holder.

4. The Registrar shall be entitled to present a petition for winding-up under this section 272(1) on any of the grounds specified in this sub-section, except on the grounds specified in clause (b), clause (d) or clause (g) of that sub-section:

Provided that the Registrar shall not present a petition on the ground that the company is unable to pay its debts unless it appears to him either from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 210 that the company is unable to pay its debts:

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition.

Provided also that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

5. A petition presented by the company for winding-up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.
6. Before a petition for winding-up of a company presented by a contingent or prospective creditor is admitted, the leave of the Tribunal shall be obtained for the admission of the petition and such leave shall not be granted, unless in the opinion of the Tribunal there is a *prima facie* case for the winding-up of the company and until such security for costs has been given as the Tribunal thinks reasonable.
7. A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

### **QUESTIONS FOR DISCUSSION**

1. Explain the term 'E-Governance'. What are the advantages of E-Filing?
2. What is meant by 'Portal'? State the important features of MCA-portal.
3. What constitutes 'E-filing'? State the different categories of e-forms. Explain in brief the E-filing process.
4. Explain in brief the assistance of the facilitation centre. What are the pre-requisites for 'E-filing'?

5. What is 'Directors Identification Number' (DIN)? What is the procedure to be followed for applying for DIN?
6. Take an account of provisions of Companies Act, 2013 in respect of DIN and E-filing process.
7. Write Short Notes On:
  - (i) Advantages of E-filing.
  - (ii) MCA-Portal.
  - (iii) E-filing under Companies Act.
  - (iv) E-filing process.
  - (v) Pre-requisites for e-filing.
  - (vi) Role check procedure to be followed in e-filing in MCA - 21, Portal.
  - (vii) Registration of Digital Signature Certificate.
  - (viii) Director's Identification Number.
8. What do you mean by 'Winding-up' of a company? State the various modes of Winding-up? What are the grounds for compulsory Winding-up of a company?
9. Explain in brief different modes of 'Winding-up' of a company.
10. What is 'Winding-up'? When can a company be wound up by the Tribunal? Who are the persons entitled to present a petition for such Winding-up and when?
11. Explain in brief, the provisions of the Companies Act relating to members' voluntary Winding-up of a company.
12. What is Winding-up of the company? State two grounds for compulsory Winding-up.
13. Enumerate any two instances of just and equitable grounds of compulsory Winding-up of a company.
14. Who can file a petition for the Winding-up of a company?

